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CALIFORNIA REPORTER

269 PACIFIC REPORTER

204 Cal. 491

FINANCE & CONSTRUCTION CO. OF CALIFORNIA v. CITY OF SACRAMENTO.★

(Sac. 3996.)

Supreme Court of California. July 11, 1928.

Rehearing Denied Aug. 9, 1928.

1. Municipal corporations ⟹1024—Corporation, suing city for diversion of water onto corporate lands, on which corporation was growing crops, held "doing business" in county, authorizing change of venue on motion of city (Code Civ. Proc. § 394).

Where corporation, having its principal place of business in San Francisco, sued the city of Sacramento in Yolo county for damages for diversion of water onto corporate lands, thereby injuring its crop of pasturage and barley, which it was growing in Yolo county, and city moved for change of venue, under Code Civ. Proc. § 394, providing city, not located in, but sued in, county in which plaintiff is "doing business," may secure change of venue; *held*, corporation was "doing business," within meaning of statute authorizing change of venue.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Doing Business.]

2. Municipal corporations ⟹1024—Statute authorizing change of venue held remedial; hence subject to liberal construction (Code Civ. Proc. § 394).

Code Civ. Proc. § 394, authorizing change of venue where city is sued by plaintiff, doing busi-

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★Rehearing denied.

ness in county in which suit is brought, in event that city is not also within that county, *held* remedial, hence subject to liberal construction.

3. **Municipal corporations ⇐1024—Where city moved for change of venue, allegation of plaintiff that at commencement of action it owned land on which crops were damaged supported implied finding it was then producing crops (Code Civ. Proc. § 394).**

Where city, sued for diverting water onto lands of corporation, moved for change of venue, under Code Civ. Proc. § 394, providing city not located in county, sued by plaintiff "doing business" in county, may procure change of venue on motion, and corporation contended there was no showing that at commencement of action it was farming land or growing crops thereon, warranting change, allegation in complaint that at commencement of action corporation owned land, and that city threatened to, and would, unless enjoined, continue to discharge volumes of water from river, thereby destroying crops growing thereon, *held* sufficient allegation from which it could be inferred that at commencement of action corporation had crops growing on land, especially in absence of any denial on corporation's part supporting implied finding that at commencement of action corporation was producing crops on its land.

Department 1.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by the Finance & Construction Company of California against the City of Sacramento for damages for unlawful diversion of water onto lands of plaintiff. From an order granting a motion for change of venue, plaintiff appeals. Affirmed.

Huston, Huston & Huston, of Sacramento, for appellant.

R. L. Shinn, of Sacramento, for respondent.

CURTIS, J. This action against the defendant, the city of Sacramento, was filed in the county of Yolo. Said defendant appeared therein and moved the court for a change of the place of trial of said action, upon the ground that the plaintiff was either a resident of or was doing business in said county of Yolo. The motion was granted, and an order made changing the place of trial of said action from said county of Yolo to the county of Napa. From this order plaintiff has appealed.

The order was granted under the authority of section 394 of the Code of Civil Procedure and was based upon the following state of facts: The action was brought against the city of Sacramento, the defendant, in a county other than that in which said city is situated; said city being situated in the county of Sacramento, and the action having been instituted in the county of Yolo. The action was brought to recover from said city damages alleged to have been sustained by reason of the unlawful diversion by said city of Sacramento of the waters of the Sacramento river from said river onto plaintiff's land, situated in the county of Yolo. There were two unlawful diversions complained of, one of which plaintiff alleges damaged a crop of barley growing upon 1,000 acres of plaintiff's said land, one-fourth of which crop plaintiff was the owner of. The other diversion complained of destroyed the pasturage grown upon land belonging to plaintiff. Plaintiff is a corporation with its principal place of business in the city of San Francisco. It was therefore not a resident of said county of Yolo.

[1, 2] The foregoing facts all appear in plaintiff's complaint, and were relied upon by defendant at the time of making said motion, without any affidavit or other showing of any additional facts. The question presented, therefore, is whether or not a person who owns a tract of land upon which he is growing pasturage and a crop of barley is "doing business," in the sense in which this expression is used in said section 394 of the Code of Civil Procedure. The evident purpose of this section of the Code, as was held in City of Stockton v. Wilson, 79 Cal. App. 422, 424, 249 P. 835, 836, "is to guard against local prejudices which sometimes exist in favor of litigants within a county as against those from without and to secure to both parties to a suit a trial upon neutral ground." It is apparent from the terms of this section of the Code that the Legislature was of the opinion that a person doing business in a county would have an unfair advantage over a city situated without said county, in the trial of an action in which such person and such city were arrayed against each other. It accordingly provided that, in an action in which the parties were so situated, the city might have the place of trial of said action changed to some other county, where such condition did not prevail.

The section is remedial in its purpose, and should for that reason receive a liberal construction. Strictly speaking, it might be said that persons "doing business" are confined to those engaged in merchantable pursuits, such as merchants or others carrying on trade or commerce, and it is in this sense, plaintiff contends, that the words are used in said section 394. The expression "doing business" has frequently been the subject of judicial determination, principally in proceedings wherein the right of a corporation to transact business in a state other than that in which it is organized and has its principal place of business was under consideration. In at least one instance it has been held that "to do business * * * is 'to carry on any particular occupation or employment for a livelihood or gain, as agriculture, trade, me-

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⇐For other cases see same topic and KEY NUMBER in all Key-Numbered Digests and Indexes chanic arts, or profession.'" George R. Barse L. S. Com'n Co. v. Range Val. Cattle Co., 16 Utah, 59, 65, 50 P. 630, 632.

In none of the numerous decisions upon the subject do we find that the courts have given the words "doing business" the narrow construction contended for it by the appellant. In one of these cases, cited by appellant, this court held that the mere owning of land in this state by a foreign corporation and the execution and delivery of a deed of said land was not the transaction of business by such foreign corporation. The court further held that the phrase "to transact business," as used in the Constitution, was equivalent to the words "to do business" (General Conference Free Baptists v. Berkey, 156 Cal. 466, 105 P. 411).

There was nothing before the court in that case which showed that the foreign corporation owning said land was engaged in raising crops thereon, or that it did any other act in connection therewith than transfer the same by deed executed by it. We think it is more in keeping with the remedial purpose of section 394 to give the words this broader and more liberal meaning than to restrict them, as contended for by the appellant, to the narrow meaning signifying those only who are engaged in trade or commerce. A person may become as intimately identified with the affairs of a community, and as closely associated with the people of such community in the ownership of a farm and the growing thereon of products of the soil as those who are engaged in carrying on a store or conducting a mill or foundry in the same community. In the event of a suit instituted by him against a city situated as the defendant city in this action finds itself, the same local prejudices could well exist in his favor and against said city as if the plaintiff in said action were the grocer or the hardware merchant in said community. We think the intent of the section of the code was to cover just such cases as well as those where the parties plaintiff were actually engaged in some strictly commercial venture. We find nothing in City of Stockton v. Wilson, supra, in conflict with such a conclusion.

[3] The further contention is made that there was no showing that the plaintiff was engaged in farming the land or growing crops thereon at the commencement of the action. It is alleged in plaintiff's complaint that it was, at the commencement of the action, the owner of said land, and that defendant threatened to and would, unless enjoined by this court, continue to discharge upon plaintiff's said land large volumes of water from the Sacramento river, thereby "destroying all crops growing thereon." We think this a sufficient allegation from which it might well be inferred that at the commencement of the action plaintiff had growing crops on said land, and in the absence of any denial whatever on plaintiff's part that it was, at the commencement of the action, engaged in growing crops upon its said land, such an allegation will support the implied finding of the court that plaintiff was, at the commencement of the action, engaged in producing crops on its said land.

The order is affirmed.

We concur: PRESTON, J.; TYLER, Justice pro tem.

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204 Cal. 702

Lizzie H. GLIDE, Plaintiff and Appellant, v. CITY OF SACRAMENTO (a Municipal Corporation), Defendant and Respondent. (Sac. 3995.)★

Supreme Court of California. July 11, 1928.

Rehearing Denied Aug. 9, 1928.

Department 1.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Huston, Huston & Huston, of Sacramento, for appellant.

R. L. Shinn, of Sacramento, for respondent.

PER CURIAM. The order granting defendant's motion for a change of venue in this action is affirmed, on the authority of Finance and Construction Co. of California v. City of Sacramento (Sac. No. 3996) 269 P. 167, this day decided. The only difference in the two cases is that in this case the plaintiff is a private person, while in case No. 3996 the plaintiff is a corporation. This difference is not material to any question involved herein.

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204 Cal. 501

SMITH v. SHERMAN et ux. (L. A. 9430.)★

Supreme Court of California. July 14, 1928.

Rehearing Denied Aug. 13, 1928.

1. Trusts ⚷44(2)—Evidence held to support finding that husband's quitclaim deed to wife did not convey land in trust (Civ. Code, § 164).

Court's finding that husband's quitclaim deed conveyed land to wife, not in trust to convey, but absolutely for a valuable consideration, *held* supported by evidence that they were living in strained relationship at time, and that she had power of attorney to convey property, and presumption, under Civ. Code, § 164, that deed was intended to vest all his title in wife as her separate estate.

2. Trusts ⚷365(2)—Husband, not asserting claim of trust for 20 years after executing quitclaim deed to wife, held guilty of laches, barring relief.

Husband, not asserting claim that his quitclaim deed to wife conveyed land in trust to convey until 20 years after its execution nor any claim to home purchased by wife with proceeds of sale of such land for 14 years after its pur-

★Rehearing denied.

chase, *held* guilty of laches, precluding establishment of trust in such home after wife's death.

3. **Trusts ⚷87—Husband's affidavits, testimony, and petitions, as administrator, in probate and homestead proceedings, held admissible in suit to establish trust in deceased wife's realty.**

Affidavits, testimony, and petitions of husband, as administrator of his deceased wife's estate, in probate and homestead proceedings, *held* properly admitted in evidence, in his suit to establish trust in home purchased by wife with proceeds of land conveyed to her by his quitclaim deed, to show that he regarded property as her separate estate and received benefit of law entitling him to homestead therein for life.

4. **Trusts ⚷89(2) — Husband's assertion of trust 20 years after executing quitclaim deed to wife held insufficient to establish trust in realty purchased with proceeds of land conveyed.**

Husband's claim of trust in realty purchased by wife with proceeds of land conveyed to her by his quitclaim deed *held* without merit, in absence of any other indication of intent to establish trust than his assertion, some 20 years after executing deed, in contradiction of his own prior written statement, testimony, and acts as administrator of wife's estate in probate and homestead proceedings.

Department 1.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Herschel M. Smith against Robert W. Sherman and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

I. W. Bane, of Los Angeles, for appellant.

Fogel & Beman and Dryer, Castle & Harke, all of Los Angeles, for respondents.

PRESTON, J. Appeal by plaintiff from judgment in favor of defendants. The complaint was in the usual form of a quiet title suit, but upon the filing of answer and cross-complaint by defendants it was amended to declare a trust in real property, and under such pleadings, upon request of the parties, the question of title to the property was tried.

The appeal is utterly without merit and the various contentions of appellant scarcely warrant discussion. The claim which he asserts to the property in question is based upon a quitclaim deed made by him more than 20 years ago, conveying certain land owned by him as his separate estate to his wife, from sale of which she presumably acquired the funds to purchase later the home which is the subject of this action. His contention now is that said deed was made simply as a trust to convey and without intention of passing title. The arguments advanced by him present, in reality, but the sole query as to whether the findings and judgment are supported by the evidence. That they are amply supported is plain beyond the shadow of a doubt.

[1, 2] The court found that the property covered by the quitclaim deed was not conveyed to the wife in trust for the husband, but, on the contrary, found, according to direct evidence, that she did in fact buy it from him and that said transfer was made for a valuable consideration. The evidence shows that the wife and husband were living in strained relationship at the time. It also shows that she had a power of attorney, which would have enabled her to convey the property. The form of the deed itself, in the light of the circumstances and presumption of law (section 164, Civ. Code), leaves little doubt that it was intended to vest all his title in the wife as her separate estate. The court also found that appellant was guilty of laches, and that his cause of action, if any he had, was barred by the statute of limitations. The truth of this finding, as to laches, at least, cannot be questioned in the face of the fact that appellant for 20 years after execution of said quitclaim deed failed to assert his claim and for 14 years after purchase of the home likewise asserted no claim whatsoever to it.

[3] When the wife passed away she devised the home to her son, respondent Robert W. Sherman, and upon petition of appellant himself, as administrator with the will annexed of her estate, it was duly distributed by decree of distribution to said respondent, subject to homestead for life in appellant. Appellant attacks the finding that the various affidavits, testimony, and petitions made by him as administrator in the probate proceedings, praying for distribution of said property to respondent, subject to the life homestead in himself, and the similar recognition made by him in the homestead proceedings that said home was the separate property of deceased, should estop him from asserting any other right, title, or interest in or to said property and that the respective claims of the parties have already been adjudicated by said probate court.

[4] It is not necessary to discuss the effect of the orders made in the probate and homestead proceedings as res adjudicata on the matters determined thereby. The probate and homestead exhibits were properly admitted in evidence as proof of the fact that appellant had regarded the property as the separate estate of deceased and received the benefit of the law predicated upon that basis. But even were such admissions removed from our consideration, we would find ample support for the claim of respondents. There is absolutely no indication that a trust was ever established or intended to be established in the wife, save and except an assertion to

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that effect made by the husband some 20 years later in contradiction of his own prior written statement, testimony, and repeated acts to the contrary. The claim of appellant is entirely without merit.

Judgment affirmed.

We concur: CURTIS, J.; SEAWELL, J.

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204 Cal. 540

PENNELL v. STANLEY W. SMITH, Inc.
(L. A. 8674.)

Supreme Court of California. July 17, 1928.

Sales ⚬⇒396—Buyer could recover payment made on automobile for partial failure of consideration, in action to rescind for fraudulent representations regarding its condition (Civ. Code, § 1689, subd. 2).

In action by buyer to rescind purchase of secondhand automobile on ground of fraudulent misrepresentations touching state of repair, judgment for buyer for amount of purchase price paid *held* supported by pleadings, findings, and evidence on basis of rescission for partial failure of consideration under Civ. Code, § 1689, subd. 2.

In Bank.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action upon a conditional sales contract by W. C. Pennell against Stanley W. Smith, Inc. From a judgment for plaintiff, defendant appeals. Affirmed.

Superseding opinion of District Court of Appeal in 265 P. 957.

Newby & Palmer and Dee Holder, all of Los Angeles, for appellant.

E. O. Leake, of Los Angeles, for respondent.

PRESTON, J. The appeal is by defendant, as seller, from a judgment for plaintiff, as a buyer, for $700, the amount paid on the purchase price, in an action to rescind the purchase under formal written contract dated May 6, 1923, of a secondhand Packard automobile. As finally amended, count 1 of the complaint is denominated a cause of action to rescind for fraudulent misrepresentations touching the state of repair and mechanical condition of the car and specifying in detail these defects; alleging also a return of the car to the seller. Count 2 is for the same relief upon mutual consent of the parties. The answer is a denial of the fraud charged, and contains also a specific denial of all general and special allegations touching the poor state of repair and imperfect mechanical condition of the car.

From the findings it may be stated that the fraud was negatived and the rescission by mutual consent sustained. The appellant asserts a dearth of evidence to support mutual rescission. The question is debatable, but in our view of the situation it becomes unimportant. The judgment is supported by the pleadings, by the findings, and by the evidence upon the basis of a rescission for partial failure of consideration under subdivision 2, § 1689, of the Civil Code. See, also, Richter v. Union Land, etc., Co., 129 Cal. 367, 62 P. 39; Sterling v. Gregory, 149 Cal. 117, 85 P. 305; Campbell v. Kennedy, 177 Cal. 430, 433, 170 P. 1107; Blahnik v. Small Farms Imp. Co., 181 Cal. 379, 184 P. 661.

The complaint pleads the warranty of good repair and condition and the findings follow it. The written contract introduced in evidence provided for it as follows:

> "It is agreed that said automobile is now in good repair and condition, and that this instrument contains the entire agreement between the parties."

The complaint also specifies in detail, as above stated, the defects. The answer puts in issue their existence. Evidence was introduced by both parties on the issue, and the court found the allegations of the complaint were correct and specified in detail the defects and lack of repair of said car. The evidence amply supports the findings, and this fact could not be seriously controverted.

Defendant has therefore had a full day in court upon every issue involved in the cause of action for a rescission for partial failure of consideration, which we hold to be included within the allegations of the cause of action denominated an action for fraud. Of course, we are not meaning to state that in every action for rescission of a sale for fraud such cause of action may be found, but what we are intending to state is that in this particular case a cause of action for partial failure of consideration is found.

Judgment affirmed.

We concur: CURTIS, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

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204 Cal. 542

NISSEN v. CORDUA IRR. DIST.★
(Sac. 3912.)

Supreme Court of California. July 17, 1928.

Rehearing Denied Aug. 16, 1928.

Waters and water courses ⚬⇒261—Irrigation district held not liable for refusal of its officers and agents to furnish landowner his proportion of available water (California Irrigation District Act [St. 1897, p. 254] as amended and supplemented).

Irrigation district organized under California Irrigation District Act (St. 1897, p. 254), as amended and supplemented, may not be held liable for damages for refusal of its officers and agents to furnish landowner in the district his proportion of the available water where district had the admitted ability to furnish it.

★Rehearing denied.

In Bank.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by G. A. Nissen against the Cordua Irrigation District. From an adverse judgment, plaintiff appeals. Affirmed.

Frank A. Duryea, of Marysville, for appellant.

W. H. Carlin, of Marysville, for respondent.

SHENK, J. This is an appeal from a judgment of dismissal following the sustaining of a demurrer to the complaint without leave to amend. The complaint is one for damages for loss of a crop of rice resulting from the defendant's alleged refusal to deliver irrigation water to the rice lands of the plaintiff. Briefly and in substance it is alleged that the defendant is organized and existing under the California Irrigation District Act (Stats. 1897, p. 254, and acts supplementary to and amendatory thereof); that the district had acquired a large volume of water for the irrigation of the lands within the district; that during the rice-growing season of 1925 the district had and controlled water, as well as the necessary canals, ditches, flumes, etc., more than sufficient to irrigate properly all of the land within the district, including the 260 acres of land held under lease by the plaintiff, of which approximately 250 acres had been planted to rice and of which planting defendant had notice; that the plaintiff made repeated demands upon the defendant for an apportionment to his land within the district of an amount of water necessary and sufficient to irrigate the 1925 rice crop thereon; that defendant failed, refused, and neglected to deliver such water except a limited and insufficient amount thereof, but that on the contrary defendant diverted large quantities of irrigation water from the district to lands without the district, by reason whereof 140 acres of plaintiff's rice crop was totally lost, to his damage in the sum of $25,000. A general and special demurrer was interposed to this complaint. The trial court held the special demurrer to be good and would have permitted an amendment to cure the defects in the complaint. But the court also held that as the defendant was not liable in such an action in any event the general demurrer must be sustained without leave to amend, on the authority of Whiteman v. Anderson Cottonwood Irr. Dist., 60 Cal. App. 234, 212 P. 706. The question is therefore directly presented as to whether the district itself may be held liable for damages for the refusal of its officers and agents to furnish to a landowner in the district his proportion of the available water, having the admitted ability to furnish the same.

In the Whiteman Case an action was brought against an irrigation district organized under the same act and the directors thereof for damages for the death of the minor son of the plaintiff, alleged to have been caused by the negligence of the defendants. A general and special demurrer to the complaint was sustained. The plaintiff declined to amend, and judgment was entered dismissing the action. The complaint alleged that the defendants negligently left and permitted to remain at night on a highway within the district certain sacks of cement and other material which obstructed the highway and that no light or other signal or warning or any protection against danger was provided. The District Court of Appeal entered upon an extended consideration of the nature and character of an irrigation district organized under such act, referring to In re Madera Irrigation District, 92 Cal. 296, 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, where it was held that such a district is a "public corporation for governmental purposes"; to Jenison v. Redfield, 149 Cal. 500, 87 P. 62, where the district was called a "public corporation"; to Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056, where it was denominated a "public agency"; to Turlock Irr. Dist. v. White, 186 Cal. 183, 198 P. 1060, 17 A. L. R. 72, where it was called a "public corporation for municipal purposes," citing Fallbrook Irr. Dist. v. Bradley, 164 U. S. 112, 17 S. Ct. 56, 41 L. Ed. 369; to People ex rel. v. Reclamation Dist. No. 551, 117 Cal. 114, 48 P. 1016, where a reclamation district was stated to be a "state organization for state purposes." The court then concluded that a district organized under the California Irrigation District Act must be deemed a public agency created for a public purpose and as such is not subject to an action for damages resulting from the negligence of its officers or agents in the absence of a statute expressly imposing such liability, and that the language of the act authorizing the board "to sue, appear and defend" in all courts, actions, suits or proceedings (section 15b, Stats. 1917, p. 758) did not enlarge the liability of the defendant and applied only to such actions as a public corporation might be subject to in carrying out its purposes. The court also decided, pursuant to familiar principles applying to municipal corporations, that as there was no allegation in the complaint that the district was promoting a proprietary right in the use of the cement, nor any allegation of personal participation, etc., by the directors or of negligence in the selection by them of employees, the complaint did not state a cause of action either against the district or the directors.

While the facts which gave rise to the present action are different from those in the Whiteman Case, we think the application of the law should be the same in both. In the Whiteman Case the plaintiff alleged affirmative acts of negligence. In the present case the complaint is based upon the negligent or willful omission to perform a duty imposed by statute. In each the case is grounded in tort and the district itself is no more bound in the one case than in the other. It may be that a sound public policy should demand that the district itself be bound in a case of this kind, but until the state has directed or permitted its agency to be so bound we do not feel justified under established law in holding it liable.

With reference to similar public agencies the Legislature has declared that the district itself be liable. For instance, section 3464 of the Political Code provides:

> "The negligence of a trustee or trustees of a reclamation district shall be imputed to the district to the same extent as if the reclamation district were a private corporation, and the reclamation district shall have power and authority to levy assessments for the purpose of paying any damages so incurred, said damages to be deemed incidental expenses of the district."

We find no similar law of this state, either in substance or effect, applicable to an irrigation district. Reclamation districts and irrigation districts are public agencies of the same general character and organized to accomplish similar objects. Each is aimed to aid in the productivity of land, the one to drain surplus water therefrom and the other to supply water thereto. Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056. The Whiteman Case was decided in 1922, and in the intervening years the Legislature has not seen fit to subject an irrigation district to liability for damages on account of the torts of its officers. Until the Legislature had directed otherwise, it must be held that the district itself is not liable.

The judgment is affirmed.

We concur: PRESTON, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.

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204 Cal. 504

BLACK v. MEYER. (L. A. 9180.)★

Supreme Court of California. July 14, 1928.

Rehearing Denied Aug. 13, 1928.

1. Executors and administrators 🔑221(9)—Evidence in suit to establish claim against estate held insufficient to sustain finding that note was executed and delivered and unpaid (Code Civ. Proc. § 1880, subd. 3).

In suit to recover on claim against estate of deceased, consisting of note claimed to have been executed by deceased, evidence *held* insufficient to support finding that note had been executed, delivered for valuable consideration, or that it was not intentionally destroyed and that it was uncanceled and unpaid, without regard to competency of testimony, under Code Civ. Proc. 1880, subd. 3.

2. Bills and notes 🔑499—Maker's possession of note before death with finding thereof on dead body gives rise to disputable presumption as to payment and cancellation (Code Civ. Proc. § 1961, and section 1963, subds. 9, 13, and 20).

Fact that note on which claim against estate was based or signature thereto was in possession of the maker before his death and was found on his dead body gives rise to certain disputable presumptions under Code Civ. Proc. § 1961, and section 1963, subds. 9, 13, and 20 as to payment and cancellation, which are binding when uncontroverted by other evidence.

Department 1.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Suit by C. W. Dorris against Mabel V. Meyer, executor of the estate of Henry D. Meyer, deceased. Judgment for plaintiff, and defendant appeals, and, C. W. Dorris having subsequently died, the appeal is prosecuted against Alfred L. Black as executor. Reversed.

Hahn & Hahn, of Pasadena, and O'Melveny, Millikin, Tuller & Macneil, of Los Angeles, for appellant.

W. I. Gilbert and Frank P. Doherty, both of Los Angeles, for respondent.

PRESTON, J. This suit was commenced by C. W. Dorris. He subsequently died, and defendant's appeal is therefore prosecuted against his executor. The action is one to recover upon a creditor's claim filed against the estate of Henry D. Meyer, deceased, based upon an alleged promissory note dated November 26, 1923, executed by decedent to said C. W. Dorris, payable six months after date, in the principal sum of $25,000, with interest thereon at 7 per cent. per annum.

The peculiar facts of the case are that no note was produced nor was any direct evidence of its execution offered. In the creditor's claim, which contains only what purports to be a true copy of said note, it is stated, as was likewise asserted upon the trial, that the original thereof was totally destroyed with the exception of a fragment found upon the dead body of the alleged maker, upon which appears a signature and a small portion of the printing, as follows:

> "This note or any portion thereof I promise court may adjudge reasonable as attorney's fees in said suit.
>
> "[Signed] Henry D. Meyer."

Section 1880, subd. 3, of the Code of Civil Procedure, provides that a party to an action against an executor upon a claim against the estate of a deceased person cannot be a witness as to any matter or fact occurring before the death of such deceased person. By reason of the prohibition of this section

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★Rehearing denied.

such testimony of plaintiff, C. W. Dorris, as was admitted over the objection of defendant, was extremely limited. The court did permit him, however, to identify the fragment as having been torn from a document of which the note set forth in the claim was a copy and that he last saw it in the outer coat pocket of said Henry Meyer, deceased.

The substance of the testimony of other witnesses was that Dorris and Meyer had had certain business relations and in the year prior to Meyer's death had endeavored to make some settlement of their affairs; that during said period Dorris had been seen in possession of a $25,000 note apparently executed by Meyer, which he exhibited on several occasions and even had copied; that Meyer had likewise mentioned to various people a $25,000 note held by Dorris, but he had emphatically declared more than once that he would never pay it. Handwriting experts testified for both parties, differing materially in their opinion as to the age of the paper, although the signature was positively identified as that of Meyer. Police Detective Moseley testified to having removed said fragment from the body of Mr. Meyer after his death—from his pocket on the outside of his coat.

The court found, among other things, that said note was executed and delivered to Dorris for a valuable consideration; that the original thereof was not voluntarily, intentionally, or maliciously destroyed, but remained a legal and binding obligation and valid claim against the estate of said Meyer; and that no part thereof had been paid. Judgment was accordingly entered in favor of plaintiff for $27,154.15, being the principal sum of said note, with interest, less a small offset.

The appeal is based primarily upon the ground of insufficiency of the evidence to support the findings, especially in view of the undisputed fact that the fragment of paper was in possession of Meyer and found upon his body. Appellant also complains of prejudicial error committed by the court in permitting plaintiff, Dorris, to testify to matters and facts which occurred prior to the death of Meyer, in violation of said section 1880, subd. 3, of the Code of Civil Procedure.

As to the latter contention the record shows plainly that in the examination of plaintiff both court and counsel were careful in their efforts to limit the questions and replies to matters not within the inhibition of said section. Whether it was proper to permit identification through his testimony of the note set forth in the claim as that copied by Miss Tompkins prior to the death, the original of which was destroyed, is doubtful. As said in Re Kitchen, 192 Cal. 384, 391, 220 P. 301, 303 (30 A. L. R. 1008) the purpose of the rule declared in said section is "to prevent a claimant from mulcting an estate by proving by claimant's own testimony that which the decedent might perhaps disprove were his lips not sealed by death. Its declared purpose is to protect the estate from the possibility of fraud, perjury, and injustice." Determination of this question, however, becomes unnecessary, as the other grounds urged require a reversal of the judgment.

[1] Bearing in mind and giving full weight to all testimony indicating that, at a time not long before the death of said Meyer, Dorris did in fact hold his note for $25,000, we are confronted with this situation: There was offered no evidence whatsoever, except the testimony of Dorris himself, identifying the fragment as a portion of the instrument set forth in the claim. There was offered no direct evidence of execution of the note. There was no actual proof of any indebtedness of Meyer to Dorris. There was offered no evidence directly connecting the instrument copied prior to the death with the alleged document destroyed prior thereto and said document with the fragment of paper. There was no proof that the note had not been canceled. There was no proof that it had not been paid. There was no explanation of its undisputed possession by the maker. There was no explanation of the fact that the signature had been torn from the body of the note, if such was the fact. There was no proof that the alleged document had not been destroyed voluntarily, willfully, or intentionally, or for purposes of cancellation. In short, the record contains not one word of evidence to support the findings that said note was executed, that it was delivered for a valuable consideration, that it was not intentionally destroyed, and that it was uncanceled and unpaid.

[2] The very fact that said alleged note, or the signature thereto, was in the possession of the maker before his death and was found upon his dead body, gives rise to certain disputable presumptions as to payment and cancellation, which are binding upon the court when, as here, they are uncontroverted by other evidence (section 1961, Code Civ. Proc.) to-wit: "That an obligation delivered up to the debtor has been paid" (subdivision 9); "that a person in possession of an order on himself for the payment of money * * * has paid the money * * *" (subdivision 13); "that the ordinary course of business has been followed" (subdivision 20, § 1963, Code Civ. Proc.).

Light v. Stevens, 159 Cal. 288, 113 P. 659, is an exact converse of the case at bar. There as here the lips of one of the parties to the transaction were closed by death and those of the other party by law, so evidence on the question of payment of the note was somewhat unsatisfactory. The court held that just as an obligation delivered up to the debtor is presumed to have been paid, so the converse of this, that possession by the payee is prima facie evidence of nonpayment, is universally held, further saying:

> "* * * It would be quite a departure from 'the ordinary course of business' which is presumed to have been followed (Code Civ. Proc. § 1963, subd. 20), to pay the full amount due on a note without receiving the note from the payee or, if it cannot be delivered, some other evidence of payment. Griffith v. Lewin, 125 Cal. 618, 58 P. 205."

The converse of the latter statement is likewise true and here directly applicable. It would surely be quite a departure from the ordinary course of business to surrender possession of an unpaid note and permit the signature thereto to remain in the hands of the maker.

The case of Turner v. Turner, 79 Cal. 565, 21 P. 959, is also directly in point. The notes there involved were made by one J. T. Turner to his brother, whose administrator was plaintiff in the action. Both brothers were dead before the suit was commenced. There was no direct evidence for or against the payment. Plaintiff did not produce the notes at the trial or give any satisfactory explanation of their absence; the last seen of them was that they were in possession of the maker. The court said:

> "The possession of the notes is a material circumstance in relation to the question of payment. Possession by the maker raises a rebuttable presumption of payment. Code Civ. Proc. § 1963, subd. 9; Greenl. Ev. § 527; Zeigler v. Gray, 12 Serg. & R. [Pa.] 42; Lipscomb v. DeLemos, 68 Ala. 592; Carroll v. Bowie, 7 Gill. [Md.] 41. * * * And upon this principle it has been held in this state that if payment is denied the onus is upon the plaintiff to prove the nonpayment at least by the production of the note. Farmers' Bank v. Christensen, 51 Cal. 572. In other words, if the plaintiff does not produce the note or account for its absence, the presumption is against him."

Thus even if the competency of plaintiff's testimony, the indebtedness of Meyer to Dorris and execution and delivery of the note of which said fragment was a portion, were conceded, there would still remain the unexplained and decisive fact that the undestroyed portion of the alleged obligation was admittedly found in possession of the maker. This would indicate that said obligation had been met, the note returned to the maker, and that, for the purpose of canceling it in accordance with his custom as shown by the evidence, he tore off the signature thereto. Section 3204 of the Civil Code provides that:

> "* * * Where an instrument or any signature thereon appears to have been canceled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority."

Here not only did plaintiff fail to meet the burden of proof resting upon him, but he utterly failed to offer any proof controverting said appearance of cancellation.

The judgment is reversed.

We concur: CURTIS, J.; SEAWELL, J.

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93 Cal. App. 124

OLSON v. RANKER et al. (Civ. 6334.)

District Court of Appeal, First District, Division 2, California. July 9, 1928.

1. Appeal and error 🔑907(2)—In absence of evidence in record to sustain specification of error that decision was contrary to evidence, findings and judgment must be presumed sustained.

Where record was brought up on bill of exceptions which was so incomplete, ambiguous, and unintelligible that appellate court found it impossible to obtain a clear understanding of the facts, specifications of error therein being that decision was contrary to the law and the evidence, and no evidence was set out in bill of exceptions, evidence must be presumed sufficient to justify trial court's findings and judgment.

2. Appeal and error 🔑901—Appellate court cannot presume error was committed, but burden is on appellant to show it.

Appellate court cannot presume that error was committed, but burden is on appellant, who claims error, to show its existence by presenting a record showing error.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Hazel B. Olson against Frank X. Ranker and another. Judgment for defendants, and plaintiff appeals. Affirmed.

J. W. Hocker, of Los Angeles, for appellant.

Irvin C. Taplin and Clifford Crail, both of Los Angeles, for respondent.

PRESTON, Presiding Justice pro tem. The plaintiff, Hazel B. Olson, brought this action to foreclose the rights of defendants in certain real property situate in the city of Los Angeles. The case was tried by the court without a jury, and the court found, among other things, that plaintiff had no right, title, or interest in the property described in the complaint, and rendered judgment in favor of defendants, from which judgment the plaintiff prosecutes this appeal.

[1] The record is brought up under what appellant calls "A Bill of Exceptions," but which is so incomplete, ambiguous, and unintelligible that we find it impossible to obtain a clear understanding of the facts. Neither does the opening brief of appellant assist us in determining what facts were presented to the trial court, nor have the attorneys for the respondent seen fit to assist us in any way; in fact, they have filed a stipulation

agreeing to submit the appeal upon the opening brief of appellant.

The specifications of error in the so-called "Bill of Exceptions" are:

> "(a) That the decision is contrary to law; (b) that the decision is contrary to the evidence and not supported by the pleadings nor by the testimony."

There is no evidence set forth in the bill of exceptions. It appears, however, that this case was submitted to the trial court upon the evidence taken in a case entitled "Peters v. McFate, No. 174484," pending in the superior court of Los Angeles county, but not one word of the evidence taken in that case is shown anywhere in this record on appeal.

[2] In view of this situation, we must presume that the evidence was sufficient to justify the findings and judgment of the trial court. This court cannot indulge in the presumption that error was committed; the burden is upon appellant, who claims error, to show its existence. It was therefore incumbent upon appellant to present a record which affirmatively shows the existence of alleged error. Foster v. Young, 172 Cal. 317, 156 P. 476; 2 Cal. Jur. 697. No such record is here presented. Furthermore, the conclusions of law and judgment are supported by the findings of fact.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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93 Cal. App. 174

PEOPLE v. COOK. (Cr. 1463.)★

District Court of Appeal, First District, Division 1, California. July 13, 1928.

Hearing Denied by Supreme Court Sept. 11, 1928.

1. Homicide 🔑254—Evidence held to sustain conviction of murder in second degree for causing death of woman while performing criminal operation.

Evidence *held* to sustain conviction of murder in second degree for causing death of pregnant woman while operating on her for purpose of producing an abortion.

2. Criminal law 🔑1168(2)—Showing declarations of coconspirator, not in defendant's presence, before showing conspiracy, though misconduct, held not prejudicial, in view of subsequent evidence of conspiracy.

In prosecution for causing death of woman while performing criminal operation on her, conduct of prosecuting attorney in attempting to show certain declarations by defendant's alleged coconspirator, not in defendant's presence, tending to incriminate defendant before existence of conspiracy had been shown, though misconduct, *held* not prejudicial, resulting in miscarriage of justice, in view of evidence subsequently adduced tending to show conspiracy, instruction to jury to disregard questions, and conclusive evidence of defendant's guilt.

3. Homicide 🔑291—Instruction held to have sufficiently presented necessity of establishing fact that instrument used in performing criminal operation was such as would produce abortion.

In prosecution for causing death of pregnant woman while performing criminal operation on her, instruction that, among elements necessary to be established, it must be shown that defendant employed instrument on deceased with intent to produce miscarriage, and that direct and proximate cause of her death was use of such instrument, was a sufficient instruction that instrument used was such as would produce an abortion.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

E. R. Cook was convicted of murder in the second degree, and he appeals. Affirmed.

Joseph P. Lacey, of Oakland, and Frank W. Hooper, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

CASHIN, J. The defendant was charged by an information filed in the superior court of Alameda county with the murder of Elizabeth Buckles. Upon the trial the jury returned a verdict of murder of the second degree, and from the judgment thereon and an order denying a motion for a new trial, the defendant appealed.

As grounds for reversal it is contended that the evidence is insufficient to support the verdict; that the conduct of the prosecuting attorney during the course of the trial was prejudicial to the rights of the defendant; that the court erred in admitting certain evidence over objection, and failed to instruct the jury upon matters material to the defense.

[1] The evidence shows that on December 20, 1927, an operation for the purpose of producing an abortion was performed upon Elizabeth Buckles, who was pregnant, and who died on the operating table. According to the testimony of Josephine Risius, she, with one Cole, assisted in the operation, which was performed by defendant. She testified that chloroform was administered by Cole and that the woman while under its influence, but during the course of the operation, died. Physicians who made a post mortem examination testified that the woman was pregnant; that the cavity of the uterus was dilated; that within the same was found a partially dismembered foetus and placental tissue, much of which had been torn from the walls of the uterus; and that the head and one of the lower limbs had been torn from the body of the foetus. A physician further testified that some outside influence, substance, or metal instrument had been used to dilate the cervix, testifying that in his opinion the major cause of death was hemorrhage and shock. Although the defendant denied that he assisted in the operation, it is admitted

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★Hearing denied by Supreme Court.

that he was present in the office maintained by Cole about the time the death occurred and aided Cole and the witness Risius in an attempt to revive the deceased. On this occasion, according to another witness, he was clad in a gown of the kind worn by surgeons in the operating room. It further appears that Cole was not a licensed physician, although representing himself to be such; that the defendant frequently visited his office, where were found instruments and paraphernalia used in the performance of such operations. It was further shown that after the death of Mrs. Buckles, but before the discovery of her body by the authorities, a person employed in the building in which the office mentioned was situated was requested by defendant to deny in case inquiry should be made that the latter had been associated with Cole. Other circumstances were shown strongly tending to connect the defendant with the death, and the evidence adduced was ample to sustain the conclusions of the jury.

[2] The prosecution, before laying a foundation for such testimony by showing the existence of a conspiracy between Cole, Risius, and the defendant, the objective of which was the performance of criminal operations, attempted to show by questions to witnesses certain declarations by Cole, not in the presence of the defendant, tending to incriminate the latter. The asking of these questions was assigned as prejudicial misconduct on the part of the prosecution, as were also certain questions asked of the defendant and his son on cross-examination. While the former was subject to objection when propounded, nevertheless, in view of the evidence subsequently adduced, which tended to show such conspiracy and the instruction to the jury to disregard the questions, we cannot say that they were prejudicial, and certainly not to a degree to warrant a reversal of the judgment. The same is true of those asked on the cross-examination, for while one of the latter was an inquiry as to whether the witness knew that a certain act of fraud had been committed by the defendant, which, if true, had no connection with the charge being tried by the jury, nevertheless, after a careful examination of the entire record, including the evidence, which leaves no reasonable doubt of guilt, we are satisfied that the acts of the prosecuting attorney, although misconduct, did not prevent the defendant from having a fair trial or result in a miscarriage of justice.

[3] It is further contended that it was the duty of the court to instruct the jury that, before a conviction could be had, they must find that the instrument or instruments used, if any, were such as would produce an abortion and that no such instruction was given. An examination of the record shows the contrary, as the jury was charged that, among the elements necessary to be established before a conviction might be had, it must be shown beyond a reasonable doubt that the defendant had used or employed an instrument in or upon the uterus of the deceased with the intent to produce a miscarriage, and that the direct and proximate cause of her death was the use of such instrument.

A motion by the defendant in arrest of judgment was properly denied, and the record discloses no error in the rulings of the trial court.

The judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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93 Cal. App. 81

PEOPLE v. MOUNT. (Cr. 1636.)

District Court of Appeal, Second District, Division 1, California. July 5, 1928.

1. Homicide 🔑203(3)—Statement of deceased, voluntarily made when she justifiably believed she would not get well, held admissible as "dying declaration."

Statement of deceased *held* admissible as "dying declaration" in murder case, where she had of her own volition, on several occasions prior to making thereof, expressed to her sister and doctor the belief that she would not get well, and her condition was such as to justify her belief.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dying Declarations.]

2. Criminal law 🔑516—Defendant's statements to witnesses held admissible as admissions, and did not constitute confession.

Statements made by defendant in murder case in conversation with witnesses *held* admissible in evidence as admissions, and did not constitute a confession.

3. Homicide 🔑169(6)—Testimony of having seen surgical instruments in chiropractor's office about three years before treatment of deceased held competent to rebut defendant's testimony denying possession of such instruments.

In prosecution for murder against chiropractor, resulting from alleged abortion performed by him, testimony of a physician that he had seen certain surgical instruments in defendant's office about three years before defendant had treated deceased, offered in rebuttal of defendant's testimony denying that he had any surgical instruments in his office, *held* admissible to impeach such testimony, and was not incompetent as too remote.

4. Homicide 🔑282—Under charge of murder, jury might convict of manslaughter, notwithstanding district attorney argued death resulted from abortion.

Under a charge of murder, jury could find defendant guilty of any lesser offense included within the charge, and fact that district attorney believed defendant committed abortion and urged on jury that theory of case did not limit jury to finding verdict requested so as to preclude conviction for manslaughter, where there was substantial evidence that deceased came to her death by reason of gross negligence of defendant in treatment administered to her.

5. **Homicide 🔑33—That chiropractor, in treating patient, used instruments not permitted by his license, held in itself negligence.**

That defendant in murder case used instruments in the treatment of his patient which his license as a chiropractic physician did not permit him to use *held* in itself negligence.

6. **Homicide 🔑250—Evidence held sufficient to support verdict of manslaughter against chiropractor, based on death of patient treated by him.**

In prosecution against chiropractor for murder based on death of patient treated by him, evidence *held* sufficient to support verdict of manslaughter.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Charles O. Mount was convicted of manslaughter, and he appeals. Affirmed.

John A. Deweese and Josiah Coombs, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

HAHN, Justice pro tem. Appellant was charged by information filed by the district attorney of Los Angeles county with the crime of murder. From the judgment upon a verdict of guilty of manslaughter, and an order denying the defendant's motion for a new trial, this appeal is prosecuted.

Four assignments of error are stated, as follows:

"First. A dying declaration, or statement, was admitted in evidence contrary to law, and to the injury of this appellant. The said declaration is set forth on pages 69 and 70 of the reporter's transcript.

"Second. The statement made by the defendant, alleged to be a confession, as found on pages 33 to 70 of the reporter's transcript.

"Third. The court allowing testimony to be introduced as to instruments in Dr. Mount's Belvedere office a long time prior to the 15th of November, 1927, as found on pages 187 and 205 of the reporter's transcript, wherein the witness Dr. J. J. Mortensen testified, beginning on page 193, that in the fall of 1924 the defendant had instruments, and various instruments, that could be used to produce an abortion.

"Fourth. The fourth assignment of error relied upon by this appellant is the error in giving instructions, and the failure to give instructions, and the theory upon which this case was submitted to the jury; that is to say, that the defendant was charged with murder, or homicide."

While there is a sharp conflict in the evidence upon several material matters, there is sufficient evidence to have justified the jury in accepting the following as a fair story of the material events and circumstances relating to the case:

The deceased, Violet Van Tassel Berdue, was a young married woman of the age of 25 years. Early in October, 1927, she was taken ill with pains and dizzy spells. Attributing her suffering to the fact that she had passed her menstrual period, upon the advice of a woman friend, she consulted the defendant, who was a licensed chiropractic practitioner. After the defendant had made an examination of the patient and had listened to her story, he gave her an electric treatment, and then inserted two instruments in her vagina. She was told to return on the following day, when again an instrument resembling a clippers was inserted into her vagina. Two days later, on October 17th, she was treated by the defendant in a similar manner with instruments. On this third occasion the defendant stated to the deceased: "You are in a pretty bad condition, but I can't make you come." He then inserted a tube into the patient's vagina, with instructions that it be kept there during the night. Some time during the night she began to flow. Several days later the patient called at the defendant's office, where she was treated by him, and shortly thereafter he visited her at her home, where she was confined to her bed, suffering from vomiting and nausea, and running a high fever and a rapid pulse. She was then removed to the county hospital, where she was under the care of a regular physician, but, on November 6th, she was taken to the Angelus Hospital, where she was under the care of Dr. A. M. Hansen, a regular physician, until her death, which occurred on November 15th. At the Angelus Hospital she was given three blood transfusions, and a portion of her uterus was removed. Upon examination of the uterus, it was found to contain a portion of the afterbirth and in a diseased condition. Dr. A. F. Wagner, who performed an autopsy, testified that death was due to "acute endocarditis with septicemia following abortion."

On November 10th, when apparently the patient's condition was regarded as very serious, and after she had on several occasions stated to the members of her family and the attending physician that she did not expect to recover, the deceased made what has been referred to in the record as a dying declaration, which reads as follows:

"State of California, County of Los Angeles—ss:

"Violet Van Tassel, being first duly sworn, deposes and says: That she is above the age of twenty-one years, a resident of 419 West 57th St., Los Angeles, Calif., and a competent witness. That on October 14th, 1927, at about 7 p. m., she went to the office of Dr. O. C. Mount at Avalon and Vernon streets, Los Angeles, and the nurse there said, 'All right, come on in.' I said, 'I am the girl that Allie sent.' The nurse then put an electric pad on her stomach. Then Dr. Mount came in and said, 'All right, come on in here.' Then he put a spoon in me to open me up and then another instrument like a pair of clippers in me. That on October 15th, 1927, at about 9 a. m., affiant went again to the office of Dr. Mount and the nurse put a big light over me for about an hour and then she was taken into another room. The doctor said, 'Good morning, how do you feel.' Affiant said, 'Not very good.' Ede was with me that morning, but did not go into the office with me. The doctor used the long slender clippers a couple of times. The doctor said 'to come back Monday night.' That on Monday, Oct. 17th, 1927, affiant went to the office of Dr. Mount at about 7 p. m. Doctor asked how I was. I told him not very well. The doctor said, 'You are in a pretty bad condition, but I can't make you come.' Then he used the clippers and inserted a red tube. This tube was left in me all night and I started coming sick. The first time affiant went to the office she told the doctor that she was about seven weeks over time and he said that he thought she was about five weeks. That on Oct. 19th, 1927, affiant went to the office of Dr. Mount and he asked how she was. I told him very bad. I said there wasn't any afterbirth. He said there wouldn't be any, as it was such a short time. On Sunday, October 23d, Dr. Mount came to the house. He asked how she felt. I told him I was sick and just passing little clots. He punched me in the stomach and back and rubbed the back of my neck. Violet Van Tassel."

After Mrs. Berdue had gone to the Angelus Hospital and was under the care of Dr. Hansen, he and her brother-in-law, Mr. Culberson, went to the office of the defendant and had a conversation with him concerning the defendant's treatment of Mrs. Berdue. According to the testimony of Dr. Hansen and Mr. Culberson, the defendant, in response to the question, "What were you treating her for?" replied, "Well, she was overdue, past her period." Other statements and admissions made by the defendant in this conversation, as testified to by Dr. Hansen and Mr. Culberson, corroborate the declaration of Mrs. Berdue that the defendant treated her to overcome a pregnant condition. Dr. Hansen testified further that several days after the first conversation defendant called at his office and inquired as to the condition of Mrs. Berdue. When informed that she was in a very serious condition, defendant stated to Dr. Hansen, "You know if she dies it means the pen for me;" and that a day or two later he asked Dr. Hansen to use his influence to protect him from any trouble, and offered to pay him for any aid he would render in the matter.

[1] Appellant's first contention is that the court erred in permitting the so-called dying declaration to be read to the jury. He gives no specific reason for this assertion, except that the ruling was "contrary to the doctrine announced in the case of People v. Westcott (Cal. App.) 260 P. 901." The point is not well taken. In the Westcott Case there was no evidence whatever to indicate that the deceased, at the time he made the statement which was offered as a dying declaration, had any realization of the fact that he might pass away, or in fact that he was seriously wounded. In the instant case, Mrs. Berdue had on several occasions prior to the time that the statement was made, of her own volition, expressed to her sister and the doctor the belief that she would not get well. It also appears that her condition was such as to justify her belief. The evidence was sufficient to meet the requirements that permit the introduction of a "dying declaration."

[2] In his second point appellant does not indicate what particular testimony is the subject of his criticism other than referring to it as "the statement made by the defendant, alleged to be a confession." The pages of the reporter's transcript referred to include the testimony of two witnesses covering various matters. Among other things, these witnesses testified to a conversation with the defendant. The statement referred to as having been made by the defendant, in our opinion, did not constitute a confession. There were statements and admissions which were damaging to the defendant, but in our opinion no error was committed in permitting their introduction.

[3] It is next urged that the court committed error in permitting testimony to the effect that surgical instruments commonly used by surgeons in treating the vagina and cervix had been seen in the defendant's office by Dr. J. J. Mortensen approximately three years prior to the time that the defendant was treating Mrs. Berdue. This testimony was offered by the prosecution in rebuttal, after the defendant on the stand had testified that he had not used any instruments in treating Mrs. Berdue other than a vaginal electrode, and that he had inserted no other instrument in the vagina of this patient. He further testified that, with the exception of a wave generator, with its various electrical attachments, including the vaginal electrode, he had no other instruments in his office; and particularly he denied that he had a clippers or a catheter in his office. It was clearly pertinent to the issues involved in the case as to whether or not the defendant had used surgical instruments in treating Mrs. Berdue. Defendant was licensed only as a chiropractic doctor, and he had no legal right to practice surgery. Certainly, upon the denial that he had any surgical instruments, it was within the right of the prosecution to impeach his testimony, if possible, by showing that he had such instruments as a part of his equipment in his office where he treated his patients. It is urged that the testimony of Dr. Mortensen related to a time so remote as to make it

incompetent. We cannot agree with this assertion. The question as to the time when the defendant had surgical instruments in his office may go to the weight of that testimony, but not to its competency.

[4] The fourth and last assignment of error relates to certain instructions given and which it is claimed were erroneous, as also the refusal to give several instructions requested by the defendant. We have carefully examined all of the instructions referred to, and are satisfied that but one point requires any discussion.

The court gave the usual instructions defining murder, and also the degrees of murder, including an instruction defining manslaughter. It is urged that the court committed error in giving any instruction on the subject of manslaughter, for the reason that the prosecution presented its case upon the theory that deceased came to her death from an act of abortion committed by the defendant, and that there was no issue before the jury that required an instruction on the subject of manslaughter. In support of this theory appellant cites the case of People v. Huntington, 138 Cal. 261, 70 P. 284.

There is no merit in this contention. It is too well settled to require discussion that under a charge of murder the jury may find the defendant guilty of any lesser offense that may be included within the charge, and, of course, manslaughter is so included. The fact that the district attorney believed that the defendant committed an act of abortion and urged upon the jury that theory of the case did not limit the jury to finding the verdict requested by the prosecution. There is substantial evidence in the record to justify the jury's conclusion, which undoubtedly formed the basis for the verdict, that the deceased came to her death by reason of the gross negligence of the defendant in the manner and character of the treatment he administered to her.

[5, 6] In the case of People v. Huntington, supra, there was no evidence in the record to support any theory except that the death was produced by an act of abortion committed by the defendant. Mr. Justice McFarland, in his opinion reversing the judgment of the lower court, says: "Instructions must be applicable to the facts and features of the case in hand." But assuming that there is language in the opinion in that case that furnishes some basis for appellant's contention, the case loses its effect in that respect largely because of the fact that upon a retrial of the defendant he was found guilty of manslaughter, and upon appeal the judgment was affirmed. People v. Huntington, 8 Cal. App. 612, 97 P. 760. Furthermore, there is evidence that the defendant used instruments in the treatment of the patient which his license as a chiropractic physician did not permit him to do. This in itself constituted negligence. In addition, there is expert testimony to the effect that the conditions which caused the patient's death were induced by the careless and incompetent treatment accorded the deceased by the defendant.

In our opinion, there is sufficient evidence to support the verdict of manslaughter.

The judgment is affirmed.

We concur in the judgment: HOUSER, Acting P. J.; YORK, J.

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93 Cal. App. 166

DICKERMAN v. AHERN et al. (Civ. 5680.)

District Court of Appeal, First District, Division 2, California. July 12, 1928.

1. Creditors' suit ⚿46—Evidence held to sustain finding in creditor's suit that bonds which debtor's brother delivered for deposit as bail on appeal in criminal proceedings against debtor, were property of debtor.

Evidence in creditor's bill *held* to sustain finding that debtor was owner of bonds which his brother had taken to attorney for deposit with United States commissioner as bail on appeal in criminal proceedings against debtor.

2. Courts ⚿478—One court will not ordinarily issue process against property held under process of another court.

One court will not ordinarily issue process against or attempt to disturb possession of property which is held under process previously issued by another court.

3. Courts ⚿497—Order in creditor's suit directing payment to plaintiff of remainder of bonds deposited in United States District Court as bail on appeal, after appeal bond was satisfied, held within court's authority.

Court in creditor's suit had authority to require debtor to apply to plaintiff's claim remainder of bonds, deposited by debtor as bail on appeal in criminal case, which should not be required to satisfy appeal bond, where no process of any sort was directed to any officer of the United States District Court in which the criminal proceedings were instituted.

4. Appeal and error ⚿169—To obtain rulings on appeal, points involved should be first presented to trial court.

Points should be first presented in trial court in order to obtain ruling thereon on appeal.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by M. Dickerman against William Ahern, also known as W. J. Ahern, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

James F. Brennan, of San Francisco, for appellants.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Byrne & Lamson, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff brought a creditor's bill against the defendants. They answered and a trial was had before the court, sitting without a jury. The court made findings in favor of the plaintiff, and from a judgment entered thereon, the defendants have appealed.

The defendants make two points. They contend the evidence is insufficient to justify the decision and they contend that the bonds hereinafter mentioned were in custodia legis, and therefore were exempt from attachment, garnishment, or levy. We will discuss these points in the order stated, but it is necessary to state some of the facts.

On October 22, 1923, a judgment was entered against William Ahern, one of these defendants, and in favor of this plaintiff. That judgment was for $3,349.61, costs, and interest. On December 4, 1923, $406.78 was credited thereon. Later such proceedings were had that the creditor's bill was filed. In the meantime William Ahern was arrested on process issued out of the United States District Court. He was tried and convicted and took an appeal. Pending his appeal, an order was made that he be admitted to bail in the sum of $5,000. As bail on appeal, the brother of William Ahern took to Joseph Connelly, who was acting as attorney for William Ahern, five $1,000 United States bonds, and Connelly deposited the bonds with the United States commissioner and took a receipt in his own name. By the creditor's bill this plaintiff sought to obtain a decree subjecting said bonds to plaintiff's claim after the said bond on appeal should have been exonerated.

[1] In presenting their attack on the findings, the defendants claim there was no evidence that William Ahern was the owner of the bonds, but that all of the evidence was to the effect that the defendant Frank Cator was the owner of the bonds. The direct evidence given by the witnesses was as contended by the defendants; but the testimony of each witness was very inexact, inaccurate, and equivocal. The brother of William Ahern, a most material witness, was not produced, nor was his absence accounted for. There were many conflicts in the story as told by the defendants. We think it is clear that there is in the record substantial evidence supporting the findings.

[2-4] As to the second point made by the defendants, it will be conceded at once that one court will not ordinarily issue process against, or attempt to disturb the possession of, property which is held under process theretofore issued by another court. Swinnerton v. Oregon Pac. R. R. Co., 123 Cal. 417, 424, 56 P. 40. But that authority has no application to the facts of this case. In the case now before us the record does not disclose that the trial court issued a writ of attachment, garnishment, or any other process or order directed to any officer of the United States District Court. Its process was addressed solely to the actors before it. The point is without merit under the facts. Furthermore, the point was never presented to the trial court, and is, for the first time, presented to this court. If defendants wanted a ruling thereon, they should have made the point below. 2 Cal. Jur. 234. We find no error in the record.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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93 Cal. App. 152

Ex parte AHUMADA. (Cr. 1696.)

District Court of Appeal, Second District, Division 2, California. July 11, 1928.

1. Criminal law ⚷1218—Confinement in county jail carried out municipal court sentence to "city jail" on conviction of misdemeanor (Pen. Code, § 19, and § 1617, as added by St. 1925, p. 949).

Under Pen. Code, § 19 and § 1617, as added by St. 1925, p. 949, confinement in county jail, merely carried out terms of municipal court sentence designating "city jail" as place of confinement on conviction of misdemeanor, no matter what jailor's intention was; such designation being interchangeable with term "county jail."

2. Criminal law ⚷1218—One acquitted of felony after expiration of city jail sentence, served in county jail, for misdemeanor, held entitled to discharge (Pen. Code, § 19, and § 1617, as added by St. 1925, p. 949).

Imprisonment in county jail for period of sentence to "city jail" by municipal court on conviction of misdemeanor being lawful under Pen. Code, § 19, and § 1617, as added by St. 1925, p. 949, prisoner was entitled to discharge on acquittal of felony after expiration of such term as against contention that such restraint was pursuant to law authorizing it pending disposition of felony charge.

Application by Francisco Ahumada for a writ of habeas corpus to the Chief of Police of the City of Los Angeles. Writ granted.

John F. Groene, of Los Angeles, for petitioner.

E. J. Lickley, City Prosecutor, Joe W. Matherly, and F. W. Fellows, Deputy City Prosecutors, all of Los Angeles, for respondent.

CRAIG, J. On the 11th day of May, 1928, in the municipal court of the city of Los Angeles, Francisco Ahumada was convicted of a misdemeanor committed in said city. On the same day he was sentenced to pay a fine of $250, or, in default thereof, to be confined in the city jail in the proportion of one day for each $10 of the fine unpaid, not to exceed 25 days. He was then taken to the Los Angeles county jail, where he remained until June 28, 1928, when he was removed to the Los Angeles city jail. It appears that on the 10th day of May, 1928, petitioner was charged by complaint with having committed a felony, and was thereafter immediately arraigned on the last-named charge and lodged in the county jail, which, it will be noted, was on the day previous to his sentence for the misdemeanor. The customary steps in the prosecution of the felony action were taken, terminating on June 28, 1928, in an acquittal of Ahumada. He thereupon at once applied to the sheriff for release, which was refused.

The theory of the petitioner is that his detention in the county jail, in all 49 days up to June 28th, was pursuant to the judgment pronounced in the municipal court case, and hence that he is now entitled to his liberty. Respondent insists that such sentence could only be satisfied by imprisonment in the city jail, and that the restraint of petitioner in the county jail was pursuant to the provisions of law authorizing the same pending disposition of the felony charge. It is conceded that the sentence for a misdemeanor might have been imprisonment in the county jail. The decisions cited shed but little light upon the question presented. Leaving the felony charge out of consideration, if, under the sentence pronounced, incarceration in the county jail was illegal, the petitioner might have been released through habeas corpus. If such imprisonment would have been lawful it is clear that he is entitled to a discharge.

[1] Section 1617 of the Penal Code (as added by St. 1925, p. 949) reads in part:

> "Whenever by the terms of this Code, or of any other law of the state, it is provided that a prisoner shall be confined in any county jail, such provision shall be construed to authorize the confinement of any prisoner convicted in a municipal or police court to be confined in a city jail of the city in which such conviction was had, and as to such prisoner so confined in such city jail, the designations, county jail and city jail shall be interchangeable."

That confinement in the county jail upon the misdemeanor charge was authorized in this instance is conceded by respondent, and cannot be doubted. Pen. Code, §§ 19, 1617. We think it clear that the language above quoted from section 1617, "As to such prisoner so confined in such city jail, the designations, county jail and city jail shall be interchangeable," applies and controls here. The county jail became a city jail for the purpose of petitioner's imprisonment. It is as though the city possessed two jails and the sentence had been to one of them by name; in that case it would hardly be argued that imprisonment in either would be unlawful. Since the designation "city jail" in the sentence pronounced in the instant case is interchangeable with the term "county jail," confinement in the last-named place was but carrying out the terms of the sentence, no matter what the intention of the jailor may have been.

This conclusion is supported by authority as well as by reason. In Re Johnson, 6 Cal. App. 734, 93 P. 199, it appeared that the city of San Diego had an arrangement with the county for the use of certain cells in the county jail for city prisoners. The petitioner was convicted of a misdemeanor and sentenced to confinement in the city jail. He was lodged in one of the cells of the county jail rented by the city. It is said in the opinion: "This portion of the county jail, then, to all intents and purposes, is the city jail of the city of San Diego."

[2] The only purpose of detaining one charged with crime pending trial is to guard against his escape and to insure his presence at the trial, and his custody according to law in case of conviction. The attainment of this object and the serving of a sentence pursuant to a judgment after conviction of another criminal offense are entirely consistent. It does no violence to the principle that courts merely construe laws and do not ordinarily give weight to questions of policy to observe that the citizen's loyalty or disloyalty is often dependent upon the degree of fairness with which he is treated by his government. Although it is undoubtedly permitted by law, and justifiably so, that one charged with crime, unable to furnish bail, be held in custody of proper officers pending trial, yet the imposition of such a hardship becomes an injustice where those responsible for the administration of the law do not make all reasonable concessions to avoid it, consistent with the safety of society. Where, as here, a defendant has been pronounced innocent by a jury after trial, beyond dispute the accused was deprived of liberty to which we must admit all human beings have an absolute right. That right was disregarded for the good and protection of the public, a matter of even higher importance than the maintenance of the individual's rights. Yet a real wrong was done the petitioner, but this inequity does not result if his incarceration during the period in question was in conformity with the sentence under which he rested as a result of an offense of which he had been adjudged guilty. A fair consideration of the law prevents an injustice in this case, and in any other for which this might be a precedent.

The writ is granted.

We concur: WORKS, P. J.; HAZLETT, Justice pro tem.

93 Cal. App. 88

Ex parte GRAHAM. (Cr. 1653.)

District Court of Appeal, Second District, Division 2, California. July 6, 1928.

1. Municipal corporations 🔑121—One charged with standing taxicab at place not designated cannot challenge constitutionality of ordinance as discriminatory without showing that any other was given permit for stand at same place.

One charged with violating city ordinance by causing his taxicab to stand elsewhere than at place designated by permit of Board of Public Utilities cannot challenge constitutionality thereof, in absence of showing that any permit was given any other taxicab owner to stand at same place, though discrimination may occur through administration of such ordinance.

2. Municipal corporations 🔑680, 681(2)—Delegation of power to municipal officers to grant and refuse permits for occupations subject to police regulation will be sustained, though involving discretion.

Delegation of power to municipal boards or officers to grant and refuse permits to engage in occupations and businesses, which are proper subjects of police surveillance and regulation, will be sustained, though involving discretion, on theory that such officers will not use powers villainously or for purpose of oppression or mischief.

3. Municipal corporations 🔑686—No one has natural right to conduct business excluding others from particular area in street.

No one has a natural right to conduct a business involving the exclusion of others from a particular area in a public street, but such an occupation ordinarily constitutes a nuisance.

4. Municipal corporations 🔑680, 681(8)—City council may abolish street taxicab stands.

City council has authority to abolish taxicab stands on streets, not because taxicab operators are common carriers, but because of their private use of public highways.

5. Municipal corporations 🔑683(1)—Privilege of maintaining taxicab stand can be granted only under proper regulation, which may be confided to discretion of municipal administrative board or officer.

Privilege of maintaining taxicab stands on streets can be granted only under proper regulation, which may be properly confided to discretion of municipal administrative board or officer.

6. Constitutional law 🔑241, 297—Use of public highways by common carrier for hire is mere privilege, which may be granted or withheld without violating due process or equal protection clauses (Const. U. S. Amend. 14).

A citizen may have right, under Const. U. S. Amend. 14, to travel and transport his property on public highways by auto vehicle, but has no right to make highways his place of business by using them as common carrier for hire; such use being a privilege which may be granted or withheld by state in its discretion without violating due process or equal protection clauses.

7. Habeas corpus 🔑92(1)—Objection to ordinance, first stated in habeas corpus petitioner's closing brief, need not be discussed.

Objection to ordinance, stated for first time in closing brief of petitioner for writ of habeas corpus to secure his release from custody after conviction of violating it, need not be discussed.

8. Habeas corpus 🔑54—Taxicab owner's habeas corpus petition, not alleging that petitioner encroached on area assigned to another for taxicab stand, held not to show discrimination invalidating ordinance (Const. U. S. Amend. 14).

Petition for writ of habeas corpus, merely alleging petitioner's confinement on conviction of violating city ordinance prohibiting taxicab owners and drivers from causing such vehicles to stand elsewhere than at place designated by stated board, without showing that petitioner encroached on area assigned to owner of other such vehicles, *held* not to show discrimination invalidating ordinance, under Const. U. S. Amend. 14.

Application, by Orville Graham, for a writ of habeas corpus to the Chief of Police of the City of Los Angeles. Writ discharged, and petitioner remanded.

Charles W. Cradick, of Los Angeles, for petitioner.

Jess E. Stephens, City Atty., and James L. Ronnow and D. M. Kitzmiller, Deputy City Attys., all of Los Angeles, for respondent.

CRAIG, J. The petitioner is under sentence of imprisonment for having violated certain provisions of an ordinance of the city of Los Angeles. He asks to be discharged on habeas corpus, claming that the ordinance is void. The provisions of the ordinance here in question are the early part of section 5, subdivision (a) of section 5, and the first paragraph of section 12. The first part of section 5 reads:

> "Permits may be issued as provided in section 12 hereof to the owners of the vehicles herein defined allowing any such vehicles while awaiting employment to stand at certain designated places upon the streets of the city of Los Angeles. * * *"

Subdivision (a) provides:

> "It shall be unlawful for the owner or driver of any of the vehicles herein defined to stand or to cause or to permit such vehicles to stand while awaiting employment at any place other than a stand designated by the Board of Public Utilities and Transportation and assigned to the owner of said vehicle."

The first part of section 12 is as follows:

> "The board in its discretion shall have the power to grant or deny any and all of the permits mentioned in this ordinance. * * *"

The only contention of the petitioner which requires our attention is the claim that these provisions concerning permits are void as being partial and oppressive and not general in their operation, and because of them, it is asserted, an arbitrary power is placed in the hands of the police commission, and that they violate certain constitutional provisions, not very definitely specified, but apparently those protecting him from a denial of equal protection of the law and the privileges of citizens.

[1, 2] It is said that the petitioner is not in a position to challenge the constitutionality of the ordinance under whose provisions he is prosecuted, on the ground that it is discriminatory, because there is no showing that he has been the subject of discrimination. There is nothing to indicate that any permit had been given to any one else to stand at the place where he is charged with having caused his taxicab to stand. Hence it seems clear that the petitioner is in no position to say that the law is discriminatory unless it is sufficient to render a law void upon this ground that discrimination *may* occur through its administration. This, petitioner asserts, is the law. He insists that, if a law allows an opportunity for the exercise of discrimination of municipal authorities in the regulation of a lawful business, it is per se void and unconstitutional, and he cites a long list of cases from many jurisdictions. However, a careful examination of these and other authorities reveals that with few exceptions the doctrine expounded by them is not broad enough in its scope to support the principle asserted to be the law. This is especially true of the decisions from this jurisdiction. Here the rule has been announced in positive terms to be that in those occupations and businesses which are the proper subject of police surveillance and regulation the delegation of power, even though involving discretion to municipal boards or officers to grant and refuse permits, will be sustained. This is upon the theory, as stated by our Supreme Court in Re Flaherty, 105 Cal. 558, 38 P. 981, 27 L. R. A. 529, that:

> "Laws are not made upon the theory of the total depravity of those who are elected to administer them; and the presumption is that municipal officers will not use these small powers villainously and for purposes of oppression and mischief."

The authority of this decision is augmented by the fact that it has repeatedly been referred to with approval by other cases, among which are In re Dart, 172 Cal. 47, 155 P. 63, L. R. A. 1916D, 905, Ann. Cas. 1917D, 1127; Gaylord v. Pasadena, 175 Cal. 433, 166 P. 348; In re Holmes, 187 Cal. 640, 203 P. 398. If the petitioner had applied for a permit under the section of the ordinance in question, and, had his application been arbitrarily or capriciously refused, he would then have been entitled to secure relief from such unjust action through the courts. Gaylord v. Pasadena, supra; In re Holmes, supra.

But, if there is any doubt upon the merit of this preliminary objection interposed by respondents, regardless of any conflict which may exist in other jurisdictions, the cases named above and others of similar import in this state have determined the merit of the main question presented and adversely to the contention of petitioner. In cases which have to do with things which may be dangerous to public health, comfort, or welfare enactments have uniformly been upheld regulating the conduct of individuals as to whom no natural, inviolate right was possessed, even though special privileges might result to particular persons. On the other hand, in instances where one possessing an inherent right to do a lawful and innocent act has been limited in the exercise of that right by the creation of an arbitrary power in an officer or board, the ordinance has been held unlawful, discriminatory, and void. This distinction is well pointed out in Re Flaherty, supra, where many other cases are reviewed, and to which attention is called in a concurring opinion in Re Dart, supra.

[3, 4] Bearing in mind and applying these distinctions and principles, the issue here presented is not difficult of decision. Public streets and highways are made for travel and the convenience and enjoyment of the citizens. The petitioner has the same rights to their use as others, but he is demanding a privilege which might greatly inconvenience the general public and impair its safety. No one has a natural right to conduct a business involving the exclusion of others from a particular area in a public street; such an occupation would ordinarily constitute a nuisance, but the wants and pleasures of the public suggest that, although in a broad sense an interference with public comfort and convenience may result, the maintenance of taxicab stands should be allowed under special conditions and regulations. It cannot be doubted that the city council has the authority to abolish taxicab stands from the streets. As was said in Holmes v. Railroad Commission, 197 Cal. 627, 242 P. 486:

> "The reason for the rule which authorizes the state to prohibit the private use of the highways by such carriers is not that they are common carriers. It is that they are making a private use of the public highways, which are owned and paid for by the public and which are open alike to all persons."

This applies to taxicab stands as well as to any other instance in which an individual is making a private use of public highways, a use which would be subversive of the rights of other members of the public.

[5] It is too obvious to require extended discussion that, if such a privilege is to be granted at all, it must be only under proper

regulation. If petitioner's theory were correct, that if any citizen is entitled to a taxicab stand all others have the same right, it is easy to conceive that dozens of taxicab drivers might see fit to claim a stand on the same corner, and thus obstruct traffic, bring about great public inconvenience, and seriously endanger property and persons.

It is obvious that this subject, like many others, is one which no general enactment could possibly regulate efficiently. Other matters similar in character which have been held properly confided to the discretion of an administrative board or officer are where, on the public street or on private property, glass, rubbish, etc., might be deposited (Ex parte Casinello, 62 Cal. 538); in what wooden buildings within certain fire limits repairs might be made (Ex parte Fiske, 72 Cal. 125, 13 P. 310); the regulation of noises on the traveled streets (In re Flaherty, supra); operation of motor vehicles on public highways (Holmes v. Railroad Commission, supra). See, also, the following cases involving the same general principles: In re Guerrero, 69 Cal. 88, 10 P. 261; Ex parte Frazer, 54 Cal. 94; Ex parte Moynier, 65 Cal. 33, 2 P. 728; Ex parte Christensen, 85 Cal. 208, 24 P. 747; Ex parte Tuttle, 91 Cal. 589, 27 P. 933. Dozens of authorities of similar import might be cited from other jurisdictions, many of which are enumerated in Re Flaherty, supra.

[6] It is not necessary to discuss each decision cited by petitioner in which a law has been held unconstitutional upon the grounds here under consideration. In so far as those of California courts mentioned are concerned, without exception they uphold inherent inviolate property rights only. The same is true of his citations of decisions of the United States Supreme Court. Especial reliance is placed on Yick Wo v. Hopkins, 118 U. S. 374, 6 S. Ct. 1064, 30 L. Ed. 220, but the limitation of the authority of that decision has been determined by our Supreme Court in Ex parte Fiske, supra, in which it was said:

> "It is evident from this language that the decision rested mainly upon the admitted discrimination against a class of persons in the *public administration* of the ordinance. Indeed, the admitted facts which the court considered, showed that the intent of the ordinance was to exclude Chinamen from a business which should be open to all other persons, as clearly as if that intent had been boldly written on its face. The decision, therefore, *as an authority*, goes no further than to hold that, under a state of facts similar in character to the facts of that case, an ordinance similar in character to the one there passed upon would be invalid. But there are no such facts in the case at bar." (Italics as quoted.)

Nor do they exist here. Instead, the record is such that the language in Buck v. Kuykendall, 267 U. S. 307, 45 S. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 286, applies. The rule there stated is:

> "* * * A citizen may have, under the Fourteenth Amendment, the right to travel and transport his property upon them [the public highways] by auto vehicle, but he has no right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld by the state in its discretion, without violating either the due process clause or the equal protection clause."

[7] Petitioner attacks the ordinance in question upon other grounds. We do not regard it as possessing merit, and, since it is stated for the first time in his closing brief, it is unnecessary to discuss the objection presented.

The writ is discharged, and the petitioner remanded to custody.

WORKS, P. J. I concur in the judgment and, with one or two exceptions, in everything that is said in the opinion of Justice CRAIG.

[8] I think it unnecessary to say in disposing of the proceeding, as it is said in the opinion, that in certain specified cases "enactments have uniformly been upheld regulating the conduct of individuals as to whom no natural, inviolate right was possessed, even though special privileges might result to particular persons." I take this language to mean, reducing it to the terms of the present situation, that the public authorities, in conferring privileges in streets, may discriminate between persons belonging to the same class, and such a pronouncement seems to me unnecessary for the reason that petitioner can make no claim that he was subjected to such a discrimination. The petition merely alleges that petitioner is under confinement by reason of his having been found guilty of a violation of section 5a of the ordinance referred to in the foregoing opinion, which we construe, under the arguments contained in the briefs, as a reference to subdivision (a) of section 5, for there is no section 5a contained in the ordinance. There is no showing whatever in the petition that in causing a vehicle to stand or in permitting it to stand "while awaiting employment, at any [some] place other than a stand designated by the board * * * and assigned to the owner of said vehicle," the offense denounced by subdivision (a), petitioner was encroaching upon an area which had been assigned to the owner of vehicles other than that owned or driven by him. The petition must be construed, then, as alleging that he was found guilty and was imprisoned because he stood his cab in a space which had been assigned as a stand to no owner of vehicles. Plainly, under such circumstances, petitioner could have been subjected to no discrimination, as all other cab drivers, if standing their cabs in the same place occupied by his, would have been subjected to pains the same as those under which he suffers.

I think, for the reasons stated in the last preceding paragraph, it is unnecessary to a disposition of the proceeding to include in the foregoing opinion the following matter:

> "If petitioner's theory were correct, that if any citizen is entitled to a taxicab stand all others have the same right. It is easy to conceive that dozens of taxicab drivers might see fit to claim a stand on the same corner, and thus obstruct traffic, bring about great public inconvenience, and seriously endanger property and persons."

For the reasons given above, we are not now required to say whether or not all owners of taxicabs have the right upon some principle of rotation, for instance, or upon some other principle which may be imagined, to occupy what might be conceded as immeasurably the best and the greatest revenue producing stand in the city of Los Angeles. Therefore I feel it unnecessary for the present to commit myself upon the question.

Having thus limited my concurrence in the foregoing opinion, I think it not inappropriate to say something, in addition to what Justice CRAIG has said, upon the point made by petitioner that the ordinance is unconstitutional because it confers upon the petition granting body powers that are susceptible of a discriminatory exercise. I think petitioner is in no position to raise such a question. It would be strange, as the petition must be construed as showing no invasion of an established stand by petitioner, if he could contend that the petition granting body might act arbitrarily in the future in granting applications for the establishment of stands. Petitioner's arrest and imprisonment resulted, under a proper construction of his petition, from his placing his cab at a place outside of spaces which had *already been designated as stands*. There is no contention that the petition granting body has not fairly and justly discharged its duty in locating these stands. As the power granted by the ordinance is surely susceptible of a just exercise, we must presume, under the well-known rule to that effect, that official duty has been properly performed and that, therefore, the established stands from which petitioner had strayed at the time of his arrest were judiciously and indiscriminatorily located. Under the circumstances surrounding his arrest, I think petitioner must look to the occurrences of the past and cannot be heard to urge the point, whether or not it would be good in any case, that the power granted by the ordinance possibly might be unfairly exercised in the future. In truth, I conclude that the petition fails to state facts sufficient to entitle petitioner to the relief he asks.

THOMPSON, J. I concur in the judgment solely because I am of the opinion that petitioner fails to allege a situation showing that he has been discriminated against, or showing that the ordinance is susceptible of a discriminatory exercise. I am so convinced, however, that even as the Creator "maketh his sun to rise on the evil and on the good, and sendeth rain on the just and the unjust," even so must the laws and ordinances be made to operate alike upon the elect and nonelect, that I cannot assent to language intimating that arbitrary discrimination is permissible when the subject of legislation is not a natural right.

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93 Cal. App. 155

RESIDENTIAL DEVELOPMENT CO. OF SAN FRANCISCO v. ANDRIANO et al.★

(Civ. 5841.)

District Court of Appeal, First District, Division 1, California. July 12, 1928.

Hearing Denied by Supreme Court Sept. 6, 1928.

1. Municipal corporations 🔑460—Sum expended to make portion of tunnel conform to architecture of surrounding dwellings held improperly charged against assessment fund.

Sums paid for labor and material in excavating tunnel in order to conform to high-class architecture of surrounding dwellings, being clear departure from original plans and specifications, and increasing cost thereof, having no other purpose than to further private interests, *held* improperly charged against fund raised by assessment for construction of such tunnel, pursuant to resolution of municipality.

2. Municipal corporations 🔑460—Sums expended to reconstruct crossings in accordance with city plan subsequently entered into held improperly charged against tunnel assessment fund.

Where resolution for construction of tunnel required contractor to restore all surface pavement which might be destroyed through work of construction of tunnel, sum paid contractor for restoring crossings to conform with subsequent plans *held* improperly charged against assessment fund.

3. Municipal corporations 🔑460—Award for death of city employee held improperly charged against assessment fund for constructing tunnel (St. 1913, pp. 279–286).

Where city and county employing an inspector was within the provisions of Workmen's Compensation Act (St. 1913, pp. 279–286), and liable thereunder, but had failed to protect itself by insurance, an award against the municipality by the Industrial Accident Commission to widow of such inspector who was killed in inspecting the tunnel *held* not properly chargeable against assessment fund.

4. Municipal corporations 🔑426—Excluding parcels of realty owned by city from assessment for construction of tunnel held improper.

Excluding parcels of realty owned by city from assessment on property for construction of tunnel, on the sole ground that such parcels were owned by the city, *held* improper, without

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★Hearing denied by Supreme Court.

having been excluded from assessments by resolution of intention.

5. Limitation of actions ⚿66(3)—Limitation relative to landowners' right to proportionate distribution of remaining part of fund created by assessment for tunnel ran only from date of demand (Pol. Code, § 3804; Code Civ. Proc. § 338).

Fund remaining in hands of city from assessment against landowners for cost of constructing tunnel being held in trust for purposes provided by ordinance, limitations of Pol. Code, § 3804, and Code Civ. Proc. § 338, relative to landowner's right to proportionate distribution of remaining part of fund, commenced to run only from date of demand for distribution of remaining part of such fund.

Original application for writ of mandate by the Residential Development Company of San Francisco and others against Sylvester Andriano and others, as members of, and constituting, the Board of Supervisors of the City and County of San Francisco, and others. Writ granted.

Theodore J. Savage, of San Francisco, for petitioners.

John O'Toole, City Atty., and Dion R. Holm, Chief Deputy City Atty., both of San Francisco, for respondents.

CASHIN, J. A proceeding in mandamus to compel respondents to make a proportionate distribution of the remaining part of a fund known as the "Twin Peaks Ridge Tunnel Assessment Fund," which was created by the assessment upon land owned by petitioners and others of the cost of constructing the Twin Peaks tunnel in the city and county of San Francisco.

On March 3, 1913, there was adopted by the board of supervisors, and approved by the mayor of the city and county, a resolution of intention, numbered 10,020 (new series), to order the construction of the tunnel mentioned and to assess the cost, including that of construction, the acquisition of rights of way, damages to property, and incidental expenses, upon two assessment districts, in which were situate the lands of petitioners. Thereafter, on November 25, 1913, the board, with the approval of the mayor, adopted resolution numbered 10,545 (new series), confirming a report by the board of public works, and making and levying an assessment upon the districts mentioned in the sum of $3,955,001.29 for the purpose of defraying the cost of constructing the tunnel, including the other expenses in that connection. Subsequently the municipality acquired the necessary land and rights of way, a contract for the construction of the tunnel was entered into, and the work was completed on or about July 27, 1917. An ordinance of the city and county known as the "Tunnel Procedure Ordinance" provides a method of procedure for the construction of tunnels within the municipality and for the levying of assessments on private property to defray the cost thereof. It also provides for the levy and collection of the assessment before the contract for the work is let, based upon an estimate of the cost of construction, the necessary acquisition of private property, with the damage thereto and incidental expenses, and further, that the assessment shall be collected by the tax collector of the city and county either in cash or installments, or, in the event of a delinquency, by a sale of the property assessed. The ordinance provides that the resolution of intention shall contain a general description of the construction contemplated (section 2), and that a copy of the same shall be transmitted to the board of public works, and that the latter shall prepare a plan showing the gradients of approaches to, and the passageway through, the proposed tunnel (section 3). Notices of the passage of the resolution are required to be posted and published, and thereafter, within 30 days, any owner of property claiming damage by reason of the proposed tunnel may file with the board of public works a petition showing the estimated amount of damage (section 4). Thereupon this board is required to determine such damage, and estimate and assess the total amount thereof, together with the other expenses of construction, upon the land benefited (section 5). It is their further duty to file with the board of supervisors a report including, among other things, (1) plans, profiles, cross-section, and general specifications of the work required for the completion of the tunnel and appurtenances thereto; (2) an itemized estimate of the cost of the proposed tunnel, including damages that may result therefrom to property and all incidental expenses; (3) a map showing the district or districts as specified in the resolution of intention, and a list of the parcels assessed, with an estimate of the benefits to be received by the construction of the tunnel (section 6). A notice of the filing of the report is required to be given (section 7), and any person interested objecting to the construction of the tunnel, to the plans and specifications therefor, to the extent of the assessment district, or to the amount of the damages or benefits estimated in the report, may file a protest in writing. Such protests are required to be heard by the board of supervisors at a time fixed by notice (section 8), when the board may by resolution confirm the report, and upon such confirmation it is provided by section 10 that the report and list filed shall "be and constitute the assessment made and levied for defraying the damages, costs, and expenses of such tunnel construction, and the amount of the benefits set opposite each parcel of land shall constitute the amount of the assessment thereon."

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

No opportunity is afforded the property owner to object to the assessment proceedings previous to the filing of the report by the board of public works, following which, however, the property owner may object, not only to the project as a whole, but also to the manner of doing the work as shown by the plans and specifications.

Section 28 of the ordinance provides that, should the estimate levied appear to be insufficient to fully complete and pay for the construction of the tunnel in conformity with the plans and specifications, the board of supervisors may levy a supplemental assessment upon the district or districts for the amount required, or, in lieu of a supplemental assessment, may provide for payment by the city and county of the amount necessary to complete the construction. Section 31 provides that the board in its discretion may order that not more than one-half of the whole of the cost and expense of any work mentioned in the ordinance, or the damage resulting therefrom, be paid out of the treasury of the city and county from such fund as the board may designate. The last section also requires that, when the work has been completed, and all damages and incidental expenses have been paid, the board of public works shall make a ratable and proportionate distribution of the entire actual cost based upon the original assessment, and issue an order to refund to all persons who have paid an excess either on the assessment or for interest the amount thereof, and that the treasurer shall pay such order from the fund.

Under section 17 the property owner is given an option to pay his assessment in ten annual installments upon signing what is called an installment agreement, by which he is required to pay interest on deferred payments at the rate of 7 per cent. per annum, it being also provided by section 25 that such interest payments, of which a separate account is required to be kept, shall be used to pay interest on the bonds or certificates issued to the contractors; and by section 22 that any surplus in the interest account shall by resolution of the board of supervisors be transferred to the assessment fund.

The levy in the present case followed the filing of a report by the board of public works, together with plans and specifications and an estimate that the work would cost $3,955,001.29, upon which an assessment for a like sum was levied by the board of supervisors. The contract for the construction of the tunnel let as above stated provided that:

> "Said work shall be done according to the plans and specifications hereto annexed and made a part of this contract, and the materials used therein shall comply with the specifications."

The answer to the petition admits that, with the exception of certain sums transferred to the assessment fund from the funds of the city and county, and which they alleged have not been restored, the entire cost of the work, including construction, the acquisition of land, rights of way, damages to property and incidental expenses, has been paid, and that the records of the treasurer of the city and county show a balance or overplus in the assessment fund of $42,508.21. It is claimed by petitioners that this amount should be distributed to the property owners as provided by the ordinance, and by respondents, that the sums paid into the fund by the property owners were insufficient to complete the tunnel, and that the overplus shown is the unused balance of moneys transferred for that purpose from other city funds, and should be retained by the city.

This proceeding having involved a determination of questions of fact, a referee was appointed, before whom evidence, both oral and documentary, was adduced by the parties. The correctness of the treasurer's account of the receipts from the assessment and from other sources is not disputed; but petitioners contend that certain expenditures made by the city were improperly charged against the fund, and that the sums received, exclusive of any advances made by the city, were sufficient, after paying all proper charges for the construction of the tunnel, to leave a surplus in the assessment fund. They further claim that the sums advanced by the city were in lieu of a supplemental assessment, were made under the provisions of section 28 of the ordinance for the purpose of completing the tunnel, and that any surplus thereof remaining in the fund should be shared pro rata by the property owners.

As to the last contention, however, it will be sufficient to say that the sums advanced were transferred from other funds to the assessment fund for the purpose of meeting the demands of the contractor for which the latter fund was temporarily inadequate, and nothing appears from the resolutions of the board of supervisors authorizing the transfers or from the evidence which would justify the conclusion that the same were in lieu of a special assessment, or made with the intention of thereby providing for the payment by the city and county of any part of the cost of building the tunnel.

The evidence shows the following receipts and expenditures in connection with the work, the items of which are numbered from 1 to 14:

Receipts:		
1. From assessments..........	$3,903,910.93	
2. From interest..............	767,484.53	
3. From the sale of old improvements	9,617.70	
4. From the redemption fund	32,608.25	$4,713,621.41
Advanced by the city:		
5. From the good roads fund	8,500.00	
6. From the municipal railway fund................	82,152.53	90.652.53
Total		$4,804,273.94

Expenditures:

7. Paid contractor on his contract	$3,709,919.00	
8. Paid contractor for extras	122,160.74	
9. Paid for incidental expenses	34,577.70	
10. Paid for land in fee simple	511,098.00	
11. Paid for easements	6,528.00	
12. Paid for leaseholds	3,840.00	
13. Paid interest on bonds or certificates issued to contractor	352,243.94	
Cash balance May 31, 1927	42,508.21	
14. Transferred from assessment fund to general fund	21,398.35	
Total		$4,804,273.94

It appears from the above that the total amount paid by the taxpayers, together with the sums received from the sale of improvements situated on lands taken for the tunnel, was $4,713,621.41, and that the total expenditure, including the extras, so called (item No 7 above), which petitioners contend were improperly charged against the fund, was $4,740,367.38. The apparent deficit of $26,745.97 was counterbalanced by the advances made by the city, the net amount of which was $69,254.18, the balance to the credit of the fund being the sum of $42,508.21, as shown by the books of the treasurer.

In addition to the allowances for extras, the petitioners also except to the payment from the fund of an award made by the Industrial Accident Commission against the city for the sum of $4,500 for the death of a city employee who was killed in the tunnel, and to the cancellation by the board of supervisors of assessments aggregating $9,271.92, assessed against 181 parcels of property owned by the city, and which were situated in the assessment districts.

[1] It appears that certain labor and material consisting of 32 items, including the two last mentioned, were allowed as extras, for which a total of $122,160.74 was paid from the fund. That certain of these items were properly allowed is clear from the evidence, but we are of the opinion that others were improperly charged to the fund. These items are numbered in the report of the city engineer, which is in evidence, and will be hereinafter referred to by the number used therein.

The sum of $858.10 (item 24) was paid for labor and material in excavating the west portal and westerly portion of the tunnel to conform with a planned subdivision to be known as West Portal Park. The further sum of $14,526.40 (item 26) was spent in making additions to, and changes in, the construction of Laguna Honda station, which, according to the report, were made in order "to conform to the high-class architecture of the surrounding dwellings."

The above excavations and additions were clear departures from the original plans and specifications, increased the cost in the above amounts, and were made, as shown by the evidence, for no other purpose than to further private interests.

Item 27 covers a substitution of tile for plaster in the Eureka Valley and Laguna Honda stations, for the purpose of obtaining, according to the report, "a more sanitary, lasting, and more sightly wall covering," and for which the sum of $9,450.05 was expended. This change was also a departure from the original plans and specifications, and the expenditure was made, as fairly appears from the evidence, for the same reasons that led to the extra expense covered by items 24 and 26.

[2] The contractor was required to restore all surface pavement which, due to the work of constructing the tunnel, might be destroyed. At the time the contract was let, the city contemplated the construction of what is known as the Market street extension, which lies above the eastern end of the tunnel. These plans were completed before certain Market street crossings, the pavement upon which had been removed, were restored by the contractor, as provided by his contract. In order to save the city the additional expense of reconstructing the restored crossings to conform with the plans for the Market street extension, it was agreed that the contractor should pave in accordance with the new plans, and not with the original plans referred to in his contract. For the additional services shown by item 32, the contractor was allowed the sum of $13,162.44. He was also allowed the sum of $5,374.34 (item 33) for paving Collingwood street to conform with the Market street extension plans, which street had been reconstructed to conform to the new plans adopted after the contract for the construction of the tunnel had been let. As shown by item 34, the sum of $9,626.16 was spent for the construction of a retaining wall at Ord street, in accordance with the Market street extension plan, and charged to the assessment fund. After more extensive studies of the Market street extension plan, the city determined to construct a two-level street north of the easterly approach walls of the tunnel, and the reconstruction of the pavement at Market and Seventeenth streets in accordance with the new plan led to the further expenditure of $1,112.47 as shown by item 39. None of the work done or materials furnished shown by the last five items was within the resolution of intention or the original plans and specifications; no estimate of the benefits, if any, to the lands in the districts by reason thereof was made by the board of public works; no opportunity to be heard was afforded the property owners, and the result of these expenditures from the assessment fund was to charge all the land in both assessment districts without regard to

benefits with the cost of a project having no necessary connection with the construction of the tunnel.

What we have said respecting items 24 and 26 applies also to item 36 of $962.88. This sum was expended for labor in changing what are called the Eureka Valley kiosks. As stated in the engineer's report:

> "Above the Eureka Valley station a two-level street with a dividing wall was planned for the Market street extension, but, owing to the protests of the property owners, the plans were changed."

[3] In addition to the foregoing, it appears that on July 2, 1915, an employee of the city and county, namely, an inspector attached to the office of the city engineer, was killed while inspecting the work in the tunnel. An award against the municipality in the sum of $4,500 was made by the Industrial Accident Commission to the widow of the deceased and paid. This sum was also charged against the fund. The city and county was the employer of the inspector within the provisions of the Compensation Act (Stats. 1913, pp. 279–286), and liable thereunder, but failed to protect itself by insurance, as it was empowered to do. The evidence shows no reasonable ground for shifting to the property owners a loss which by the use of ordinary foresight might have been prevented, and the same was not properly chargeable to the fund.

[4] It was shown that 181 parcels of realty owned by the city were found to be benefited by the proposed improvement, and that the same were assessed for a total of $9,271.92. Section 33 of the tunnel procedure ordinance provides that "city and county property may be assessed for any benefit as other property if it appears that such property is benefited, and the amount thereof shall be paid as ordered by the supervisors upon the completion of the work or as progress payments as other demands are paid." On February 25, 1924, the board of supervisors adopted resolution No. 22,156 (new series), declaring that the assessments upon property owned by the city and county for the construction of the Twin Peaks tunnel should be canceled; that the lien of the assessment thereon was thereby discharged, and directing the tax collector to cancel the same. None of the parcels mentioned were excluded from the assessment districts by the resolution of intention, and it is not contended that the parcels were not benefited by the improvement; the only ground for the attempted cancellation being that the same were owned by the city. This ground alone was insufficient, in view of the tunnel ordinance and the previous assessment to support the action of the board.

While, as stated, the petitioners except to other items, the foregoing comprise all the items reasonably shown by the evidence to have been improperly charged against the fund. The amounts so paid from the fund or charged against the same total the sum of $55,072.84. This, with the award of the Industrial Accident Commission of $4,500, which was a charge against the city and county alone, and the amount of its assessment, which should have been paid or credited to the fund, aggregate the sum of $68,844.76. The account of the treasurer shows a balance to the credit of the city and county for moneys advanced of $69,254.18, the difference between this balance and the sums chargeable to the city and county being the sum of $409.42. The actual balance shown in the assessment fund is $42,508.21; and, had the proper charges and credits to the fund been made, the balance therein to the credit of the property owners would have been the sum of $42,098.79, which under the ordinance should be distributed pro rata to the property owners, including the city and county, and the excess of $409.42 retained by the latter.

[5] The respondents contend that the claims of petitioners are barred by certain provisions of the charter, by section 3804 of the Political Code, and section 338 of the Code of Civil Procedure. We find no merit in this contention. The fund is held in trust for the purposes provided by the ordinance, and the statute of limitations commenced to run only from the date of demand. Miller & Lux v. Batz, 142 Cal. 447, 76 P. 42; MacMullan v. Kelly, 19 Cal. App. 700, 127 P. 819.

It is ordered that a peremptory writ of mandate issue out of and under the seal of this court directing the distribution by respondents or their successors in office of the sum of $42,098.79 now in the Twin Peaks ridge tunnel assessment fund; that said board of public works make a ratable and proportionate distribution of the entire actual cost of the work described above based on the original assessment, and issue an order to refund to persons, including the city and county of San Francisco, who may have paid an excess, either on the assessment or for interest, a ratable and proportionate share of the above amount; that the auditor of said city and county audit and its treasurer pay the same; and that respondent board of supervisors do and perform such acts as may be necessary to effect such distribution in accordance with the views above expressed.

We concur: TYLER, P. J.; KNIGHT, J.

93 Cal. App. 116

BRAUN v. LEO G. MacLAUGHLIN CO.
(Civ. 6323.)

District Court of Appeal, First District, Division 2, California. July 9, 1928.

1. Landlord and tenant 🔑86(2)—Notice by lessee that it has "decided" to exercise option held sufficient to show clear intention to exercise option.

Notice by lessee to purchaser of leased premises that lessee "has decided" to exercise option granted it for an additional lease *held* sufficient to show clear intention on part of lessee to exercise option; the word "decided" being defined as meaning resolved or determined.

[Ed. Note.—For other definitions, see Words and Phrases, Decide.]

2. Landlord and tenant 🔑86(2)—Provision in lessee's notice of exercise of option held not to have constituted counter offer, constituting rejection of option.

Provision in notice by lessees to purchaser of leased premises following lessee's unqualified exercise of option to lease premises for additional term that lessees are prepared to execute new lease in proper form, obliging themselves for additional term, together with testimony of president of lessee corporation, *held* not to show that acceptance of terms of option did not meet terms of offer in option, but was, in effect, a counter offer.

3. Appeal and error 🔑173(6)—Plaintiff, not raising issue of invalidity of option at trial, cannot claim its invalidity for first time on appeal.

Where, in suit for declaratory relief under Code Civ. Proc. § 1060, involving question whether lessee exercised option for additional lease, plaintiff in his complaint treated option as valid, and only issue raised was whether option could be withdrawn at any time before acceptance because of lack of consideration, *held*, that plaintiff could not on appeal contend that option was void for uncertainty.

4. Landlord and tenant 🔑86(1)—Option written on reverse side of lease, granting lessee additional lease at stipulated rental for stated period, held supported by valuable consideration.

Option, written on reverse side of original lease, and granting lessee an additional lease of five years at stipulated monthly rental, *held* to be supported by valuable consideration, since it is clear that other terms and conditions of additional lease were to be same as in old lease, which contains full terms and conditions and particular description of property, etc., and option had same effect as if it had been incorporated in original lease.

5. Landlord and tenant 🔑86(1)—Exercise of option by lessee one year and seven months after it was granted, and two years and eight months before expiration of original lease, held within reasonable time.

Where lessee was granted option of additional lease on June 19, 1923, and original lease ran until September 30, 1927, more than four years later, no time limit for exercising option being stated, *held*, that exercise by lessee of option in January, 1925, one year and seven months after option was granted, and two years and eight months before expiration of original lease, was within a reasonable time.

6. Landlord and tenant 🔑86(1)—What is reasonable time for exercising option for additional lease depends on particular circumstances in each case.

A question of what is a reasonable time within which lessee is required to exercise an option for an additional lease depends in each case on its own particular circumstances, and it is primarily question of fact for determination of trial court.

7. Landlord and tenant 🔑86(1)—Option granted lessee for additional lease held granted on same terms and conditions as original lease, whether treated as option for renewal or as mere extension of old lease.

Where, by option written on reverse side of old lease, lessee was granted right of additional lease for five years at stipulated rental, *held* that, whether option be treated as one for a renewal or as a mere extension of old lease, lessee, on exercising option, was entitled to occupy premises for five years from expiration of old lease under same terms and conditions as original lease, except as to time and rental.

Appeal from Superior Court, Los Angeles County; John F. Pullen, Judge.

Action for declaratory relief by F. W. Braun against the Leo G. MacLaughlin Company. Judgment for defendant, and plaintiff appeals. Affirmed.

John E. Biby, and Harry C. Biby, both of Los Angeles, for appellant.

W. J. Carr, of Los Angeles, and A. G. Allen, of Pasadena, for respondent.

PRESTON, Presiding Justice pro tem. This is an action for declaratory relief under section 1060 of the Code of Civil Procedure. The case was tried by the court sitting without a jury, and judgment was entered in favor of the defendant, from which judgment the plaintiff prosecutes this appeal.

The facts are, briefly, these: The plaintiff and appellant is the owner of the Chamber of Commerce building, situate in the city of Pasadena. Said building was formerly owned by the Chamber of Commerce Building Company. On May 21, 1920, the Chamber of Commerce Building Company executed a lease to the defendant and respondent, Leo G. MacLaughlin Company, a corporation, covering a portion of this building, to be used for store purposes. Respondent went into possession under this lease. The lease was for a term of eight years, commencing on October 1, 1919, and ending September 30, 1927. On June 19, 1923, the said Chamber of Commerce Building Company, for a valuable consideration, indorsed on the back of the original lease the following option:

> "In accordance with action taken at the regular meeting of the board of directors of the Chamber of Commerce Building Co. held June 19, 1923, an option is hereby granted the party of the second part herein for an additional lease of five years from September 30, 1927, at a monthly rental of $300.00.
>
> "Dated June 19, 1923. Chamber of Commerce Building Company, by Wm. C. Crowell, President; by Leo G. MacLaughlin, Secretary."

On the said 19th day of June, 1923, the Chamber of Commerce Building Company accepted the offer of one Louis Conrad to purchase said property covered by said lease, and, at the request of the purchaser, the conveyance was made to the Angelus Realty Company, and, through mesne conveyances, the title to the building was conveyed to appellant. The respondent, at all times since the making of the original lease, has occupied and used the premises.

The appellant and his immediate and mesne grantors, at and prior to their respective purchases, knew of the existence of said lease and said option.

On January 2, 1925, appellant wrote respondent the following letter:

> "January 2, 1925.
>
> "Leo G. MacLaughlin Co., Pasadena, Cal.—Gentlemen: As I think you know, I am, and have been for some months past, the owner of the Security building at Colorado and Broadway, Pasadena, of which building you are a tenant, being located on the ground floor, 119 East Colorado street.
>
> "In looking over the lease originally made betweeen yourself, as lessee, and the Chamber of Commerce Building Company, as lessor, for a period expiring *December 30th, 1927*, I note on the reverse thereof an option, dated *September 19th, 1923*, given you by the Chamber of Commerce Building Company, for a five year period after the expiration of your present lease, mentioned.
>
> "Inasmuch as you have never exercised the option, mentioned, it of course, cannot be binding in any way upon me as the present owner of this building and I hereby give you notice to this effect.
>
> "Yours very truly, F. W. Braun."

Immediately upon the receipt of this letter, respondent, through its attorney, replied on January 6, 1925, in part as follows:

> "*You are hereby notified that the Leo G. MacLaughlin Company intends to and hereby does exercise its option to continue its occupancy of the premises now occupied by it, and covered by said option for the term of five years from October 1, 1927, at the rate of $300 per month.*"

Thereafter, and on January 22, 1925, a more formal notice was given appellant by respondent, as follows:

> "Pasadena, Cal., January 22, 1925.
>
> "Mr. F. W. Braun, 2140 S. Main St., Los Angeles, Calif.—Dear Sir: You are hereby notified that the Leo G. MacLaughlin Co. by resolution duly passed by its board of directors has decided to exercise the option which it holds covering the leasing of the premises now occupied by it in what was formerly known as the Chamber of Commerce building, now known as the Security building, in Pasadena, California, said option being dated June 19, 1923, and endorsed on the lease, copy of which lease and option we understand is in your possession and with which you are familiar.
>
> "Under the terms of this option, we are given the right of an additional lease for a term of five years, commencing September 30, 1927, at a monthly rate of $300 per month; the premises being that certain room on the ground floor of said building at 119 E. Colorado street, Pasadena, and being the same quarters now occupied by us and having been occupied by us for more than five years last past.
>
> "If we are mistaken in our understanding that you have and are familiar with the copy of the lease and option, please advise us and a copy of the same will be furnished you promptly.
>
> "We are prepared to execute a new lease in proper form, obliging ourselves for this additional term. Kindly prepare such a lease satisfactory to you at your early convenience and submit for our execution. Yours very truly, Leo G. MacLaughlin Co., Leo G. MacLaughlin, President; Geo. F. Howell, Secretary. [Seal.]"

From the foregoing facts the trial court, among other things, found that:

> "On January 22, 1925, the defendant elected to exercise, and did exercise, its option to have and take an additional lease of five years from the expiration of its then lease at a rental of three hundred dollars ($300) per month. Said election and exercise of said option was made by the defendant within a reasonable time."

[1] Appellant first contends that the court erred in finding that respondent exercised the option in question. There is no merit in this contention; it is based entirely upon the wording of the notice of January 22, 1925, which says, "You are hereby notified that the Leo G. MacLaughlin Company * * * *has decided* to exercise the option. * * *" Appellant claims that this is equivalent to respondent saying "it intends to" or "it will exercise the option at some future time." We think this an entirely too narrow and technical interpretation to be placed upon the language used in the notice. The word "decided" is defined by Webster's International Dictionary as meaning "resolved" or "determined." Any form of expression, showing a clear intention on the part of respondent to exercise its option on the precise terms stated in the option, is sufficient. We think that the wording of the notice is amply sufficient to show a clear intention on the part of respondent to exercise the option in question. If, however, it be conceded that the language of the notice of January 22d is defective or insufficient, still, the notice of January 6th is amply sufficient. There can be no question but that respondent served upon appellant an unqualified acceptance of the option, and, when this was done, what was before an option became an executory contract for a con-

tinuance of the lease for five years from October 1, 1927, upon a monthly rental of $300.

[2] Appellant further contends that the last paragraph of the notice of January 22, 1925, reading "We are prepared to execute a new lease in proper form, obliging ourselves for this additional term. Kindly prepare such a lease satisfactory to you at your early convenience and submit for our execution," coupled with the testimony of Mr. MacLaughlin, the president of the respondent corporation, shows that the purported acceptance of the terms of the option by respondent does not meet the terms of the offer in the option, and, in effect, is a counter offer, and therefore a rejection of the offer contained in the option. We think this contention is without merit. The portion of the notice complained of, and the testimony of Mr. MacLaughlin, had reference solely to the *performance* of the contract that came into existence by the acceptance of the terms of the option; that is to say, the manner in which the newly created contract for the extension of the old lease for five years should be carried out—it has reference to something that would necessarily have to be done *after respondent had exercised its option;* it was merely a suggestion of a convenient mode or manner of closing up the transaction. Respondent had already, in the first paragraph of this notice and in the notice of January 6, 1925, unqualifiedly exercised the option. A similar notice was involved in Cates v. McNeil, 169 Cal. 697, 147 P. 944, and the ruling there fully sustains our conclusion here.

[3, 4] Appellant next contends that the option is void for uncertainty, and urges two points: (1) "That the offer was for 'an additional lease' and the terms of the additional lease were not stated, except that it was to be for a period of five years at a rental of $300 per month," and (2) "The failure to describe the property to which the additional lease relates renders the option void." There are at least two answers to both of these contentions. In the first place, the pleadings do not raise this issue. Appellant, in his complaint, treated the option as valid, but claimed that it could be withdrawn at any time before acceptance because of lack of consideration. In fact, this was the only issue raised by the complaint. Both parties, however, throughout the entire case have treated the option as valid. The terms of the "additional lease" are fixed in the option at five years and the rental at $300 per month. It is clear that the other terms and conditions of the "additional lease" were to be the same as in the old lease, for the option itself is written upon the reverse side of the old lease, and refers to it, which contains the full terms and conditions and a particular description of the property, etc. The option is supported by a valuable consideration, and, to all intents and purposes, has the same effect as if it had been incorporated in the original lease itself.

[5, 6] Appellant next contends that the court erred in finding that respondent exercised said option within a reasonable time. No time limit is stated in the option. The option was granted on June 19, 1923, one year and seven months later, and in January, 1925, respondent exercised the option for an additional lease of five years from October 1, 1927. The original lease ran until September 30, 1927, more than four years from the date of the option, and two years and eight months after the option was exercised.

Under all these circumstances, we think the trial court was correct in finding that the option was exercised within a reasonable time. It is true that appellant offered evidence tending to show that the value of the leasehold had increased between the date of the option and the date it was exercised by respondent, but respondent also offered testimony to the effect that the rentals were about the same when the option was given and when it was exercised, so that was a disputed question of fact for the trial court to determine.

The rule is well settled that the question of what is a reasonable time depends in each case upon its own particular circumstances; it is primarily a question of fact for the determination of the trial court. Hoppin v. Munsey, 185 Cal. 678, 198 P. 398; Smith v. Bangham, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522; Adams & McKee Land Co. v. Dugan, 68 Cal. App. 226, 228 P. 681; Cambridge v. Ramser, 43 Cal. App. 722, 185 P. 862; Luckart v. Ogden, 30 Cal. 547; Weatherbee v. Sinn, 73 Cal. App. 98, 238 P. 134.

[7] Appellant further contends that the court erred in finding that said option was granted on the same terms and conditions as the original lease, except as to rent, and also erred in rendering judgment that it was appellant's duty to execute a new lease on the same terms and conditions as the old lease, except as to time and rental.

A careful examination of the entire record convinces us that there is no merit in either of these contentions. We are well aware of the fact that there is a clear distinction between the meaning of the expression "renewing a lease" and "extending the term" thereof (Shamp v. White, 106 Cal. 220, 39 P. 537; Robertson v. Drew, 34 Cal. App. 143, 166 P. 838; 15 Cal. Jur. 659), but we think the distinction is wholly immaterial under the facts of the case at bar. If the expression "an additional lease," used in the option, be construed as meaning "a renewal of the old lease," then it was incumbent upon respondent to give notice of his election to renew the lease within a reasonable time before the expiration of the original lease. This respondent did. If it be construed merely "as an extension of the terms of the old lease" (there being no special form of notice required by the option), respondent could have stayed in possession after the expiration of the old lease, and that would have been a sufficient notice of its intention to exercise the option to extend the lease. But in this case the old lease had not expired when the notices of January 6 and January 22, 1925, were given, and respondent was in possession under the old lease; therefore, if the option be construed merely as providing for "an extension of the old lease," and respondent had stayed in possession after the expiration of the old lease, the notices would have been unnecessary. On the other hand, if the option be construed as calling "for a renewal," meaning a new lease, respondent has fully complied with all the requirements entitling it to a new lease upon the same terms and conditions as the old one, except as to time and rental. Therefore, whether it be treated as an option for a "renewal," as the trial court did, or as a "mere extension of the old lease," is wholly immaterial, for in either case the *terms and conditions are to be exactly the same.*

Respondent is clearly entitled to occupy the demised premises for five years from October 1, 1927, by paying a rental of $300 per month, and complying with all the terms and conditions of the old lease, and whether it does this under an extension of the old lease, or under a new lease containing the same terms and conditions, is wholly immaterial as far as appellant is concerned, and he certainly could not be prejudiced by being required to execute a new lease containing the same terms and conditions as the old one, with the exception that the rent would be increased to $300 per month, and the term five years.

We have examined the entire record with care, and find no error that could be considered in any way prejudicial to the rights of appellant.

Appellant sought to have the option declared void solely on technical grounds, none of which has any substantial merit. The equities of the case are all on the side of respondent. Respondent paid a large consideration for the option, acted seasonably in exercising it, and should not be deprived of enjoying the fruits thereof, merely because some of the language used in the negotiations was awkward or ambiguous, when the intent and purpose thereof were clearly understood by all parties to the transaction. Appellant was not a party to the original lease or the option, but purchased the leased premises with full knowledge of respondent's lease and option, and also knew that respondent was in possession under the original lease.

The judgment should be affirmed, and it is so ordered.

We concur: NOURSE, J.; STURTEVANT, J.

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93 Cal. App. 141

PEOPLE v. MAINE. (Cr. 1029.)

District Court of Appeal, Third District, California. July 10, 1928.

1. Infants 🔑20—Information for committing certain lewd and lascivious acts upon body of minor, stating specific acts, held sufficient (Pen. Code, § 288).

Information under Pen. Code, § 288, for having willfully, unlawfully, and lewdly committed certain lewd and lascivious acts upon the body of a minor, stating the specific acts with which the defendant was charged, *held* sufficient to state a public offense.

2. Infants 🔑20—Law forbidding committing lewd or lascivious acts on or with body of minor held constitutional (Pen. Code, § 288).

Pen. Code, § 288, forbidding any person from willfully, unlawfully, or lewdly committing any lewd or lascivious act on or with the body of a minor child, *held* constitutional.

3. Criminal law 🔑742(1)—Truth or falsity of testimony is for jury.

The truth or falsity of testimony given by witnesses in a criminal trial is wholly a matter for the jury.

4. Criminal law 🔑807(1)—Refusal of argumentative instructions held not error.

Refusal of requested instructions which were couched in argumentative language *held* not to constitute error.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Robert Maine was convicted of having willfully, unlawfully, and lewdly committed certain lewd and lascivious acts upon and with the body of a minor, and he appeals. Affirmed.

Emmett I. Donohue, of Petaluma, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted upon an information charging the commission of a felony, omitting mere formal allegations in the following words, to wit:

> "The said Robert Maine, on or about the 15th day of November, A. D. one thousand nine hundred and twenty-seven, at and in the county of Sonoma, state of California, did willfully, unlawfully and lewdly commit certain lewd and lascivious acts upon and with the body of one Delbert Butler, a person under the age of fourteen years, to wit, of the age of eleven years, by placing his hands upon the private parts of the said Delbert Butler with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the said Robert Maine and of the said Delbert Butler, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

From the order denying his motion for a new trial and the judgment of conviction, the defendant appeals.

Upon this appeal it is urged that the information does not describe a public offense; that section 288 of the Penal Code is unconstitutional; that the evidence is insufficient to warrant the verdict; that the court erred in its instructions and in the admission of testimony; and that the district attorney was guilty of misconduct.

[1] To the point that the information is insufficient to state a public offense, we are cited to the case of People v. Grinnell, 9 Cal. App. 238, 98 P. 681. In that case, however, the information did not state the specific acts with which the defendant was charged. The information simply contained in its charging part words to this effect, that the defendant did willfully and lewdly commit a lewd and lascivious act with and upon the body of a minor child, with intent, etc. The mere comparison of the information in the instant case with the case relied upon demonstrates that the objection to the sufficiency of the information is wholly without merit.

[2] In support of appellant's contention that section 288 of the Penal Code is unconstitutional, the case of In re Lockett, 179 Cal. 581, 178 P. 134, is cited. In that case, section 288a of the Penal Code was held unconstitutional by reason of the fact that the section as it then stood was not wholly printed in the English language, and contained Latin words, which had not become Anglicized, and that, as adopted by the Legislature, the section was uncertain and indefinite. Appellant, however, overlooks the fact that section 288a of the Penal Code was amended in 1921 to avoid the objections pointed out in the Lockett Case. Since the amendment to that section it has been passed upon and upheld in the following cases: People v. Parsons (Cal. App.) 255 P. 212; In re Parsons (Cal. App.) 257 P. 881.

The point urged by appellant is that section 288 of the Penal Code is no more definite than section 288a of the Penal Code, and therefore, if section 288a of the Penal Code is unconstitutional, the same invalidity attaches to section 288, Penal Code. In view of the fact that section 288a of the Penal Code has been held constitutional, the argument of appellant, based upon the comparison of the two sections, necessarily fails.

It is finally argued that, as section 288 of the Penal Code refers to part II, instead of to part I, it is indefinite, uncertain, and not capable of furnishing a foundation for a criminal prosecution. In that particular it is urged that the holding in the case of People v. Bradford, 1 Cal. App. 41, 81 P. 712, should be overruled. In that case the court held that part II should be read as part I, and that it was evident that the characters "II" were inserted by clerical misprision for the character "I." In that case it was said:

> "Such construction is warranted by the decision of our Supreme Court in California Loan Co. v. Weis, 118 Cal. 497, 50 Pac. 697, wherein it was held that the word 'June' was inserted, either by legislative oversight or clerical error, where 'July' was intended, such construction being necessary to give effect to the plain intent of the Legislature as deduced from the whole act then under consideration. The rules of statutory construction embrace also the correction of clerical errors by the insertion of the true word or words. County of Lancaster v. Frey, 128 Pa. St. 593, 18 Atl. 478, cited in California Loan Co. v. Weis, 118 Cal. 497, 50 Pac. 497. Under this construction section 288 is intelligible and certain."

The appellant, however, cites the case of Hatfield v. Jordan, 183 Cal. 223, 190 P. 1030, wherein it was held that, where a statute contained the figures "1931," it could not be read as referring to the year 1921. The Hatfield Case, however, is not controlling here, and does not furnish any reason for our refusing to follow the case of People v. Bradford, supra. In the Hatfield Case there was nothing before the court which indicated what the intention of the Legislature was other than mere inferences. Section 288 of the Penal Code, supra, appears in the Penal Code in such a setting that the intention of the Legislature, and the purpose to refer to part I instead of to part II is so plain and certain that no one could be misled as to the intention and meaning of the Legislature. As to the section being ambiguous when read as held in the Bradford Case, supra, is shown to be without merit by reference to 16 California Jurisprudence, p. 67, § 28, and the authorities there cited. We deem it unnecessary to quote the section.

As to the insufficiency of the evidence to warrant the verdict, we can only say that a careful reading thereof leads to the contrary conclusion. The testimony shows that the defendant took the boy named in the information, a boy of the age of 12 years, and also another boy named Charles Burmester, somewhat older, just how many years not stated in the testimony, in a Dodge coupé from the town of Santa Rosa to a place called Bennett Valley, ostensibly on a hunting trip; that on the way out he stopped and purchased a bottle of wine, which fact, perhaps, accounts in part for the commission of the acts with which he was charged, and of which he was found guilty. The two boys testified substantially to the acts charged in the information as having been committed upon the person of the boy Delbert.

[3] The testimony is of such a vile character that we refrain from setting it forth in this opinion, and we will content ourselves with saying that we are satisfied from a reading thereof that the contention that there

is not sufficient testimony to warrant a conviction by the jury is likewise without merit. The defendant, of course, denied all the testimony given by the boys. The truth or falsity of the testimony being wholly a matter for the jury, the fact that the acts were denied by the defendant cannot be considered by us as overthrowing the testimony of the boys.

As to the errors of the court alleged to have been committed in overruling the objections to certain testimony, it appears from the transcript that the testimony objected to had previously been given by the defendant without any objection being interposed thereto. The testimony objected to was that of the witness upon cross-examination, and, upon objection by defendant's counsel, the court did erroneously state that such testimony had been given upon direct examination. The transcript shows that the testimony which was objected to had, however, been previously given by the defendant on cross-examination, and, when so given, came into the record without any objection being interposed. However, if such were not the case, the testimony objected to is not such as to warrant a reversal. It simply referred to the fact of the defendant's having taken an automobile ride with a boy by the name of Martin Law. The defendant had testified that he took an automobile ride with the witness Burmester and another boy whose name he did not know.

It is next objected that the court erred in its instructions to the jury and in refusing instructions requested by the defendant. The instructions are too lengthy to set out in this opinion, and we content ourselves with the statement that the court fully and very carefully advised the jury as to the law in the premises, and also went so far as to give the jury the following precautionary instructions, to wit:

> "You are instructed that the testimony of a child of tender years, such as the prosecuting witness here, ought to be viewed with care and caution, and the evidence in a case of this kind is to be weighed by you with the utmost care without bias or prejudice."

And further:

> "While the law does not require in this character of a case that the prosecuting witness be supported by another witness or other corroborating circumstances, it does, however, require that you examine the testimony of the prosecuting witness with caution."

[4] It may be observed further that the testimony of the prosecuting witness was corroborated. The appellant challenges the veracity of the corroborating witness. However, that was a matter for the jury and not for us. If believed by the jury, the corroborating evidence was absolutely sufficient to support the verdict of guilty, irrespective of the testimony of the prosecuting witness. As to the refused instructions, which cover a number of the pages of the transcript, we only need to state that everything contained therein which should have been given to the jury was included in the instructions given, and that most of the refused instructions were couched in argumentative language and were not asked in such form as to entitle them to be read to the jury. We do not need to cite authorities to the effect that a trial court should not give instructions which are argumentative in form.

The trial court properly held that, under the testimony, Delbert Butler was not an accomplice, and therefore the instruction requested by the defendant, to the effect that he was, was properly refused.

We find nothing in the transcript indicating any serious misconduct on the part of the district attorney, or any misconduct that calls for comment in this opinion.

Appellant has quoted page after page from opinions of other courts when passing upon questions similar to those involved herein to the effect that great caution and circumspection should be used in cases of this character, lest a defendant be convicted from the mere repulsiveness of the charge. It would serve no useful purpose to add anything to such comments or to review them herein. It is sufficient to say that the instructions which we have quoted, as given by the trial court in this case, call that very fact to the attention of the jury, and advise them to give serious and critical attention to the testimony of the witnesses upon which the charge was based.

As herein stated, the record is so full of repulsive details that we refrain from contaminating the public records of this state with a recital thereof, and content ourselves with the statement that a review of the whole case leads us to the conclusion that the testimony sufficiently supports the verdict, and that no error was committed by the court of which the appellant has any reason to complain.

The order and judgment appealed from are affirmed.

We concur: FINCH, P. J.; HART, J.

93 Cal. App. 169

PEOPLE v. REDDING. (Cr. 1659.)★

District Court of Appeal, Second District, Division 1, California. July 12, 1928.

Hearing Denied by Supreme Court Sept. 6, 1928.

1. Robbery 🔑24(3)—Evidence of defendant's identity held sufficient to sustain conviction for robbery.

Evidence of defendant's identity, though weak and unsatisfactory, in view of impeachment of witness identifying defendant, *held* sufficient to sustain conviction of robbery.

2. Criminal law 🔑1170½(5)—Witnesses 🔑337(4)—Compelling defendant to admit on cross-examination he was "fugitive from justice," without showing particular crime of which he was accused, held error and prejudicial (Code Civ. Proc. § 2051).

In robbery prosecution, forcing defendant to admit on cross-examination, over objection, that at time robbery occurred he was a fugitive from justice, *held* error, under Code Civ. Proc. § 2051, so prejudicial as to have affected his substantial rights, where there was no attempt to show any connection between fact that before his conviction he had been convicted of a felony and fact that, when robbery occurred, he was fugitive from justice, thus leaving matter wholly to conjecture of jury; the general understanding of what is meant by "fugitive from justice" being one who, having perpetrated a crime, or was accused of having done so, in a given jurisdiction, flees therefrom without awaiting consequences of act which it is assumed he has committed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fugitive from Justice.]

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Terrell Redding was convicted of robbery, and he appeals. Reversed.

Martin S. Ryan, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime of robbery and from an order denying his motion for a new trial.

The fact that a robbery occurred, as charged in the information filed against defendant, is not disputed; but the sufficiency of the evidence to establish the identification of defendant as the man who committed the crime, as well as the effect of certain evidence admitted over the objection of defendant, are the material questions presented for the consideration of this court.

[1] With reference to the first question, the record discloses the fact that on the trial of the action the man who was robbed was unable to, and did not, identify defendant as the man who committed the robbery. However, the identity of defendant as the robber was positively established by the testimony of a boy of the age of 13 years, who was present at the time the robbery was committed. The boy's testimony was impeached, not only by the fact that in his testimony given at the preliminary examination of defendant before the committing magistrate he failed to identify defendant, but as well by the testimony of two witnesses to the effect that prior to giving his testimony on the trial of the action in the superior court the boy had been approached by two police detectives, who, by the power of suggestion, if not by a more sinister influence, had induced the boy to change his testimony given at the preliminary examination of defendant, so that on the trial of the action in the superior court he testified to what amounted to an identification of defendant as the man who committed the crime. However, in rebuttal, each of the police detectives denied that they, or either of them, had been guilty of the use of any improper or unethical methods with reference to the testimony given by the boy.

In the main the defense consisted of a denial by defendant of his guilt, together with the testimony of six other witnesses to the effect that, not only including the exact time when the robbery was committed, but for several hours preceding such time and for about an hour thereafter, they were and each of them was in the presence of defendant at a place located approximately eight miles from the scene of the robbery. If, notwithstanding the weakness of the evidence upon which the verdict of guilt of defendant depended, resting as it did upon what ordinarily might be assumed as being great infirmities, the jury chose to adopt it as a reflection of the truth of the situation, including the identity of defendant as the robber, the result, as expressed in its verdict, is beyond the reach of successful attack on appeal. The evidence, though in itself weak and perhaps unsatisfactory to the judicial mind, nevertheless was legally sufficient to sustain the verdict.

[2] But, as hereinbefore indicated, the reversal of the judgment and the order denying the motion for a new trial is sought upon the additional ground that, over the objection of defendant evidence was admitted against him by which he was substantially prejudiced in the eyes of the jury. By defendant's testimony on cross-examination it was established that some years preceding the date of the robbery here under consideration, acting on the belief that he was "pleading guilty to a misdemeanor," defendant actually pleaded guilty to "an attempt to commit burglary," for which he was sentenced to a term of one year in the county jail. In the course of such cross-examination of defendant he was asked by the deputy district attorney in charge of the prosecution whether, at the

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★Hearing denied by Supreme Court.

time the robbery in question was committed, he was a fugitive from justice. The court overruled defendant's objection to the question. Thereupon defendant answered in the affirmative. No point was made at the trial, nor is it here raised, as to whether in the circumstances, as a matter of law, defendant had actually been convicted of a felony as defined and provided, respectively, by sections 17, 664, and 461 of the Penal Code. But it is now urged that the ruling by the trial court to which attention has been directed was "grossly prejudicial," and authorities are cited in support of such contention.

While in accordance with the provisions of section 2051 of the Code of Civil Procedure on the examination of a witness it is permissible to show that theretofore he had been convicted of a felony, nevertheless it is also specifically provided therein that "evidence of particular wrongful acts" may not be shown for the purpose of impeaching the general reputation of the witness for truth, honesty or integrity. 27 Cal. Jur. 132.

Over the objection of defendant, he was forced to admit that at the time the robbery in question occurred he was a fugitive from justice. The general understanding of what is meant by the term "fugitive from justice" is one who, having either perpetrated a crime, or who is accused of having done so, in a given jurisdiction, flees therefrom without awaiting the consequences of the act which it is assumed he has committed. The record herein is silent as to any connection between the fact that before his conviction in the instant case defendant had been convicted of a "felony" and the fact that when the robbery in question occurred he was a fugitive from justice. The "particular wrongful act" of which defendant was accused, or which in fact he had theretofore committed, was left wholly to the conjecture of the jury, and without any evidence of the specific fact each member of the jury may have assumed that the crime, the consequences of which defendant was fleeing, was of the most heinous character, and consequently that his testimony was unworthy of belief.

Nor is this court convinced that, because the jury had before it evidence to the effect that theretofore defendant had been convicted of a "felony," to wit, of an attempt to commit the crime of burglary, the testimony of defendant had been so impeached that nothing was added to the discredit of his testimony by reason of the fact that he was a fugitive from justice. An attempt by defendant to commit burglary may have had some effect upon the credibility which should attach to his testimony; but it may not have entirely destroyed confidence in it. On the other hand, the possibly imagined fact by the members of the jury that, in addition to an attempt by defendant to commit burglary, he was at least accused of the commission of some other offense, ranging in character from the least morally objectionable to that of the most desperate or most despicable, may have had the effect, not only of utterly overthrowing the testimony given by defendant, but as well of creating such a prejudice against him and his defense as to have carried with it a fatal distrust of the testimony given by his supporting witnesses.

Considering the weakness of the case presented by the prosecution, it is not improbable that, without the evidence to which reference has been had, the jury would have taken a different view of the testimony of defendant and his six witnesses relating to the presence of defendant at the time the robbery was committed and at a place where it would have been impossible for him to have been the robber, with the result that he would have been acquitted of the charge against him. It thus becomes manifest that the error of which appellant complains was prejudicial in that it affected his substantial rights in the premises. While for the safety of the public it is greatly to be desired that the guilty be apprehended and punished for their crimes, as a stabilizing influence toward the permanence of our institutions, it is of much greater importance that the guaranty of a fair trial within the meaning and intent of the Constitution and the statutes should be assured and made a certainty, so far as may be within the bounds of average human ability, attended by its inevitable imperfections and frailties.

The judgment and the order denying the motion for a new trial are reversed.

We concur: CONREY, P. J.; YORK, J.

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93 Cal. App. 42

PEOPLE v. KUDER et al. (Cr. 1539.)★

District Court of Appeal, Second District, Division 2, California. June 29, 1928.

Hearing Denied by Supreme Court Aug. 27, 1928.

1. Indictment and information 🔑125(19)—Indictment charging violation of Corporate Securities Act by doing several acts prohibited thereby charged but one offense (Corporate Securities Act, § 14).

Under Corporate Securities Act, § 14 (St. 1917, p. 680), making it an offense to issue or sell any security in nonconformity with permit of corporation commissioner, or to apply proceeds of sale to purpose contrary to permit, or to fail to comply with any provisions of the act, or to conspire to violate said act, indictment charging violation of the act by defendants issuing and selling to themselves 250 shares of stock without paying to, or obtaining and receiving for, the corporation cash representing full par value, and by using and applying proceeds of such sale to purposes other than those specified in application and permit, charged but one offense, since violation of any

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★For opinion on hearing in Supreme Court, see 269 P. 630.

or all provisions of act constitutes but one offense.

2. Licenses 🔑42(3)—Proof of violation of any one of acts prohibited by Corporate Securities Act charged in indictment would sustain conviction (Corporate Securities Act, § 14).

Where indictment charged violation of Corporate Securities Act, § 14 (St. 1917, p. 680), regulating issuance and sale of securities, proof sustaining any one of violations charged would be sufficient to sustain conviction.

3. Constitutional law 🔑32—Constitutional provision making fictitious increase of stock or indebtedness by corporation void is self-executing (Const. art. 12, § 11).

Const. art. 12, § 11, providing that no corporation shall issue stock or bonds except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void, is self-executing to the extent that acts done in contravention of it are illegal and void.

4. Constitutional law 🔑62—Statute regulating issuance and sale of corporate securities held not invalid as delegating legislative powers to commissioner (Corporate Securities Act, §§ 4, 14).

Corporate Securities Act, § 14 (St. 1917, p. 680), regulating issuance and sale of securities, *held* not invalid as attempting to delegate legislative powers to commissioner of corporations because of provision of section 4 authorizing commissioner to impose such conditions as he may deem necessary to issuance of securities and to establish such rules and regulations as may be reasonable or necessary to insure disposition of proceeds of securities for purposes provided in permit, and to amend, alter, or revoke any permit issued by him or temporarily suspend applicant's rights thereunder.

5. Constitutional law 🔑60—Legislature may delegate making of rules and regulations for transaction of any state business and declare violation of rules offense.

The Legislature has power to delegate to proper authority the making of suitable rules and regulations for the conduct and transaction of any business of state and to declare the violation of the rules a penal offense.

6. Words and phrases—"Quasi judicial power" lies in judgment and discretion of officer other than judicial officer.

Quasi judicial power is a duty conferred by words or by implication on an officer to look into facts and to act on them in the exercise of discretion, and it lies in the judgment and discretion of an officer other than judicial officer.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Quasi Judicial.]

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

J. M. Kuder and others were convicted of violating the Corporate Securities Act. From an order granting defendant's motion in arrest of judgment after conviction, the People appeal. Reversed.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

J. M. Friedlander, Corporation Com'r, H. A. I. Wolch, Asst. Corporation Com'r, and Vernon S. Gray, Deputy Corporation Com'r, all of Los Angeles, amici curiæ.

Arthur L. Veitch, of Los Angeles, for respondent Kuder.

Estudillo & Schwinn, of Riverside, for respondents E. B. Fishel and U. R. Fishel.

P. N. McCloskey, of San Bernardino, for respondent Luke.

William Guthrie and R. E. Hodge, both of San Bernardino, for respondent Bedford.

CRAIG, J. The respondents were tried before a jury in San Bernardino county upon a charge of having violated the Corporate Securities Act, and were convicted. They then moved the trial court for an arrest of judgment, which motion was granted upon the ground that the indictment failed to state facts sufficient to constitute a public offense. The people appealed from such ruling, and respondents moved this court for an order dismissing said appeal, which we denied on April 3, 1928. 266 P. 337. The case is now before us upon its merits.

In the indictment which is the subject of this appeal the grand jury of San Bernardino county accused the five defendants of the crime of violation of the Corporate Securities Act, (St. 1917, p. 673), "a felony, committed as follows," and the acts therein alleged to have been committed in violation of said statute were that, on or about September 30, 1925, the defendants did willfully, unlawfully, knowingly, fraudulently, and feloniously authorize, direct, and aid in the issue and sale of, and cause and assist in causing to be issued, executed, and sold, certain stock certificates and securities of a corporation known as Fishelton Farms, Incorporated, consisting of 250 shares of its capital stock to themselves, in nonconformity with a permit of the commissioner of corporations authorizing such issue, and that, with intent to violate said permit, the defendants issued and caused the issuance of said stock without demanding, obtaining, and receiving for and on behalf of the corporation, and without paying, remitting, or delivering to it cash therefor at par, so as to net the corporation par value at the selling price, and, with intent to violate the terms of said permit, that the defendants used, expended, and applied the cash obtained from the sale and issue of said stock for uses and purposes other than and contrary to the uses and purposes recited in the application therefor.

The commissioner's permit is made a part of the indictment, and recites that said corporation is authorized to sell and issue 250 shares of its capital stock to its five incorporators at par for cash, for the uses and purposes recited in its application, and so as to net the applicant the full amount of the selling price thereof.

[1] Before the trial, the defendants demurred, and thereafter moved in arrest of judgment, upon asserted grounds that the indictment charged two separate and distinct offenses, which should have been separately stated, first, that of issuing and selling to themselves 250 shares of stock without paying to, or obtaining and receiving for, the corporation cash representing the full par value; and, second, that of using and applying the proceeds of such sale to purposes other than those specified in the application and permit. And it was further contended that each such charge offset and justified the other, in that, if they did not pay the value of said stock to the corporation, they could not have applied the proceeds of such sale to unlawful purposes, whereas, if the latter charge were true, they could not be guilty of selling the stock without receiving the purchase price on behalf of the corporation. The evidence tends to show, as a matter of fact, that the defendants, as officers of the corporation, issued 250 shares of the stock of their corporation to themselves, for which they gave checks upon a bank account wherein there were not sufficient funds to meet them, and in turn issued to themselves checks of the corporation for like amounts so that no moneys were in fact paid or misapplied.

From the holding herein which we think is inevitable it becomes unnecessary to consider the point advanced by respondents that the allegations of the indictment are contradictory, or that the commission of one of the alleged acts would render the commission of the other impossible. Section 14 of the Corporate Securities Act (Stats. 1917, c. 532) makes it an offense to issue or sell any security in nonconformity with a permit of the corporation commissioner, or to apply or cause to be applied the proceeds of the sale of securities to a purpose contrary to the provisions of a permit, or to fail to comply with any of the provisions of the act, or to conspire to violate said act. Hence, not only is it a violation of the Corporate Securities Act to act contrary to its provisions in any one respect, but it is equally illegal and violative of the act to do so in all of them combined. To say that they are distinct offenses is equivalent to the assertion that an indictment charging the issuance of securities contrary to the provisions of a permit, and a failure to comply with the provisions of the act, would embrace two offenses, for each of which a separate sentence might be imposed.

Other similarly phrased statutes of this state have received repeated and consistent interpretations which render such views untenable. In People v. Barnnovich, 16 Cal. App. 427, 117 P. 572, an information based upon section 601 of the Penal Code was challenged upon the same grounds as those here asserted. Said section provides that one who maliciously deposits or explodes or attempts to explode under any structure which human beings usually inhabit, any dynamite, etc., with intent to injure any human being, or by means of which a human being is injured, is guilty of a felony. Barnnovich was charged with having deposited an explosive under such a structure with intent to injure a person, and with intent to injure the property described in the information. The Court of Appeal said:

> "The information alleges two intents—one an intended injury to a person and the other an intended injury to property. It does not follow from this that the information charges two offenses as claimed by counsel for the defendant. Section 601 of the Penal Code, which defines the offense of which the defendant was convicted, enumerates a series of acts any of which separately or all together may constitute the offense. 'All such acts may be charged in a single count, for the reason that notwithstanding each may by itself constitute the offense, all of them together do no more, and likewise constitute but one and the same offense.' People v. Frank, 28 Cal. 507; People v. Leyshon, 108 Cal. 440, 41 P. 480; People v. Swaile, 12 Cal. App. 192, 107 P. 134."

People v. Swaile, supra, was also a prosecution under section 601 of the Penal Code, and the court there said that it is not improper in such cases to charge conjunctively the various acts constituting the offense which are disjunctively recited in the statute. People v. Frank, supra, involved a charge that the defendant "feloniously made, forged, and counterfeited, and aided and advised and encouraged another to make, forge, and counterfeit" an indorsement. In People v. Leyshon, supra, the defendant, was charged with forging and passing a forged note. In each of these cases the same rule was invoked.

In People v. Huber, 64 Cal. App. 352, 221 P. 695, the defendant was charged with having violated the Motor Vehicle Act (St. 1915, p. 397), in that, while driving an automobile, he collided with another person, that he unlawfully failed and refused to stop, or to render assistance to the person injured, or to carry said person to a physician or surgeon for medical or surgical treatment, and failed and refused to give to such person the number of his automobile, the name of the owner, or of the passenger therein. Upon the contention that the information did not comply with sections 950 and 951 of the Penal Code, and that it charged several offenses, it was held:

> "It will thus be seen that the information is almost identical with the language used in section 21 of the Motor Vehicle Act. It is true

that there are a number of specific things required to be done by that section in the event of a collision with or injury to a person on the highway, yet the information following the language of the statute, as above quoted, charges in fact but one offense. That but one offense is charged is clearly established by the case of People v. Barnnovich, 16 Cal. App. 427, 117 P. 572. It is the failure to comply with any one of the requirements of said section that renders the person so failing amenable to prosecution. It is not alleged in the information that any assistance was necessary to be given to the injured person, but the information nevertheless charges a complete offense in that it is therein stated in both clear and concise language that the defendant did not stop his automobile and also failed and neglected to give the information required by the statute. Having charged sufficient to constitute an offense the demurrer was properly overruled, even though it be admitted that the information does not with sufficient certainty show that any assistance should have been given by the defendant to Steve Begley, the injured person."

[2] So in the case at bar respondents were charged with the offense denounced by the statute as a violation of the Corporate Securities Act, which itself is a felony as charged by the indictment under consideration, and which may be committed in any one or more of the various ways specified. It does not appear that any money was paid to the corporation for the securities issued and sold, as required by the permit, which alone is sufficient to warrant the overruling of the demurrer, and the denying of the motion in arrest of judgment, in so far as this ground of attack is concerned. It is therefore immaterial to the issue thus presented whether or not other allegations of the indictment were true, or that, had the jury found as a fact that the corporation received full par value for its stock, and that respondents misapplied the proceeds so received, the allegations of nonpayment would have been untrue. Had the indictment charged violations of all of the elements of the offense as defined in the act, it is obvious that the allegations would necessarily have been inconsistent, yet to convict upon all of them would not be necessary, since a violation of the Corporation Securities Act by noncompliance with any of its provisions or with a permit issued thereunder is sufficient to sustain the indictment, and to support a conviction thereon.

Many authorities are presented by respondents wherein statutes so worded as to embrace various distinct offenses, such as gambling, betting, pool selling, etc., were held to authorize a separate charge for a violation of each. Yet, as appears from a dissenting opinion in People v. Thompson, 111 Cal. 242, 43 P. 748, while in some cases such as sales of rum, brandy, whisky, or gin, distinct offenses may be committed, "it is not ill to charge in one count that the defendant did offer to sell and suffer to be sold intoxicating liquor." And in the same opinion it is further said that the "natures of the offense and of the act should be considered in determining whether or not a charge is double." In the instant case the defendants were alleged to have committed the "crime of violation of the Corporate Securities Act of the state of California, a felony, committed as follows," which in itself is an offense, and it is not attempted to be argued that, had all of the allegations been consistent and in fact proved, the trial court could have imposed more than one penalty. We conclude, therefore, that the indictment charged one public offense, and sufficiently conformed to the sections of the Penal Code governing the form and contents of such a pleading.

[3] It is next insisted that the Corporate Securities Act is unconstitutional. Respondents quote section 11 of article 12 of the Constitution, which provides, "No corporation shall issue stock or bonds, except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void," and assert that this provision is self-executing. They then refer to the provision of article 12, § 24, that "the Legislature shall pass all laws necessary for the enforcement of the provisions of this article," and upon the latter predicate the claim that the act does not purport to provide for the enforcement of section 11, above quoted, because, unlike other similar enactments, its object and purpose are not specifically so stated. We think the laws passed by the Legislature comply with and fulfill the constitutional mandate. Without question this provision of the Constitution is self-executing to the extent that acts done in contravention of it are rendered illegal and void. The same declaration is contained in section 359 of the Civil Code, which provides that "no corporation shall issue stocks or bonds except for money paid," etc. All that can remain to be done is to give practical effect to these enactments by supplying the necessary legal administrative and executive machinery to compel compliance therewith. The act does this by providing that the commissioner of corporations shall make all necessary investigation of the applicant and its affairs, and if thereupon he finds that the proposed plan of business "is not unfair, or inequitable, that it intends to fairly and honestly transact its business, and that the securities that it proposes to issue and the methods to be used by it in issuing or disposing of them are not such as, in his opinion, will work a fraud upon the purchaser thereof, the commissioner shall issue a permit authorizing it to issue and dispose of securities, as therein provided," etc. As suggested by respondents, the prohibition of the Constitution against the issuance of stock except for valuable consideration imports the right under reasonable and proper conditions to is-

sue and dispose of such securities. And yet, notwithstanding this constitutional privilege, section 12 of the act here in controversy provides that a sale even for cash, without the permit required by section 6 thereof, shall subject the seller to a penalty of fine and imprisonment. That all of the initial steps required by the act were complied with by the corporation and the commissioner is not denied. The applicant requested permission to dispose of its capital stock to the incorporators for cash, and a permit was issued, directing that it sell its capital stock to the persons designated, for full net cash to the corporation, which is in strict accord with the Constitution, Civil Code, and Corporate Securities Act. It is obvious that said act was intended to furnish the procedural system for enforcement of the constitutional safeguards to the purchasing public. Taken together, they constitute a single bulwark against the sale of worthless securities and other fraudulent practices, as well as guides for imprudent corporate officials, brokers, and purchasers in honest transactions. Such purpose and intention has been recognized by all of the decisions to which our attention is directed.

[4] It is insisted, however, that the act transcends legislative powers by attempting to delegate, and to provide for the exercise of, legislative and judicial authority, by conferring upon the commissioner of corporations the duty of investigation, determination as to the conditions of issuance and sales of stock, and discretion in granting or denying permits. It is contended, in effect, that what is fair, just, and equitable business which will not work a fraud upon purchasers, and reasonable or necessary conditions which should be imposed in order to insure safe disposition of the proceeds of sales of stock, are questions for legislative determination, and that since article 12, § 11, of the Constitution inferentially affords the right to issue and sell such securities, the Legislature alone is empowered to ordain what shall constitute the proper and necessary prerequisites to the issuance of a permit therefor.

The voluminous briefs filed by respondents are replete with authorities which interpret similar statutes creating commissions, and define the legislative limitations prescribed by our Constitution with respect to the delegation of powers and duties to officers of such state departments. A great many decisions are quoted which deal with harbor commissions, highway commissions, municipal charities commissions, industrial accident commissions, the state medical board, and the department of agriculture, but in none of these cases, nor in any others which we have been able to find, has it been held that the examination of facts and circumstances and determination of reasonable and necessary conditions to the issuance of permits, and their reasonable requirements, for the assurance of public safety, are legislative matters which cannot be delegated to the officers of a duly constituted state executive department. The cases relied upon by respondents hold that such commissions or departments have no power to legislate, but they do not attempt to intimate that they are mere rubber stamps. It has been held that they may not prescribe the nature and extent of proof necessary to make out a case, determine what shall be a misdemeanor and impose a penalty therefor, create drainage districts, nor in any manner enlarge or abridge a statute. Yet, in all cases where the question has arisen, it has been held that the commissioners of various departments may be invested with and exercise the power to make reasonable rules and regulations, and to determine any fact or state of facts upon which the law makes, or intends to make, its own action depend. Board of Harbor Commissioners v. Excelsior Redwood Co., 88 Cal. 491, 26 P. 375, 22 Am. St. Rep. 321; In re McLain, 190 Cal. 376, 212 P. 620; In re Dart, 172 Cal. 47, 155 P. 63, L. R. A. 1916D, 905, Ann. Cas. 1917D, 1127; Hewitt v. Board of Medical Examiners, 148 Cal. 590, 84 P. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750.

The Corporate Securities Act, by section 4 thereof, provides as follows:

> "The commissioner may impose such conditions as he may deem necessary to the issue of such securities, and shall have the power to establish such rules and regulations as may be reasonable or necessary to insure the disposition of the proceeds of such securities in the manner and for the purposes provided in such permit, and may, from time to time for cause, amend, alter, or revoke any permit issued by him, or temporarily suspend the rights of the applicant under such permit."

This general power is conferred by all statutes creating state boards and commissions, in the same or similar language, and in no instance of which we are aware has it been held invalid because conferring legislative or judicial authority. Section 2520 et seq. of the Political Code, prescribing the powers and duties of harbor commissioners; chapter 176, Statutes of 1913, as amended, applicable to the Industrial Accident Commission; chapter 212, Statutes of 1907, as amended, known as the State Medical Act; chapter 325, Statutes of 1919, defining the powers and duties of the director of the department of agriculture, as derived from the former horticultural department (Pol. Code, § 2319b et seq.); Statutes of 1907, p. 124, designated the Poison Act, and chapter 212 of the Statutes of 1901, as amended, providing for the appointment of a board of architecture, and prescribing its powers and duties—all vest such authority in officers of the departments so created. In Ex parte McManus, 151 Cal. 331, 90 P. 702, our Supreme Court in passing upon the question now under discussion in the instant case, sanctioned the delegation of such powers to state boards and commissions generally, in the following language:

> "It is insisted, in this connection, that it was the duty of the Legislature to have itself fixed in the act some standard or rules for determining the qualifications of applicants; that this was a legislative duty to be discharged by the Legislature itself, and a function which it could not delegate to the board of architecture, nor invest it with arbitrary power to provide a standard or rules upon the subject. It is undoubtedly a well-recognized maxim of constitutional law that authority conferred on the Legislature to make laws cannot be delegated by it to any other department or body; but here there is no delegation by the Legislature to the state board of architecture of the power to declare what the law shall be. That is declared by the act. It is an equally well-recognized principle that the Legislature, notwithstanding it may do things itself, may nevertheless authorize them to be done by ministerial officers or boards when it believes that they can do them more conveniently and effectually than it can itself. Especially may this be done when it is deemed proper by the Legislature to regulate in the interests of the public, through public commissions or boards constituted for that purpose, the pursuit of particular professions or occupations, as for example, that of physicians, dentists, druggists, engineers, architects, and others, which involve the exercise of skill and the possession of special knowledge and experience. Such commissions or boards are composed, as under this act the board of architects necessarily must be, of persons technically skilled and trained in their profession or occupation, and who are usually better able to determine whether an applicant for a license or certificate to practice a given profession or occupation is competent to do so, under reasonable rules and standards adopted by them, than under those which might be prescribed by the Legislature; and if in its wisdom the Legislature authorizes such a technically trained commission or board to prescribe reasonable rules, or fix a fair standard for determining the proficiency of applicants for a license or certificate, it cannot be said that a delegation, within the constitutional inhibition, of authority to make laws is conferred, or any other authority given, than the power necessary to be exercised by them to the end that the law as completely enacted by the Legislature may properly be carried into effect. * * * There is always implied in a grant of authority, such as here conferred, that it shall be exercised reasonably and fairly so as to effectuate the end contemplated. It may not be presumed that the authority conferred will be abused by the formulation of unreasonable or unjust rules, and from such presumption declare the act to be unconstitutional. On the contrary, the presumption is that the board will not act unreasonably or unfairly."

In Agnew v. Daugherty, 189 Cal. 446, 209 P. 34, section 4 of the Corporate Securities Act was directly attacked, and the Supreme Court there said:

> "The passage in the above quotation from the statute which allows the commissioner to issue a permit authorizing the applicant to sell his securities 'upon such terms and conditions as the commissioner may in said permit provide' must be read in connection with the context, which provides that the commissioner must inquire into the method of doing business and shall ascertain if the same is fair, just and equitable and that the methods used in disposing of them would not work a fraud upon the purchasers thereof. The terms and conditions to be prescribed in the permit must not be such as would make a greater burden than is consistent with safety and security. * * * If the commissioner should refuse to issue a permit except upon conditions which would be unjust, unfair or inequitable to the applicant, doubtless he would have the right to have such permit revised and reformed so as to make it equitable and fair, but we cannot assume that he will impose such conditions in advance of his action."

We think it unnecessary to look outside our own state for authority upholding the right of the Legislature to empower and direct a commission or board created by it to make reasonable rules and regulations, to investigate into affairs of the business, profession, or occupation over which it is given jurisdiction, and exercise sound discretion as occasion may arise in granting or denying rights which are conditionally conferred. Respondents do not complain that the conditions imposed by the permit issued to them were unreasonable, oppressive, or arbitrary. Since, therefore, these precautionary measures in the interests of public safety may, as we have observed, be delegated to and performed by a board, commission, or officer theretofore duly constituted by the Legislature, respondents manifestly are subject to the regulations and conditions prescribed by the commissioner of corporations in this instance, and are not legally justified in complaining of the source from which they emanated.

[5, 6] That the commissioner exercises certain functions of a quasi judicial character is true. That the Legislature has "power to delegate to proper authority the making of suitable rules and regulations for the conduct and transaction of any branch of the business of the state," and to "declare a violation of those rules a penal offense," there can be no doubt. In re Potter, 164 Cal. 735, 130 P. 721. Such delegation does not, however, as already pointed out, authorize a commissioner to declare that any particular conduct constitutes a public offense, or to impose a penalty for a violation of a rule, regulation or law. It does no more than vest in him the power to exercise such necessary judgment and discretion as shall be incidental to the enforcement of laws which prescribe his other duties, and without which he would be helpless. Quasi judicial power lies in the judgment and discretion of an officer other than a judicial officer. State ex rel. Board of Liquidation v. Briede, 117 La. 183, 41 So. 487. It is a duty conferred by words or by impli-

cation upon an officer to look into facts and to act upon them in the exercise of discretion. Bair v. Struck, 29 Mont. 45, 74 P. 69, 63 L. R. A. 481.

The order appealed from is reversed.

We concur: WORKS, P. J.; THOMPSON, J.

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93 Cal. App. 133

PEOPLE v. TURNER. (Cr. 1032.)

District Court of Appeal, Third District, California. July 10, 1928.

1. Homicide ⚷151(3)—Burden of proving self-defense does not rest on defendant charged with manslaughter (Pen. Code, § 1105).

Defendant charged with manslaughter does not have burden of proving self-defense; Pen. Code, § 1105, providing that burden of proof does not shift to defendant in cases when proof tends to show manslaughter.

2. Homicide ⚷118(2)—If circumstances lead reasonable man to believe that he is in danger of death or great bodily harm, retreat is unnecessary before killing in self-defense.

If the circumstances are such as to lead reasonable man to believe that he is in danger of death or great bodily harm, retreat is not necessary before killing in defense against attack is justifiable.

3. Homicide ⚷300(3)—Instruction that danger of death or bodily harm would not be imminent if mode of escape appeared to reasonable man held uncertain.

Instruction that, if circumstances would have induced reasonable man so situated to believe that there was reasonable mode of escape from danger of death or great bodily harm, danger would not be imminent and killing would not be justifiable, *held* uncertain and indefinite; mode of escape not being specified.

4. Criminal law ⚷1186(4)—Constitutional provision against reversal for nonprejudicial error held inapplicable where erroneous instructions were given against defendant who as sole witness testified she shot in self-defense (Const. art. 6, § 4½).

Where defendant as sole witness testified she shot deceased who was drunk, after he had given her rifle and told her to shoot him or he would kill her with knife which he had in his hand, Const. art. 6, § 4½, providing against reversal for error not prejudicial, was not applicable, where erroneous instructions were given.

Appeal from Superior Court, Modoc County, F. M. Jamison, Judge.

Cassie Turner was convicted of manslaughter, and she appeals. Reversed.

C. S. Baldwin and J. T. Sharp, both of Alturas, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted upon an information charging her with the offense of manslaughter, and appeals from the order denying a motion for a new trial and from the judgment of conviction.

Upon this appeal the principal grounds urged for a reversal are that the verdict is not sustained by the evidence, that the court erred in its instructions to the jury, and that prejudicial error was committed in calling in a person, who was not a judge of any superior court of the state of California, to pass upon the defendant's motion for a new trial. Several minor points are also set forth as reasons why the judgment herein should be reversed. By reason of the conclusion at which we have arrived, it is not necessary for us to discuss more than one of the principal reasons urged for reversal, to wit, alleged errors in instructions given by the trial court to the jury. Whether the evidence is or is not sufficient to sustain the verdict, or whether error was committed in calling in some one, not a judge of the superior court, to pass upon the defendant's motion for a new trial, will be shown to be immaterial when we have stated our conclusions as to the merits of this case. The minor errors alleged are such as may not occur again, and therefore need not be set forth at length herein.

The record shows: That on and for a short period prior to the 16th day of February, 1928, the defendant (an Indian girl), and the deceased, Robert De Clute, had been occupying a railroad car, used as a residence. On the evening of the 16th of February, 1928, the defendant and another Indian girl named Dressie Dickens spent a considerable time at a place referred to in the testimony as the Turner cabin, in the town of Alturas. That, while they were at the Turner cabin, the deceased and the two Indian girls managed to consume a bottle of rubbing alcohol which the deceased brought with him to the Turner cabin. That the three remained in the Turner cabin until about 1 o'clock of the following morning, playing cards and drinking the alcohol referred to. That at about 1 a. m. on the 17th day of February, 1928, the deceased and the two Indian girls left the Turner cabin and went to the railroad car occupied by the deceased, as hereinbefore referred to, upon the request of the deceased, and upon his statement that he had some more liquor there. That, upon reaching the railroad car, the deceased produced a gallon jug of liquor mentioned in the testimony as "jackass whisky" and "jackass brandy," and from this all three of the parties drank more or less, the deceased drinking until he became drunken. At about 2:30 a. m. the Indian girl named Dressie Dickens left the railroad car and went home. The deceased and the defendant remained in the car, and, when the witness named Dressie Dickens departed therefrom, were sitting on a bed, apparently friendly. From this time on, as to what occurred depends entirely upon the testimony of the defendant, and occurred while both of the parties in the car were in an intoxicated condition. From the testimony of the appellant, it appears that the trouble began over the subject of marriage between the deceased and the defendant, and, as it appears in the record, is substantially as follows: The deceased having asked the defendant to marry him in the morning, and the defendant having replied, "Have you forgotten our agreement that we are to get married the 1st of March?" The deceased then said, "If you don't marry me to-morrow, I will kill you and then myself;" the defendant answering, "Don't you remember we promised to get married the 1st of March? I'll bet you're drunk." The deceased replied, "You bet your ——— life I'm drunk." At this instant of time the deceased became angry and walked over to the corner of the car to a small closet and took therefrom a 30-30 Winchester rifle, manipulated it as in the act of loading, took it over to where the defendant was sitting, and placed it in her hands. After placing the rifle in the hands of the defendant, the deceased took a pocket knife from his pocket and opened a long sharp blade and sat down on the bed directly in front of the defendant, not over six feet distant, and then told the defendant to kill him, otherwise he would kill her and himself, to which the defendant replied, "I don't want to kill you, Bob, and I don't want to die, either; please don't make me do it." Again the deceased repeated his command to the defendant, and held the open pocket knife in his right hand in a menacing manner, and stated, "You kill me, or I'll kill you and then myself." Again the defendant declined to fire, and deceased further said, "Well, are you going to shoot?" He then raised the open pocket knife in his right hand and repeated for the third time, "Are you going to shoot? If you don't, I'll kill you and myself;" at which time the defendant, fearing for her own life and bodily safety, fired the fatal shot. Testimony of the defendant was further to the effect that she acted under the belief that she was in great bodily peril, and that the deceased was about to execute his threat by killing her with the knife. In support of this, testimony was introduced to the effect that the deceased was skillful in throwing knives, that the defendant had seen him so doing, and, further, that the deceased had, at some time previously, in the county of Elko, Nev., been arrested and pleaded guilty to the charge of assault with a deadly weapon, with intent to inflict great bodily harm, etc. The only evidence in the record which might tend to contradict that of the defendant was to the effect that on the following day, or shortly thereafter, the defendant, upon being interrogated, stated that the deceased was killed by a Mexican called the "Chief," and also with reference to what was stated in a letter written by the defendant after the occurrences, in which she stated that she had shot the deceased, and that what she wrote to that effect was at the request of a certain Mrs. Beck, Mrs. Beck testifying that she did not tell the defendant what to write in the letter referred to.

The record shows, as the foregoing summary indicates, that the only question to be decided by the jury was whether the defendant acted in necessary self-defense, or whether the circumstances were such as to justify a reasonable person in so acting. To aid the jury in answering this question, the court gave the jury, among others, the following instructions:

"Instruction No. 8. You are instructed, lady and gentlemen of the jury, that the defendant in this case has sought to justify the killing of Robert De Clute, by attempting to show that she acted in self-defense. You are further instructed that the burden of proving justification is upon the defendant.

"Instruction No. 9. You are instructed, members of the jury, that, to justify the commission of a homicide in self-defense, there must exist a necessity, actual or apparent. The danger must appear to the person assailed to be so urgent and pressing that, in order to save his own life or to prevent his receiving great bodily harm, the killing of his assailant is absolutely, or at least reasonably, necessary. A defendant may not justify the taking of human life upon the belief that danger is about to become imminent, or that it will in the future become imminent; it is not enough that there should exist in the mind of the defendant a belief that he is in actual peril. It must appear that he believed himself in such peril, but that, as a reasonable person, he had sufficient grounds for his belief. The killing must be done under an honest and well-founded belief that it is necessary for the party killing, to take the life of the deceased at that time to save himself from great bodily harm. If the circumstances as they appear to the defendant would have induced a reasonable man, so situated, to believe that there was a reasonable mode available to him to escape from danger of death or great bodily harm, the danger thereof would not then be imminent, and the killing would not be justifiable. It is for the jury to determine whether, as a reasonable man, the defendant was justified in believing himself in danger."

"Instruction No. 12. The court instructs you that the duty of the defendant to flee rather than to kill, if retreat is possible, only applies where the defendant is the assailant; but, when a defendant, who is himself without fault, is suddenly attacked in a way that puts his life or bodily safety at imminent hazard, he is not compelled to fly (flee) or to consider the proposition of flying (fleeing), but may stand his ground and defend himself to the extent of taking the life of the assailant, if that be reasonably necessary."

[1] While there is some doubt as to the state of the record concerning the giving of instruction No. 8, whether it was consented to by counsel for the defendant, we are satisfied that

the record is in such condition that the defendant is not bound by anything that appears therein. This instruction appears to have been given on the theory that section 1105 of the Penal Code, which reads as follows: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable," is applicable where an information or indictment charges manslaughter. This, however, is not the law. The section applies only where murder is charged, and the circumstances do not show any mitigating or justifying facts. The rule is aptly stated in 13 California Jurisprudence, p. 736:

> "If the proof on the part of the prosecution tends to show that the homicide amounts only to manslaughter, or that it was justifiable or excusable, then no burden is placed on defendant to prove any circumstances of mitigation or that justify or excuse it."

Here the charge against the defendant is that of manslaughter only, and the burden of proof is not shifted. The trial court in the instant case did not give to the jury that portion of section 1105 of the Penal Code which would have informed the jury that it applied only to cases where the defendant was on trial for the crime of murder, but, omitting such portion of the section, the court directly charged the jury that the burden of proof rested upon the defendant. To show the prejudicial character of this instruction, we have only to set forth a short excerpt taken from the concluding argument of the district attorney, to wit:

> "So, after we have presented the proof to you that the defendant Cassie Turner killed Robert De Clute by shooting him with a rifle, the burden has shifted to the defense to show why she killed him, or if she had any justification whatever for taking this human life. She must show you, by a preponderance of the evidence, that she killed this man in self-defense."

Section 1105 of the Penal Code has been considered a number of times both by the Supreme Court and District Court of Appeal, and the holding in all of the cases is to the effect that the burden does not shift when the testimony introduced on the part of the people shows that the offense amounts only to manslaughter, or that there are mitigating or justifying circumstances, and also that, when the testimony introduced on the part of the prosecution shows that the offense amounts only to manslaughter, section 1105 of the Penal Code is inapplicable and should not be given even though in some of the cases the giving of the instruction is held not to be erroneous. There is no California case holding that, when a defendant is charged only with manslaughter, the burden of proof rests upon the defendant. Such is not the meaning of the section, as we interpret it, and the giving of the instruction in this case we think prejudicial error.

[2] Again, in instruction No. 9, we find the following sentence:

> "If the circumstances, as they appear to the defendant, would have induced a reasonable man so situated, to believe that there was a reasonable mode available to him to escape from danger of death or great bodily harm, the danger thereof would not then be imminent, and the killing would not be justifiable."

While in some states this rule is followed, the modern trend is to the contrary, and the exact opposite is the law in the state of California. 13 Cal. Jur., p. 649, § 49.

In the case of People v. Maughs, 149 Cal. 253, 86 P. 187, an almost identical instruction was given to the jury, and in an elaborate opinion the Supreme Court, in the Maughs Case, held the giving of such instruction prejudicial error, and further held that the giving of an instruction, as we find in instruction No. 12 in this case, not sufficient to cure the error. The court, in considering the subsequent instruction given in the Maughs Case as to the nonnecessity of retreating, used the following language:

> "Nor is it any answer to this objection that the court elsewhere gave a correct instruction upon the subject. The result served but to confuse the jury and to render it impossible to determine whether in their deliberations they followed the law as correctly or as incorrectly set before them"—citing People v. Campbell, 30 Cal. 312; People v. Anderson, 44 Cal. 65; People v. Wong, etc., 54 Cal. 151, 35 Am. Rep. 69; People v. Messersmith, 57 Cal. 575; People v. Thomson, 92 Cal. 506, 28 P. 589, and People v. Pearne, 118 Cal. 154, 50 P. 376.

[3] The further objection that the language which we have just quoted from instruction No. 9 is indefinite and uncertain as to its meaning, we also think well taken. Just what is "the reasonable mode available to him to escape from danger of death," etc., is not specified. Was it by retreating, or was it by using other available means to repel the threatened assault of the deceased, such as by striking him over the head with the rifle instead of discharging the load therein contained? We conclude that it means that the defendant should have retreated, if possible, which, of course, is not a correct statement of the law.

[4] The arriving at a conclusion in this cause necessarily depending upon the interpretation and credibility to be given to the testimony of the defendant, as she was the sole witness to the affair, it follows that there is no room for the application of section 4½ of article 6 of the Constitution. Upon the record, the testimony would as readily lead to the conclusion that the defendant was justified, as to the conclusion that she was not.

While the words used by the deceased, taken alone, were not sufficient to justify the acts of the defendant, yet, in view of the threats of the deceased, when coupled with his acts, such as the raised right arm with the hand grasping an open knife, indicating a present purpose and ability to inflict great bodily harm, we find a situation presented which precludes our holding that the evidence was such that the jury could not have been influenced by the erroneous instructions casting the burden of proof upon the defendant, even though we were to hold that the jury may not have been misled by the conflicting instructions as to the defendant's duty to retreat. The fact that the acts of the deceased were being impelled by a thought inflamed with the poison of jackass brandy also presents an added peril which we cannot overlook in passing upon the probable effects of the erroneous instructions. The errors being prejudicial, the judgment cannot be sustained. It therefore follows that the order and judgment appealed from must be, and the same are hereby, reversed.

We concur: **FINCH, P. J.; HART, J.**

204 Cal. 535

HILTON v. OLIVER et al. (Sac. 3898.)

Supreme Court of California. July 17, 1928.

1. Drains 🔑57—Negligence of employees in cleaning débris from culvert in drainage ditch is not imputable to trustees (Civ. Code, § 2351).

Negligence of drainage district employees in placing cut tules on bank when cleaning débris from culvert cannot be imputed to trustees of the district, having no knowledge of method followed by employees in performing such work under superintendence of foreman, since under Civ. Code, § 2351, lawfully appointed subagent represents principal in like manner with original agent.

2. Principal and agent 🔑160—Agent generally is not liable to third persons for misfeasance or malfeasance of subagent.

An agent is not, in general, liable to third persons for misfeasance or malfeasance of a subagent employed by him in the service of his principal, unless he is guilty of negligence in the appointment of such subagent, or authorizes particular wrongful act.

3. Officers 🔑118—Respondeat superior doctrine does not apply between public officer and subordinates, unless superior directs or countenances tortious acts.

Doctrine of respondeat superior has no application as between a public officer and his subordinates, who are likewise in the public service, unless the public officer has directed or countenanced the tortious acts to be done, or has co-operated therein.

4. Drains 🔑57—Evidence held insufficient to sustain recovery against trustees of reclamation district for damage to crop from overflow.

In action against trustees of reclamation district for damages to crops because of overflow, evidence *held* insufficient to sustain recovery against trustees without showing knowledge of alleged acts of negligence on the part of subordinate agents in cleaning débris from ditch.

In Bank.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by F. A. Hilton against Emery Oliver and others. Judgment for plaintiff, and defendants appeal. Reversed.

Superseding opinion of District Court of Appeal in 261 P. 1021.

Charles W. Slack and Edgar T. Zook, both of San Francisco, and C. F. Metteer, of Sacramento, for appellants.

Martin I. Welsh and Robert Schwab, both of Sacramento, for respondent.

SHENK, J. In 1921 and 1922 the plaintiff was the lessee and in possession of 120 acres of land in reclamation district No. 1000. In the latter part of the year 1921 he seeded the land with barley. On the 9th day of February, 1922, the crop was about two inches high. On that day a heavy rainstorm started, and continued for three or four days. On February 12th one of the drainage ditches of the district, located near the plaintiff's land, overflowed and damaged the plaintiff's crops. Thereafter he brought this action for damages against the district and the individual defendants, who were at the time the trustees of the district. Before trial the action was dismissed as to the district. The jury rendered a verdict against the trustees in the sum of $1,000, and from a judgment thereon this appeal is taken.

The complaint alleged "that on or about the 12th day of February, 1922, said defendants so negligently and carelessly maintained and operated" said drainage ditch that the ditch overflowed and the water therefrom covered the premises of the plaintiff and damaged his crops. It is not disputed that under certain circumstances the trustees may be held liable for negligence. See Perkins v. Blauth, 163 Cal. 782, 127 P. 50; Proper v. Sutter Drainage District, 53 Cal. App. 576, 200 P. 664. Prior to 1923 the district itself was not liable for the negligence of its trustees. By section 3464 of the Political Code, added in 1923 (Stats. 1923, p. 513), the negligence of the trustees of a reclamation district is made imputable to the district to the same extent as if the district were a private corporation.

The main contention of the defendants is that the evidence is insufficient to justify the verdict finding them guilty of negligence in the "maintenance and operation" of the drainage ditch. Negligence in the construction of the ditch is not charged against them. Reclamation district No. 1000 was one of the first big tracts of overflowed land in the Sacramento valley to be reclaimed under the Drainage District Act. The work of reclamation commenced in 1914. The area in the district comprises 54,000 acres of land, and approximately 130 miles of drainage ditches were constructed therein. The particular ditch in question is known as the "L-lateral," and passes north and south within about 800 feet to the east of plaintiff's land. In the original plans it was determined from an engineering standpoint that this ditch should have a carrying capacity of 29 second feet. By applying a safety factor, the ditch was actually constructed with a carrying capacity of from 50 to 60 second feet. The original plans called for the installation of a culvert opposite plaintiff's land as a means of furnishing a crossing for the convenience of land owners. This culvert, consisting of a 30-inch pipe, was installed in 1918, and was sufficient to carry the maximum flow of the ditch. In the course of time tules and other vegetable growth appeared in the drainage ditches which required removal annually. To remove this growth laborers were employed in 1921 under the direction of a foreman, who performed his duties under the immediate direction of F. E. Awalt, who was occupying the position of field superintendent under appointment by the board of trustees. It is not claimed by the plaintiff that Mr. Awalt was not qualified for the position, nor that the trustees were remiss in any respect in his appointment. In removing the tules from the ditch above the culvert in 1921, the crew, working under the direction of the foreman, placed the cut tules on the bank of the ditch, there to remain until the same should be removed or destroyed. Following the rainstorm of February 9th to 12th, inclusive, in 1922, a large portion of the land in the district was inundated. The water covered from 10,000 to 12,000 acres of land according to one witness, and according to another witness from 40 to 50 per cent. of the entire area of the district was flooded from two to four inches deep, the water eventually running off in the canals. The field superintendent testified that "after the storm broke the canals were plugged up with all kinds of débris. Oil drums, gasoline barrels, boards, timbers, tumble weeds, débris of all description," were taken therefrom. The culvert in the "L-lateral" was clogged with débris, and it was this stoppage of the water that caused the overflowing of the ditch.

The plaintiff contended at the trial that the tules that had been cut by the employees of the district and placed upon the banks of the ditch were caught by the rising waters and floated down to the culvert, and obstructed the passage of the water through it. On the proof of the maintenance of the culvert, the placing of the cut tules upon the banks of the ditch, and the further proof that tules were removed from the culvert in order to release the water through the same, the plaintiff predicates his claim of sufficient proof of negligence against the defendant trustees. The plaintiff saw the water backing up in front of the culvert, and testified that he endeavored to remove the obstruction, but was unable to do so. He noticed that tules were fastened in the head of the culvert, and concluded that the entire obstruction was caused by tules; but employees of the district, who got down into the water and removed the débris, found boards obstructing the flow of water in the pipe. On these boards the tules and weeds had apparently fastened themselves. The evidence was undisputed that the culvert as constructed and maintained was sufficient to carry the maximum flow of the ditch, and there was no proof that the culvert had theretofore been clogged with débris or had theretofore caused an overflow of the ditch.

[1-4] Assuming that the employees of the district working under the foreman were negligent in placing the cut tules on the bank of the ditch in such a way that during the storm they were caught by the rising waters and carried on to the culvert, thereby contributing to the obstruction and the consequent overflow, there was no evidence whatever in the record, either directly or by reasonable inference, that the defendant trustees knew anything at all about such action on the part of said employees in doing the work. Nor was there any evidence that the method followed by the said employees in disposing of the cut tules was directed or countenanced by or known to the trustees prior to said rainstorm and flood. Under these circumstances the negligence, of which we have assumed the employees were guilty, could not be imputed to the trustees of the district under well-established law of this state. The trustees were the agents of the district, a public corporation. The field superintendent and foreman of the crew were subordinate agents employed in the service of the common principal, the reclamation district. Section 2351 of the Civil Code provides:

> "A subagent, lawfully appointed, represents the principal in like manner with the original agent; and the original agent is not responsible to third persons for the acts of the subagent."

The trustees in the case at bar were in the position of original agents, as contemplated by the statute. As such original agents they were not liable to the plaintiff, a third person, for the negligence of their coservants or agents, except under circumstances which do not here appear. The rule laid down or approved by the decisions in this state is that an agent is not in general liable to third persons for the misfeasance or malfeasance of a subagent employed by him in the service of his principal, unless he is guilty of negligence in the appointment of such subagent, or directs or authorizes the particular wrongful act of the subagent, or improperly co-operates in the latter's acts or omissions. Dobbins v. City of Arcadia, 44 Cal. App. 181, 186 P. 190; Baisley v. Henry, 55 Cal. App. 760, 204 P. 399. The defendant trustees can be held liable under the facts shown herein only by reason of the application of the doctrine of respondeat superior. This doctrine has no application as between a public officer and his subordinates, who are likewise in the public service, unless the public officer has directed or countenanced the tortious acts to be done, or has co-operated therein. Michel v. Smith, 188 Cal. 199, 205 P. 113; Whiteman v. Irrigation District, 60 Cal. App. 234, 212 P. 706. As the record herein does not disclose that the defendant trustees directed or co-operated in or knew of the alleged acts of negligence on the part of the subordinate agents and employees of the district, or were at all remiss in the matter of their appointment, the evidence was wholly insufficient to support the verdict.

The case of Perkins v. Blauth, supra, and the case of Proper v. Sutter Drainage District, supra, so strongly relied upon by the plaintiff, are not controlling. In the Perkins Case the defendant trustees in their official capacity entered into a contract on behalf of the district for the doing of the particular work involving the tortious act that caused the damage. In the Proper Case the defendant trustees knew of the defective condition of the ditch or lateral from which the plaintiff's land was flooded, and continued its use in that condition, with knowledge of the defects which had resulted in a prior flooding of the same land. With such knowledge they failed to control the cause so as to prevent it from inflicting further injury. In neither case was the doctrine of respondeat superior applied or applicable, for negligence was brought home to the trustees themselves.

Other points need not be discussed. The judgment is reversed.

We concur: PRESTON, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.

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204 Cal. 582

PEOPLE v. HARDWICK. (Cr. 3087.)

Supreme Court of California. July 18, 1928.

1. Assault and battery 🔑64—Peace officer in arresting for misdemeanor need not retreat before using extreme measures to prevent receiving injury, but must press forward to accomplish his purpose.

While a private citizen may be obliged to retreat to avoid the necessity of resorting to extreme measures to prevent receiving great bodily injury, a peace officer in making an arrest for a misdemeanor is not under such compulsion, but must press forward to accomplish his purpose.

2. Assault and battery 🔑96(2)—Jury should have been instructed that defendant in making arrest for misdemeanor was not obliged to retire to avoid conflict.

In prosecution for assault with a deadly weapon, under evidence that defendant was endeavoring to make an arrest for a misdemeanor, jury should have been instructed he was under no obligation to retire in order to avoid a conflict.

3. Criminal law 🔑757(6)—Instruction that witness convicted of felony was less likely to be truthful than one not so convicted held reversible error.

In prosecution for assault with deadly weapon, where to impeach defendant as a witness evidence was introduced that he had been convicted of manslaughter in Oklahoma, instruction that one convicted of felony is less likely to be honest and truthful in his testimony than one who has not been convicted *held* reversible error, where credibility of witness was for jury and court was unauthorized to suggest as matter of law that former conviction deprived witness of credit presumptively due him.

4. Criminal law 🔑823(12)—Error in charge on credibility of witness convicted of felony held not cured by general statement jury were sole judges of evidence.

In criminal prosecution, where evidence that defendant was convicted of manslaughter in Oklahoma was admitted to impeach his credibility as a witness, error in instruction that one convicted of felony was less likely to be honest and truthful in testimony than one not so convicted *held* not cured by general instruction that jury were sole and exclusive judges of effect and value of evidence.

5. Witnesses 🔑345(4)—Pardon of witness convicted of felony is admissible and to be considered by jury in determining his credibility.

In criminal prosecution, where conviction of defendant of felony is admitted to impeach him as a witness, if pardon has been granted him, it is admissible in evidence so that jury may determine his credibility thereafter.

6. Witnesses 🔑345(4)—Whether witness convicted of felony was wrongfully convicted cannot be inquired into because of admission of pardon on issue of credibility.

In criminal prosecution, where conviction of witness of felony is admitted as affecting his credibility, if pardon is introduced in evidence, whether conviction was wrongful may not be inquired into, since to do so would require examination into collateral matter.

7. Criminal law 🔑778(3)—Instruction that presumption of innocence continues throughout trial should always be given.

In criminal prosecution, charge that presumption of innocence continues with defendant throughout trial and deliberations of jury should always be given.

In Bank.

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Joe Hardwick was convicted of assault with a deadly weapon, and he appeals. Reversed.

For opinion of District Court of Appeal, see 260 P. 946.

Edgar B. Hervey and M. W. Conkling, both of El Centro, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Elmer W. Heald, of Brawley, for the People.

PER CURIAM. The petition for a hearing in this court after decision by the District Court of Appeal, Second Appellate District, Division 2, was granted. Further consideration of the record and of the points involved has persuaded us of the correctness of the conclusions expressed by the District Court of Appeal. We therefore adopt the opinion of the District Court of Appeal, of which Mr. Justice Thompson is the author, as the opinion of this court. The opinion is as follows:

The defendant was convicted of assault with a deadly weapon upon William A. Taylor and appeals from the judgment of the court pronounced upon the verdict and from an order denying his motion for a new trial.

The undisputed facts are that on the evening of February 3, 1927, Taylor, in company with his wife and six male companions and their wives, had been at the Climax Café in Mexicali, Mexico, from about 7:30 in the evening, eating, drinking and dancing; that about 8:50 p. m. they recrossed the international line into Calexico, Cal.; that upon their arrival in Calexico they separated into two groups of seven each, for the purpose of driving home in two automobiles; that very soon after Taylor and a Mrs. Booker seated themselves in one of the machines, the defendant, who was a peace officer, approached the automobile and demanded that they not make so much noise; that in the conversation which immediately ensued the defendant said in effect that he ought "to throw" Taylor "in"; that Taylor demanded to see Hardwick's authority; that Hardwick grabbed Taylor in an effort to pull him out of the machine and shortly after shot him; that the bullet entered the body near the left nipple and lodged under the skin in Taylor's back, whence it was subsequently removed; that after the shooting Taylor was taken into the police station, where the officers secured the services of a physician. This, in substance, comprises the undisputed facts. There is a sharp conflict on other matters. The defendant and several of his witnesses testified that the party returning from Mexico was very noisy and boisterous. The defendant asserts that his attention was attracted to the car in which Taylor and Mrs. Booker were sitting by the noise made by a woman and that as he approached it he heard her exclaim, "Oh! Oh!" "Quit; let me alone!" several times. Appellant further testified that when Taylor demanded his authority he threw back his coat and displayed his badge, not once but twice; that after he tried to pull Taylor out of the machine Taylor made a move with his right hand toward his right hip pocket as though to draw a gun, accompanying the move with profanity; and that he, being fearful of his life, shot. He testified further that the only members of Taylor's party in or at the automobile were Taylor and Mrs. Booker. He was corroborated in this testimony by his nephew, who said that he heard a woman screaming; that his uncle went over to see what the trouble was and a few minutes later called him and his cousin, Roly Hardwick, over there, saying something about trouble; that he saw his uncle show Taylor his badge, saw the attempt to pull Taylor out of the automobile, followed by the motion of Taylor as though to draw a gun, and saw the shooting; that Roly was there with him until he was told by his uncle to get a policeman and get him quick; and that no member of Taylor's party was present except Taylor and the one woman. The testimony of the people's witnesses may be fully illustrated by stating in substance the testimony of Taylor, who was corroborated in all important points by four of his witnesses who claimed to have been in a position to see and hear. He testified that Mr. and Mrs. Smith and Mrs. Jones branched off from his party of seven, the three of them going to the rest rooms of a Shell Oil Company station near by and did not come up to the car until about the time that he told the defendant that he was not aware of the fact that they were making any noise and also told the defendant to leave the young lady "out of the conversation"; that Hardwick at no time placed him under arrest or showed him an emblem of authority; that after his refusal to show his authority he resisted the defendant when he tried to pull him out of the car, whereupon Hardwick called out, "Come over here, you fellows," and after a few more words, pulled his gun and shot.

The appellant's first complaint is the refusal of the court to give the following instruction:

> "An officer having legal authority to make an arrest who is resisted by the person whom he attempts to arrest is under no obligation to wait for assistance or retire in order to avoid a conflict with the person he thus attempts to arrest, or to retire in order to avoid injury at the hands of any such person whom he attempts to arrest, or to wait for assistance in the making of any such arrest by reason of any resistance offered, and that *it is the duty of all persons who commit any crime be it felony or misdemeanor in the presence of an officer to peacefully submit to arrest and not to offer any resistance.*" (Italics ours.)

The court refused to give the instruction in toto, but did give the italicized portion, and also gave an instruction, a portion of which reads as follows:

> "If you believe from the evidence in this case that Taylor, at the time of his arrest, if he was arrested, or at the time defendant was approaching the car which Taylor and Mrs. Booker had entered, was drunk or committing a disturbance of the peace or any other public offense, then and in either such case it was the duty and right of the defendant to arrest Taylor, and for that purpose he was authorized to use whatever force was necessary to take Taylor into custody, and if Taylor resisted such arrest, and in the course of such resistance threw back his hand as if to draw a gun, and if from that act and other circumstances in the case the defendant honestly believed, and, as a reasonable man, had good cause to believe, that he was in imminent danger of suffering death or great bodily harm at the hands of Taylor, then the defendant was justified in shooting Taylor for the purpose of disabling or killing him, if that appeared to be necessary in order to protect himself, and in such case the defendant would not be accountable, and you should acquit him even though it should afterwards appear that Taylor was unarmed, and that the indication on which the defendant acted was wholly fallacious, and that he was not in actual peril. On the other hand, if, after considering all of

the evidence in this case, you believe, beyond a reasonable doubt, that Taylor had neither committed, nor was in the act of committing, any public offense at the time the defendant approached the car on the night in question, then the arrest of Taylor by the defendant, if he was arrested, would be unlawful, and Taylor would have a right to resist such unlawful attempt to arrest him, though he would not have a right to resort to extreme measures such as using a gun, or other dangerous weapon in such resistance, unless circumstances existed at the time the arrest was being attempted which were reasonably sufficient to justify him in the belief that he was about to be injured in body or limb, or that his life was in danger from the defendant. If the arrest of Taylor was unlawful and was made without probably [sic] cause, or, if the arrest was made by the defendant in bad faith and for the purpose of oppression, then and in either such case the defendant, as between himself and Taylor, would be the first aggressor, and the defendant would not be permitted under the law to justify his act of shooting Taylor on the ground of self-defense, unless he had in good faith, before he fired the shot that wounded Taylor, desisted from all threats, if any, and all acts of violence, if any, and had withdrawn from his attempt to arrest Taylor, if he was attempting to arrest him."

There was another instruction which stated the conditions under which the right of self-defense may be asserted, including the following:

> "That the party may not himself be the first aggressor, or, if the aggressor, that he has in good faith withdrawn from the contest before the fatal blow."

[1, 2] It is the claim of appellant that in these instructions, together with others which define with greater particularity the element of apparent necessity to resort to extreme measures to prevent receiving great bodily injury, the trial judge overlooked the distinction between a peace officer and a citizen; that while the citizen may be obliged to retreat to avoid the necessity, that the officer is under no such compulsion, but rather is obligated to press forward for the accomplishment of his purpose. There can be no doubt that appellant's statement of the law is correct, but in this connection we must bear in mind that there is a substantial difference, in using an undue amount of force to prevent escape, from that of using all the force necessary to overcome resistance. In Krueger v. State, 171 Wis. 566, 177 N. W. 917, it is said that:

> "While in order to apprehend the person charged with a misdemeanor only an officer may not take the life of the person so charged, it does not follow by any means that any resistance offered to the arrest may not be overcome to the extent of taking life, if that be necessary to overcome the resistance. * * * It was not only his privilege but his duty to overcome such resistance, and the taking of life necessary to do so constitutes justifiable homicide under section 4366, Stats."

And in State v. Dierberger, 96 Mo. 666, 10 S. W. 168, 9 Am. St. Rep. 380, the court says:

> "The officer must of necessity be the aggressor. His mission is not accomplished when he wards off the assault. He must press forward and accomplish his object. He is not bound to put off the arrest until a more favorable time. Because of these duties devolved upon him the law throws around him a special protection."

Further quotations might be added to the same effect from the old books of the common law, which are to-day accepted as guides to our modern law. See quotations and citations, Bishop's New Criminal Law, vol. 2, §§ 647 et seq. Under this state of the law the jury should unquestionably have been told, in view of the testimony which justified them in believing that the defendant was endeavoring to make an arrest for a misdemeanor, that he was under no obligation to retire in order to avoid a conflict. They were informed that before the defendant could possibly be justified in the use of a deadly weapon he could not have been "the first aggressor, or, if the aggressor, that he" had "in good faith withdrawn from the contest before the fatal blow." As is stated in the quotation from State v. Dierberger, supra, the officer must under the law be the aggressor. The court endeavored, however, to define what was meant by the term aggressor as used in the instruction by saying that if the arrest were unlawful or oppressive the defendant would be the first aggressor. Did the jury understand from this that the defendant in the eyes of the law would only be the aggressor in the event of an unlawful attempt to make an arrest? Ordinarily, it may be said that the statement of one instance where the person would be an aggressor would not conclude the possibility of his being an aggressor otherwise. However, as a part of this same instruction, the jury were told that if Taylor was in fact committing any offense at the time of the attempted arrest, "it was the duty and right of the defendant to arrest Taylor, and for that purpose he was authorized to use whatever force was necessary to take Taylor." Reading the two portions of these instructions together, we think the jury could gather no other idea than the one that only in the event the attempted arrest were unlawful or oppressive would the defendant be the aggressor, and that otherwise it was his duty to press forward and make the arrest, using all the force necessary to accomplish that purpose.

[3] During the trial of the defendant, who was a witness, evidence was introduced, for the purpose of impeachment, establishing that the defendant had been convicted of the offense of manslaughter in the state of Oklahoma, and thereafter the defendant sought to introduce an unconditional pardon by the Governor of that state in which it is recited that the defendant was first granted a parole

on the recommendation of the board of prison control, and that "since the granting of said parole" the defendant has "lived the life of a good, upright, law-abiding citizen, and as such is entitled to a full pardon." The court excluded the pardon and in connection with this phase of the case instructed the jury as follows:

> "Where the defendant in a criminal case, testifies as a witness in his own behalf, he may be impeached by showing that he has been convicted of a felony, if such is the fact; and such showing may be made by examination of the defendant himself or it may be shown by the record of the judgment of the conviction. Such impeachment affects only the credibility of the witness. It is permitted upon the theory that a man who has been convicted of a felony is less likely to be honest and truthful in his testimony than a man who has not been convicted of a felony. It does not, however, impeach the character of defendant for the peace and quiet, or prove, or tend to prove, in any way, the charge upon which he is on trial, and no such inference should be drawn from the impeachment or from the judgment of conviction upon which the impeachment is based (Code Civ. Proc. § 2051), and anything said or done in the presence of the jury concerning a pardon, which may or may not have been granted to defendant, it having been stricken from the record, is of no consequence in this case, and must be disregarded by the jury, as must all other evidence which has been ruled out or stricken, or to which objections have been sustained."

Counsel complains of the action of the court in this respect for two reasons: First, that the court erred in giving the instruction, and particularly that portion in which it is stated that one "who has been convicted of a felony is less likely to be honest and truthful in his testimony" than one who has not been convicted, asserting that the court should have given a requested instruction to the effect that it is for the jury, and the jury alone, to say what effect the conviction will have upon their mind; second, that, the conviction being admitted, the pardon was admissible, together with the circumstances attending the conviction. He also asserts that the record disclosing that the district attorney having knowledge of the pardon, it was prejudicial error for the district attorney to mention the conviction before the jury. However, inasmuch as appellant concedes the admissibility of the conviction regardless of the pardon, it is impossible to conceive any legitimate reason why the district attorney should not mention the conviction.

Should the court have given that portion of the instruction just mentioned and refused to give the following instruction:

> "A previous conviction of a felony does not necessarily destroy the credibility of any witness, nor does it raise a presumption that the witness has or will testify to that which is false. It is simply a circumstance of more or less weight which you are authorized to take into consideration in determining what credit shall be given to him with respect to his testimony."

[4] It is not debatable that the instruction asked by defendant correctly states the law applicable to the situation. It was for the jury to say, in view of all the circumstances, what credit should be given the witness, and the court has not the authority to suggest that, "as a matter of law," a former conviction "deprived the particular witness of any portion of the credit presumptively due to the testimony of witnesses [sic]." People v. McLane, 60 Cal. 412. It has been held that the effect of a former conviction, where introduced for the purpose of impeachment must be left to the jury. Leventhal v. Home Ins. Co. (Sup.) 165 N. Y. S. 323. But here the trial judge in no uncertain terms informed the jury that the witness was not entitled to the same credibility as one who had not been convicted. And in so far as he did so he stepped beyond the judicial function and attempted to discharge the duty of the jury. This he could not do, nor was the error cured by a general statement included in the instruction usually if not always given, to the effect that the jury are the sole and exclusive judges of the effect and value of evidence. In this instance they were given to understand that, as a matter of law, a person who has been convicted is deprived of a part, at least, of the credibility presumptively due the witness. We have heretofore recited sufficient of the testimony to disclose that the testimony was in sharp conflict and that had the jury not been misinstructed the trial might have terminated otherwise. We cannot say that the error is not prejudicial or that it has not resulted in a miscarriage of justice.

While the error found to exist requires a reversal, yet, in view of the fact that the admissibility of the pardon will probably arise on a retrial, we must determine the law upon that question.

[5, 6] In our consideration of the problem thus presented, and especially at a period in our civic development when there is being given great attention to procedural reform in an effort to secure sure and speedy justice, with the hope that it will result in a lessening of the commission of crime, it is most desirable that we realize that while the certain and swift conviction of the guilty is an end "devoutly to be hoped for," yet, more important still, in the aim to free the citizens from violence, is the certain acquittal of the innocent. It is obvious that whenever in any country, in a mistaken zeal for conviction, the administration of the law has reached a point where the innocent are not safe, that respect and reverence for institutions and regard for the rules of social intercourse are blighted. There is no surer avenue to the increase of social crimes than for the state to permit the punishment of those who are not guilty. Long ago it was discovered that convictions were sometimes had where there was a doubt concerning the guilt, and that sometimes a man was guilty who was not really

bad at heart and who evinced a sincere desire to atone for his misdeed. Such persons were fit subjects for pardon by the crown, in much the same manner as many persons who may have rebelled under a sense of grievance, mistaken or otherwise, were proper objects of a general amnesty. And as a general amnesty blots out the offense from the memory, so we find the early authorities concerning pardons making like statements. In Hay v. Justices of the Tower, 24 Q. B. 561, we read from Baron Pollock's opinion:

> "By the prerogative of the crown the pardon extends far beyond the mere discharge of the prisoner from any further imprisonment. It is a purging of the offense. The King's pardon, says Hale, 'takes away poenam et culpam.' 2 P. C. 278. This points to the character, condition and status of the convict. Again, in 2 Hawkins, P. C., s. 48, the author says that pardon 'does so far clear the party from the infamy and all other consequences of his crime that he may not only have an action for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness. * * *'"

And Justice Hawkins, in his opinion in the same case, says:

> "I cannot believe that it was the intention of the Legislature that if a man had the great misfortune to be *wrongly convicted, and was pardoned on the ground that the conviction was wrong*, the queen's pardon, although absolving him from the pains of imprisonment, should nevertheless leave him to suffer the penal effect of his conviction by being prevented in future from following his avocation, notwithstanding the rectification of the error which had occurred." (Italics ours.)

And in an earlier case (Cuddington v. Wilkins, 1 Hob. 67, 80 English Rep. [Full reprint] 216), which was an action for slander by Cuddington, who had been convicted of larceny and subsequently pardoned, against Wilkins, who called the plaintiff a thief and attempted to justify his words by the conviction, it was held that the plaintiff was entitled to recover, because "the felony is by the pardon extinct." Later, in the case of Osborn v. U. S., 91 U. S. 474, 23 L. Ed. 388, Mr. Justice Field, delivering the opinion of the court, says:

> "The pardon of that offense necessarily carried with it the release of the penalty attached to its commission, so far as such *release was in the power of the government, unless specially restrained by exceptions embraced in the instrument itself*." (Italics ours.)

And in Oklahoma, where the defendant in this case was formerly convicted and pardoned, we find that:

> "Pardon reaches both the punishment prescribed for the offense and *the guilt of the offender; it obliterates, in legal contemplation, the offense itself*, and hence its effect is to make the offender a new man." (Italics ours.) Ex parte Collins (Okl. Cr. App.) 239 P. 696, citing Ex parte Crump, 10 Okl. Cr. 133, 135 P. 428, to the same effect.

Mr. Chief Justice Wallace, in discussing a restoration to citizenship as distinguished from a full pardon, in the case of People v. Bowen, 43 Cal. 439–443 (13 Am. Rep. 148), says:

> "It did not purport to remove the guilt of Davis, nor wipe away the infamy by the law of the land attaching upon him by reason of his conviction. It sought to restore him to all the rights of citizenship possessed by him before his conviction of the offenses 'above referred to,' and to so restore him, while he yet remained a convicted felon, and with the consequent legal infamy attaching by law to that status. The stain of his iniquity flowing from his conviction, is still left upon him by the executive. The judgment of the law upon that fact is that the credit of his oath is so absolutely and effectually destroyed that he cannot be trusted to testify at all; that it is not to be hoped that he will speak the truth, but must be conclusively assumed that he will not. *If the judgment be reversed, the disability is, of course, necessarily removed; if the offense be pardoned the same consequence, too, would follow.*" (Italics ours.)

Also, in a disbarment proceeding (Matter of Emmons, 29 Cal. App. 121, 154 P. 619), founded upon a conviction of a felony which had subsequently been pardoned, after quoting from Ex parte Garland, 4 Wall, 333, 18 L. Ed. 366, to the effect that pardon not only releases the person from punishment but also blots "out the guilt thus incurred, so that in the eye of the law he is as innocent of that offense as if he had never committed it," and other authorities of like wording, it is said:

> "Notwithstanding that the respondent *at one time stood convicted of a felony* and that the record of conviction might have been used as the foundation for this proceeding while the *judgment of conviction was in force*, it is no longer possible, after the pardon, to disbar him by this statutory proceeding wherein, if it is maintainable at all, judgment must go against him without any opportunity to defend against any present imputation against his moral character." (Italics ours.)

We conceive of this case as being particularly in point, because the record of conviction when introduced for impeachment purposes is a "present imputation against" the "moral character" of the witness.

Basing the opinion in part upon the authority of Sims v. Sims, 75 N. Y. 466, wherein it is held that a conviction in a foreign jurisdiction, if admissible at all, is not conclusive, but may be rebutted by proof of innocence, the court in the case of Sisson v. Yost, 58 Hun. 609, 12 N. Y. S. 373, not only decides that the pardon is admissible, but also that the witness may show "the promptitude with which the pardon itself was granted, the reason why it was granted, and the time when the defendant was discharged," the statement being added that "all these facts would necessarily have had a very important bearing on the question of the credibility to be given to the witness." The judgment was reversed for this error. As long as it remained the law that the witness was disqualified by the conviction there was a unanimity in the decisions that the pardon removed the disqualification. The pardon was consequently always admissible to effect the removal. Gradually the law was changed in many jurisdictions so that the conviction does not work a disqualification. And with this change has come a small measure of difference in the language of the opinions. The only authority which we have been able to discover wherein the pardon was refused admission by the court of last resort is the case of Gallagher v. People, 211 Ill. 158, 71 N. E. 842, and although the appellate court in a former hearing of the same matter, then entitled O'Donnell v. People, 110 Ill. App. 250, decided that the pardon was admissible on the ground of "common fairness to the witness," the Supreme Court dismissed the argument with these words:

> "Under the statute" (permitting the conviction for impeachment purposes only) "the guilt or innocence of the defendant of the crime for which he had been convicted, his punishment, his term of service, etc., are wholly immaterial and incompetent. That he may have been pardoned proves nothing as to his credibility, and to permit evidence of that fact would simply be to introduce into the case a collateral issue."

This statement is at variance with the history of the reason for and the effect of a pardon. Respondent relies upon a statement in the case of People v. Mackey, 58 Cal. App. 123, 208 P. 135, but the question there was whether one who had pleaded guilty and been granted probation and served his probationary period might be confronted with the record, and it was held that he could not. The declaration that, "although the grant of a pardon makes a 'new man' of the pardoned individual, his manhood is not revived to the extent that he may not be confronted with the record of his conviction whenever he testifies as a witness," although obiter, correctly states the great weight of authority, concerning which we might have grave doubt, were it not for section 2051, Code of Civil Procedure, and the almost unanimous voice of the decisions. It does not, however, decide the inadmissibility of the pardon. Counsel attaches considerable importance to the remarks of the district judge in the case of Wallamet R. T. Co. v. Oregon S. N. Co., 29 Fed. Cas. 88 (No. 17,106) to the effect that:

> "It is, or certainly was at the date of this pardon, an ex parte proceeding, taken upon the ex parte statements, representations and solicitations of sympathizing friends and interested and uninformed parties, and cannot be said to prove anything except its own existence and the fact that the party was entitled to have, or had the influence requisite to procure the application of the executive clemency to this case. A pardon does not profess to be a reversal of the judgment of conviction, but only a relief from the punishment imposed by it. In every other respect the judgment stands as if no pardon had been granted."

This statement is certainly in sharp contrast with the opinions heretofore noted from the United States Supreme Court and does not fit as well with our notion of official duty performed by the executive as another found to have been quoted from 1 Starkie's Ev. (7th Am. Ed.) 99, in the case of Bennett v. State, 24 Tex. App. 73, 5 S. W. 527, 5 Am. St. Rep. 875:

> "And although a pardon cannot convert a wicked man into an honest one, and confer credibility upon one who through the infamy of his conduct is not credible, yet such a pardon must be presumed to have been conferred after inquiry, upon good and sufficient ground, on an object worthy of the indulgence, and therefore worthy of being heard, but the degree of credit is still to be left to the jury."

From this rather lengthy résumé of the authorities it is apparent that sound reason and a proper sense of justice dictate that the jury should be left to determine the credibility of the witness after having laid before it the pardon; that while the subject of the wrongful conviction, if such in fact it was, may not be inquired into, because that would require a lengthy examination into collateral matters, nevertheless the pardon is a proper subject of evidence.

[7] We have examined the other assignments of error, but find nothing requiring further comment other than to say that the instruction, in substance, that the presumption of innocence continues with the defendant through the trial and the deliberations of the jury should always be given. People v. Ye Foo, 4 Cal. App. 730, 89 P. 450.

Judgment and order reversed.

204 Cal. 515

CAMPANELLA v. CAMPANELLA.
(L. A. 7899.)

Supreme Court of California. July 16, 1928.

1. Judgment 🔑570(5)—Judgment dismissing suit, without findings and without judgment roll disclosing grounds, and disclosing that ruling was not on merits, held no bar to subsequent action.

Where court dismissed action by one partner against another to rescind land sale contract without making findings, and judgment roll did not disclose grounds on which dismissal was had, and disclosed that no ruling on merits was made, and no motion for dismissal was shown by record, *held*, judgment of dismissal was not res judicata as respects subsequent action for damages for the deceit.

2. Judgment 🔑570(5)—Generally judgments of dismissal are not on merits, and do not operate as bar or estoppel, unless judgment necessarily involves same matters.

Generally judgments merely of dismissal, whether voluntary or involuntary, are not on the merits, and do not operate as a bar or estoppel in subsequent proceedings involving same matters, unless it appears that judgment necessarily involves those matters.

3. Judgment 🔑197—Where case is dismissed without evidence having been offered, it is error to render judgment on merits.

When a case is dismissed without evidence having been offered, it is error to render judgment on the merits, as there is nothing before the court on which to base any findings determinative of issues.

4. Judgment 🔑540—There must have been right adjudicated or released to constitute judgment a bar or estoppel to subsequent proceedings; "estoppel by judgment."

To constitute the judgment a bar or an estoppel to subsequent proceedings, there must have been a right adjudicated or released in the first suit.

5. Judgment 🔑570(1)—Dismissal because of wrong forum, form of proceeding, or remedy, defects in pleadings or parties, want of jurisdiction, or because suit was premature, does not operate as bar or estoppel.

A judgment of dismissal of a cause for the reason that plaintiff has chosen the wrong forum or form of proceeding or remedy, or because of defects in pleadings or parties, or for want of jurisdiction, or because suit was prematurely brought, will not operate as a bar or an estoppel to subsequent suit.

6. Election of remedies 🔑1—Doctrine of election of remedies will be applied, where disadvantage which may be caused by change of remedy will be real injury.

Courts will apply the doctrine of election of remedies when, under the well-settled principles of estoppel, the disadvantage which may be caused an adverse party by change in remedy amounts to a real injury.

7. Election of remedies 🔑9—Where action to rescind partner's land sale contract was dismissed, not on merits, plaintiff was not precluded from maintaining subsequent action for damages.

Where one partner sued another party to rescind land sale contract and for damages, and action was dismissed, not on the merits, *held*, that plaintiff was not precluded from maintaining subsequent action for damages for partner's fraud and deceit in connection with such contract, on theory that prior action constituted a conclusive election.

8. Appeal and error 🔑854(6)—Order granting new trial in general terms will be affirmed, if it could properly have been granted on any ground on which motion therefor was predicated.

When trial court's order granting a new trial is general in its terms, it will be affirmed, if it could properly have been granted on any of the grounds on which motion for it was predicated.

9. Appeal and error 🔑977(3)—Order granting new trial will not be disturbed on appeal, except for clear and manifest abuse of discretion.

Order granting new trial will not be disturbed on appeal, except on a showing of clear and manifest abuse of discretion on the part of the trial court.

10. Fraud 🔑58(1)—New trial 🔑77(2)—Evidence held to sustain damage award for partner's deceit respecting selling price of land, and new trial because of passion or prejudice of jury not warranted (Code Civ. Proc. § 657, subd. 5).

In action by one partner against another in damages for deceit for misinforming plaintiff as to price received for land owned in common by partners, evidence *held* sufficient to sustain jury's finding for plaintiff, and damages awarded, and trial court's action in granting new trial could not be sustained, on ground that damages awarded were so excessive as to suggest passion or prejudice, under Code Civ. Proc. § 657, subd. 5.

11. New trial 🔑76(1)—Unduly excessive verdict is unsupported by evidence; "insufficiency of the evidence" (Code Civ. Proc. § 657, subd. 5).

Verdict which awards damages so excessive as to suggest passion or prejudice on part of jurors, under Code Civ. Proc. § 657, subd. 5, is one, in part, at least, unsupported by the evidence; "insufficiency of the evidence" meaning want of evidence, as well as contrary to the weight of the evidence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Insufficient Evidence.]

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Felice Campanella against Victor Campanella. Judgment for plaintiff, and he appeals from an order granting a new trial. Reversed.

Superseding opinion in 265 P. 327.

Canepa & Castruccio and W. W. Wallace, all of Los Angeles, for appellant.

Massey & Massey, George S. Hupp and Hunsaker, Britt & Cosgrove, all of Los Angeles, for respondent.

PRESTON, J. We are satisfied with the conclusion of the learned District Court of Appeal (265 P. 327) in this cause and adopt a part of its opinion herein:

"This is an action in damages for deceit. Judgment was entered against defendant for $3,958.33 and costs on the verdict of a jury. Defendant moved for a new trial, his motion was granted, and plaintiff appealed.

"In his second amended complaint, plaintiff alleged that he and defendant and one Giovanni Gai were the owners of 167½ acres of land as tenants in common, each owning a one-third interest; that they had been partners in manufacturing wine; that defendant was the managing partner, and conducted most of the business of the partnership; that plaintiff and defendant were cousins; that the partners agreed to sell the land, and that defendant should procure a purchaser; that defendant represented to plaintiff that he had received an offer of $29,312.50 for the land, and that he could obtain no higher offer; that plaintiff reposed great confidence and trust in defendant, and believed defendant, and believed that the land was worth no more than the amount of the alleged offer, which confidence and belief were known to defendant; that, so believing, and at defendant's solicitation, plaintiff conveyed his interest in the land to defendant for $10,000; that the representations were false, and were made to deceive plaintiff, the facts being that, before making them, defendant had an offer of $41,875 for the land, and had agreed to sell it for that sum; that the land was worth $54,437.50, and that an accounting of the affairs of the partnership was had before plaintiff learned that the representations were false; and plaintiff prayed for judgment in the sum of $8,145 as the difference between the amount received by plaintiff from defendant and the value of the land, and for interest, costs, $3,000 exemplary damages, and general relief.

"Defendant's answer denied that the three owners had agreed to sell the land; denied the alleged false representations and lack of knowledge on the part of plaintiff, and that defendant had an offer of $41,875, or had agreed to sell the land, before plaintiff conveyed his interest to defendant, and alleged that plaintiff then knew of every offer defendant had obtained; denied that the land was worth more than $30,000, and alleged that before this action was commenced another action had been brought by plaintiff against defendant and Gai, wherein plaintiff had alleged the same matters pleaded by him in this action, and wherein the pleadings had raised the same issues raised in this action, and that, after a trial was had therein, judgment on the merits was rendered against plaintiff, which judgment estopped plaintiff from maintaining this action.

"In an amendment to his answer defendant alleged that by the prior action plaintiff elected to rescind his conveyance to defendant, and that thereby plaintiff was estopped and precluded from maintaining this action or to recover damages in this action. At the trial defendant offered to introduce in evidence the judgment roll in the prior action, which offered evidence was objected to by plaintiff on the ground that it was incompetent, irrelevant, and immaterial, and the objection was sustained.

"Defendant moved for a new trial on the minutes of the court, on the grounds that excessive damages were given under the influence of passion or prejudice, that the evidence was insufficient to justify the verdict, that the verdict was against the law, and that error in law occurred at the trial and was excepted to. On this motion the court made its order granting a new trial and setting aside the verdict and judgment. This appeal was taken from the order.

"In support of the order defendant advances the propositions that (1) the judgment in the prior action was res adjudicata of the matters involved in this action, and is a bar to this action; (2) that in the prior action plaintiff elected to rescind and was thereby precluded from maintaining this action; and (3) that the jury, in awarding the damages, was under the influence of passion and prejudice.

"The complaint in the prior action, which named Gai and defendant, Campanella, as defendants, alleged substantially the same matters pleaded by plaintiff in his second amended complaint in this action, and also that plaintiff had offered to return to defendant the money paid him by defendant for plaintiff's conveyance, and at the same time demanded a reconveyance from defendant, which demand was refused by defendant, and plaintiff prayed for cancellation of the conveyance, for a judgment requiring defendant to reconvey, and for general relief. Gai did not attack this complaint, nor did he plead to it. Defendant, Campanella, demurred to it on the sole ground that it did not state a cause of action. His demurrer was sustained, and plaintiff was permitted to amend.

"There was an amended complaint predicated in damages, which omitted Gai as a party, and plaintiff alleged therein substantially the same matters pleaded in the original complaint, that plaintiff, as such partner, owned a one-third interest in the land of the partnership, and that he was damaged in the sum of $4,175, and he prayed for judgment against defendant, Campanella, in that sum, for $15,000 exemplary damages, for costs, and general relief.

"Defendant, Campanella, answered the amended complaint, denying that the partnership owned the land, admitted that he acted as agent for the other members of the partnership, but only with such powers as existed by reason of his membership in the partnership, alleging that the land was held as tenants in common by the partners, and denying the alleged false representations, the alleged sale or agreement to sell, the alleged offer of plaintiff to return the moneys paid for plaintiff's conveyance, and demand for a reconveyance, or that plaintiff suffered any damage.

"No other attack was made on the amended complaint; but thereafter plaintiff filed his second amended complaint, alleging substantially the same matters pleaded in the amended complaint, except that he pleaded that defendant sold the lands for $41,875, that the partnership affairs had never been settled, and that large sums of money were due the partnership; and praying that the partnership be dissolved, that an accounting be had, that plaintiff be adjudged the owner of one-third of the partnership assets, that a receiver be appointed, that, in the event plaintiff's conveyance to defendant cannot be canceled, plaintiff 'shall receive the difference between $175 per acre (the basis upon which plaintiff conveyed to defendant) and $250 per acre (the price at which defendant had sold the land) for his one-third interest' in the land, that the partnership's assets be sold and the net proceeds be divided, and for general relief.

"Defendant demurred to this second amended complaint. This demurrer was ordered off calendar, and on the day the order was made, the court made its judgment as follows:

" 'This matter coming on to be heard the 5th day of January, 1921, upon a motion to strike the second amended complaint from the files, Messrs. Canepa & Castruccio appearing for the plaintiff, and H. A. Massey and Geo. S. Hupp, Esq., appearing for the defendants, and the court having heard the arguments:

" 'Now, therefore, it is hereby ordered, adjudged, and decreed that the second amended complaint be stricken from the files and the said action be and the same is hereby dismissed, and that the defendants have and recover from plaintiff their costs herein expended, to wit $ (written in ink), $58.15.

" 'Done in open court this 8th day of January, 1921. Charles S. Burnell, Judge of the Superior Court.'

"Thereafter the court, without any showing in the judgment roll therefor except the recitals in the judgment, made another judgment as follows:

" 'This cause coming on to be heard the 18th day of January, 1921, upon a motion to strike the second amended complaint from the files, Messrs. Canepa & Castruccio and Wallace appearing for plaintiff, and Messrs. H. A. Massey and Geo. S. Hupp appearing for the defendants, and the court having heard the arguments:

" 'Now, therefore, it is hereby ordered, adjudged, and decreed that the second amended complaint be stricken from the files without leave to amend, and that the said action be and the same is hereby dismissed, and that the defendants, and each of them, have and recover from the plaintiff their costs herein expended, to wit, $31.50.

" 'Done in open court this 24th day of January, 1921. Charles S. Burnell, Judge of the Superior Court.'

"There were no findings of facts, and the judgment roll does not disclose upon what grounds the second amended complaint was stricken, nor for what reason the action was dismissed. No motion for dismissal of the action is shown or otherwise indicated by the record.

"Defendant contends that the judgments of dismissal in the prior action were res adjudicata of the matters involved in this action, and barred and estopped plaintiff from maintaining this action. Plaintiff contends that, as neither of the judgments purports to have been made on the merits of the cause, neither is a bar to the present action. The two judgments in the prior action are essentially the same in form and substance, and for the purposes of this opinion they will be referred to as 'the judgment.' "

[1-5] It is clear that the judgment is not res adjudicata and therefore not a bar to the present action nor an estoppel upon any issue therein and that the ruling refusing to admit the judgment roll in evidence was proper. The judgment roll not only fails to show a ruling upon the merits but discloses that no such ruling was made. The following from the opinion of the District Court of Appeal is in point:

"Generally, judgments merely of dismissal, whether voluntary or involuntary, are not on the merits, and do not operate as a bar or estoppel in subsequent proceedings involving the same matters, unless it appears that the judgment necessarily involves those matters. Oakland v. Oakland Water Front Co., 118 Cal. 160, 222, 50 P. 277; Hubbard v. Superior Court, 9 Cal. App. 166, 98 P. 394; Bell v. Solomons, 162 Cal. 105, 110, 121 P. 377; Johnston v. Baker, 167 Cal. 260, 263, 139 P. 86; 18 Cor. Jur. 1200; Freeman on Judgments, § 753.

"When a case is dismissed without evidence having been offered, it is error to render judgment on the merits. There is nothing before the court on which to base any findings determinative of the issues. The absence of proof on either side could not involve a judicial determination of the merits of the controversy. Freedman v. Sirota, 109 App. Div. 874, 96 N. Y. S. 812. See, also, Kruger v. [Persons] 52 App. Div. 50, 64 N. Y. S. 841. There must have been a right adjudicated or released in the first suit to constitute the judgment a bar or an estoppel. Haldeman v. United States, 91 U. S. 584, 23 L. Ed. 433; Rincon Water & Power Co. v. Anaheim Union Water Co. [C. C.] 115 F. 543, 549, et seq. (Welborn, District Judge).

"If the record of a judgment of dismissal fails to show that the judgment was given upon a consideration of the merits of the controversy, it is not available as an estoppel. The fact that the judgment was made at the instance of the court gives it no greater weight than if it were merely a judgment of nonsuit. The dismissal for the reason that plaintiff has chosen the wrong forum, or form of proceeding, or remedy, or because of defects in the pleadings or parties, or for want of jurisdiction, or because the suit was prematurely brought, will not operate as a bar or an estoppel to a subsequent suit. Oakland v. Oakland Water Front Co., supra; Hogeberg v. Industrial Accident Commission (Cal. Sup.) 256 P. 413."

[6, 7] Respondent contends that by the prior action plaintiff resorted to a conclusive election of remedies, and is now barred from relying upon the present cause of action. This position, too, is without merit. Herdan v. Hanson, 182 Cal. 538, 542, 189 P. 440, and cases therein cited. Under well-settled principles of the doctrine of estoppel, the disadvantage caused the other party by a change of remedy must be a real injury, such as would, in the contemplation of law, amount to an estoppel, and when it is of this character the doctrine of election of remedies will be applied by the courts. Buckmaster v. Bertram.

186 Cal. 673, 678, 200 P. 610; Mansfield v. Pickwick Stages, 191 Cal. 129, 131, 215 P. 389; Roullard v. Rosenberg, 193 Cal. 360, 224 P. 449. Here defendant has not shown or claimed that he suffered any disadvantage by reason of the prior plea in rescission and the subsequent pursuit by plaintiff of the remedy of damages. We hold that plaintiff did not elect his remedy by the prior action.

[8, 9] Lastly, it is contended by respondent that the order granting a new trial may be upheld on the ground that the damages awarded by the jury were so excessive as to suggest passion or prejudice on the part of the jurors (Code Civ. Proc. sec. 657, subd. 5). We are mindful of the rules here applicable, expressed in Scott v. Times Mirror Co., 178 Cal. 688, 690, 174 P. 312, 313, as follows:

> "It is the well-settled rule of this court that when the order of the trial court in granting a new trial is general in its terms, it will be affirmed if it could properly have been granted upon any of the grounds upon which the motion for it was predicated. Weisser v. Southern Pac. R. Co., 148 Cal. 426, 83 P. 439, 7 Ann. Cas. 636; Morgan v. J. W. Robinson Co., 157 Cal. 348, 107 P. 695. It is an equally well-settled and long-established rule of this court that an order granting a new trial will not be disturbed upon appeal, except upon a showing of clear and manifest abuse of discretion on the part of the trial court in respect to granting the same. Harrison v. Sutter St. Ry. Co., 116 Cal. 156, 47 P. 1019; Doolin v. Omnibus Cable Co., 125 Cal. 148, 57 P. 774; Sherwood v. Kyle, 125 Cal. 652, 58 P. 270; Lee v. Southern Pac. R. Co., 101 Cal. 118, 35 P. 572; Meinberg v. Jordan, 29 Cal. App. 760, 57 P. 1005, 1007."

[10] But it can be demonstrated from the record before us that the jury in the present case was influenced by neither passion nor prejudice. In answer to special issues, the jury specifically found that respondent, with a written offer in his pocket of $250 per acre for the property and while acting as the agent of his partner and cotenant, concealed said fact and represented to appellant that $175 per acre was the maximum amount he could get for it, and that relying upon said information so furnished him, appellant deeded his interest in said property to respondent for the sum of $10,000. The jury thereupon rendered a general verdict in favor of appellant for the sum of $3,958.33, and it is clear that this figure was arrived at as follows: 167½ acres of land at $250 per acre amounts to $41,875. One-third thereof is $13,958.33. Subtracting $10,000 from this result leaves the amount of the verdict, to wit, $3,958.33.

It is clear from the evidence, also, that respondent could have obtained this amount for said property, with 6 per cent. interest payable in advance upon the deferred payments. In fact, the record shows that a suit in specific performance was begun against him on account of an alleged contract resulting from said offer. Witnesses fixed the value of the property at $300, $250, $180, and $175 per acre, respectively; $250 per acre was the price fixed by respondent himself, when dealing with third persons, as the value of the property. Had the sale been consummated, appellant could have sued respondent and recovered the identical amount awarded him by the jury.

[11] It is a sacrifice of substance to form to hold that under these facts a sufficient basis may be found for upholding the action of the trial court upon the ground of excessive damages, evincing passion or prejudice on the part of the jury. It is really unfair to the trial court to attempt to explain his action upon that ground, for it is manifest from a reading of the record that the court was of the opinion that the doctrine of res adjudicata controlled the litigation. It may also be seriously doubted whether this contention is open to respondent in view of the fact that the trial court did not specify that the motion for new trial was granted on the insufficiency of the evidence (Code Civ. Proc. § 657; Yoakam v. Hogan, 198 Cal. 16, 20, 243 P. 21), for a verdict unduly excessive is a verdict, in part, at least, unsupported by the evidence. In other words, a deficiency in the evidence must be the basis for every contention that the verdict is excessive or the result of passion or prejudice. In Doolin v. Omnibus Cable Co., 125 Cal. 141, 144, 57 P. 774, 775, it is said:

> "To say that a verdict for damages was enhanced by passion or prejudice is one mode of saying that the evidence did not justify it; and the only means of discovering therein the element of passion or prejudice, within the meaning of the statute, is by comparing the amount with the evidence which was before the court at the trial."

"Insufficiency of the evidence" means want of evidence as well as "contrary to the weight of the evidence." S. P. L. Co. v. Dickerson, 188 Cal. 113, 117, 204 P. 576; Estate of Bainbridge, 169 Cal. 166, 146 P. 427.

The transaction forming the basis of this litigation transpired more than 8 years ago. There cannot be the slightest doubt as to the right of appellant to recover every cent awarded him by the jury, and it seems eminently appropriate that this litigation should now end.

The order granting the new trial is reversed.

We concur: CURTIS, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

204 Cal. 509

GRANUCCI v. CLAASEN et al. (S. F. 11825.)

Supreme Court of California. July 16, 1928.

1. Appeal and error 🔑927(7)—Facts must be most liberally viewed in favor of plaintiff's contention that court erred in directing verdict for defendants.

Facts of case must be most liberally viewed in favor of plaintiff's contention that court erred in directing verdict for defendant at close of trial.

2. Municipal corporations 🔑808(2)—Landowner, having constructed driveway primarily for use with adjacent property, must keep driveway, where superimposed on sidewalk, in safe condition for pedestrians.

Where landowner constructed driveway primarily for use in connection with adjacent property, duty was cast upon landowner and lessee to exercise reasonable care and diligence in keeping of driveway at point where it was superimposed upon sidewalk in proper and safe condition for passage of pedestrians rightfully using sidewalk and driveway superimposed thereon.

3. Landlord and tenant 🔑167(5)—Owner could not relieve herself of duty to keep driveway over sidewalk in safe condition by leasing premises or by contract with lessee.

Landowner could not relieve herself of duty to exercise reasonable care and diligence to keep driveway at point where it was superimposed upon sidewalk in safe condition for pedestrians either by leasing premises or by contracting with lessee for keeping of premises and driveway in proper state of repair.

4. Municipal corporations 🔑821(17)—Negligence of landowner and lessee in failing to keep driveway superimposed on sidewalk in safe condition where pedestrian fell held for jury.

Negligence of landowner and lessee in failing to exercise reasonable care in keeping driveway at point where it was superimposed on sidewalk in proper and safe condition for passage of pedestrians, where pedestrian had caught shoe in some obstruction above surface of driveway and fallen violently forward, *held* for jury.

5. Municipal corporations 🔑808(2)—Landowner and lessee held liable for injuries to pedestrian falling on private driveway over sidewalk without notice from municipality to repair.

Landowner and lessee *held* liable for injuries to pedestrian falling on driveway superimposed on sidewalk without notice from municipality to repair, under provisions of charter, where driveway had been constructed and was being used by defendants primarily as driveway into their premises and for their private use, convenience, and benefit.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action for damages for personal injuries by Rosa Granucci against Mary J. Claasen and another. From a judgment for defendants, plaintiff appeals. Reversed.

Superseding opinion found in 262 P. 345.

J. Maxwell Peyser and Joseph E. Isaacs, both of San Francisco, for appellant.

Andrew F. Burke, of San Francisco, for respondents.

RICHARDS, J. [1] This appeal is from a judgment in favor of the defendants after a directed verdict given and made by order of the court on motion of the defendants at the close of the trial. The action was one to recover damages for injuries sustained by plaintiff while walking upon a wooden driveway superimposed upon the sidewalk in front of the property owned by the defendant Mary J. Claasen, and at the time of the plaintiff's injury and for some time prior thereto being used by the defendant John H. Claasen, Jr., as the lessee thereof from his said codefendant. The facts of the case, which are to be most liberally viewed in favor of the plaintiff's contention by virtue of the action of the court in granting the defendants' motion for a directed verdict are as follows: On February 28, 1922, about midday, the plaintiff was walking upon and along the concrete sidewalk in front of the defendants' premises and was in the act of crossing a wooden driveway which had been constructed upon and within the space in said sidewalk which otherwise would have been occupied by a concrete pavement and which driveway led from the street into the defendants' said premises. While so proceeding, the plaintiff's shoe, caught in some obstruction above the surface of said wooden driveway with the effect that she fell violently forward, as a result of which she sustained certain injuries which form the basis of the present action. One John P. Cuneo, a carpenter, living about 200 feet away from the scene of the accident, and at the moment thereof standing or sitting at a point opposite the place where it occurred, saw the plaintiff lying upon the driveway in question immediately after she had fallen and went at once to her relief. When he stooped to pick plaintiff up he noticed two nails or spikes protruding about from a half to three quarters of an inch above the surface of the driveway, and he also noticed that the boards from which these spikes protruded were loose. The witness took his hammer and drove the spikes back into place, but noticed that they went in easily. The inference is irresistible that it was upon one or other of these protruding spikes that the plaintiff tripped and fell.

The driveway in question had been constructed by the defendant Mary J. Claasen, the sole owner of the adjacent premises, in the year 1912 when a building had been erected thereon and a cement sidewalk laid along Mission street in front of the same, except for a distance of approximately nine feet opposite an entrance at the southerly end of the premises. Upon this nine-foot space the said owner of the premises had caused to be constructed this wooden driveway under a special permit therefor from the board of public works of San Francisco. The driveway was constructed of three by twelve inch Oregon pine planks, laid on top of three by nine inch redwood stringers set sixteen inches apart, which stringers were laid upon the surface of the ground and which driveway when constructed was flush with the level of the cement sidewalk. The premises had been used for several years thereafter as a brewery and the driveway had been constructed and was used during that period for the ingress and egress of the trucks and other vehicles coming and going to said brewery daily. For about two years after the brewery ceased to operate the premises were unused, but thereafter began and continued to be used in connection with a coffee business, which the owner's son and codefendant conducted under a lease from his mother thereon under the name of Eagle Packing Company, and during the period of which use prior to the date of the plaintiff's injuries the said driveway had been used daily by trucks and other vehicles entering and emerging from said premises.

[2, 3] This driveway having been thus constructed and used not primarily for sidewalk purposes but for the benefit and convenience of the said defendants in connection with their adjacent property and which use was one which was independent of and apart from the ordinary and accustomed use for which sidewalks are designed, the duty was cast by law upon the defendants to exercise reasonable care and diligence in the keeping of said driveway at the point where it was superimposed upon said sidewalk in a proper and safe condition for the passage of pedestrians rightfully using said sidewalk and said driveway superimposed by defendants thereon. Monsch v. Pellissier, 187 Cal. 792, 204 P. 224; Du Val v. Boos Bros. Cafeteria Co., 45 Cal. App. 383, 187 P. 767; 20 Ruling Case Law, p. 77, § 68; 13 Ruling Case Law, p. 320; Grand Forks v. Paulsness, 19 N. D. 293, 123 N. W. 878, 40 L. R. A. (N. S.) 1158; Ryder v. Kinsey, 62 Minn. 85, 64 N. W. 94, 34 L. R. A. 557, 54 Am. St. Rep. 623; Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530; Gray v. Boston Gaslight Co., 114 Mass. 149, 19 Am. Rep. 324. The duty which was thus cast upon the defendant Mary J. Claasen, as owner of said premises, continued during the entire period of the presence and use of said driveway in connection therewith and said defendant could not relieve herself of such duty either by leasing the same to her codefendant or by contracting with him by the terms of said lease for the keeping of said premises and said driveway in a proper state of repair. Jessen v. Sweigert, 66 Cal. 182, 4 P. 1188; Village of Jefferson v. Chapman, 127 Ill. 438, 20 N. E. 33, 11 Am. St. Rep. 136; Norton v. St. Louis, 97 Mo. 537, 11 S. W. 242.

[4] From the evidence as thus far presented it appears conclusively, for the purposes of this appeal, that the said driveway at the point where the plaintiff tripped and fell upon it was in a state of disrepair, which, if imputable to the negligence of said defendants, would suffice to entitle this plaintiff to maintain her action. The undisputed evidence disclosed that said driveway during the ten years of its existence, with the exception of a brief intermission, had been used and passed over daily by more or less heavy trucks and horse-drawn vehicles in connection with the use of said premises as a brewery and later as a coffee mill. During that entire period, according to the testimony both of the owner of said premises and of her son, the lessee thereof, the driveway had never been subjected to any sort of repair. The defendant Mary J. Claasen testified that during said period she had frequently observed said driveway and that the same was always in a good state of repair. She does not testify, however, that her inspection of said driveway was to any extent constant or regular or otherwise than casual, as she came and went upon said premises. The testimony of her son, as the lessee of the premises, is substantially to the same effect. There is no evidence, as a matter of course, as to how long the driveway had been in the state of disrepair which was the immediate cause of the plaintiff's injuries, but from the testimony of the witness John P. Cuneo that the spikes which should have held the boards of the driveway firmly in place were protruding as much as three-fourths of an inch and that said boards were loose, it is a reasonable inference that said spikes had gradually worked their way upward and that said boards had been gradually loosened by the operation of heavy vehicles upon and across said driveway, and that a more rigid inspection thereof by the defendants than they or either of them are shown to have exercised would reasonably have resulted in the discovery of the defective condition of said driveway and the repair thereof, to the prevention of the plaintiff's injuries. In a word, we are of the opinion that the state of the evidence was such at the close of the trial and at the time of the defendants' motion for a directed verdict and of the action of the trial court in granting the same and directing such verdict, as would have required the question of the negligence of the defendants to have been submitted to the jury; and, this being so, we reach the conclusion that the trial court was in error in granting the defendants' said motion in or-

dering and procuring the jury to return a directed verdict in the defendants' favor.

[5] It is attempted to be argued by the respondents herein that because said portion of the wooden driveway upon which the plaintiff tripped and fell was a portion of the public sidewalk constructed under permission of the board of public works, the obligation and duty was not upon the defendants, but upon the municipality through its board of public works, of keeping that portion of said sidewalk in repair, and that under the provisions of section 16 of chapter 2 of article 6 of the charter of the municipality the liability of an abutting owner to repair a sidewalk does not arise until there has been a notification so to do from said board of public works, and that since in the instant case there was presented no evidence showing such notification, the owners' duty to repair said sidewalk had not arisen at the time of the plaintiff's injuries. In making this contention the respondents misconceive the meaning and application of the aforesaid provisions of the charter in their relation to the facts of the instant case, since the portion of said sidewalk upon which the defendants' driveway was superimposed was being used by said defendants, not as a sidewalk nor primarily for the use and convenience of the general public, but that the same had been constructed and was being used by the defendants primarily as a driveway into their said premises and for their private use, convenience and benefit. To such a state of facts the decision of this court in the case of Monsch v. Pellissier, supra, has direct application.

It follows from the foregoing that the trial court was in error in directing a verdict in the defendants' favor, and that the judgment entered upon said verdict was for that reason erroneous and must be reversed. It is so ordered.

We concur: CURTIS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.

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204 Cal. 546

STEWART v. STEWART. (L. A. 9554.)

Supreme Court of California. July 18, 1928.

1. Husband and wife ⇒265—Husband is sole owner of community property during marriage, and only interest of wife is mere expectancy as heir.

During the marriage, the husband is the sole and exclusive owner of all community property, and the wife has no title thereto, nor interest or estate therein, other than mere expectancy as heir if she survive him.

2. Husband and wife ⇒247—Law relating to respective interests of husband and wife in community property has no effect as to property acquired prior to effective date (Civ. Code § 161a, as added by St. 1927, p. 484).

Civ. Code, § 161a, as added by St. 1927, p. 484, relative to respective interests of husband and wife in community property during continuance of marriage relation, has no effect as to community property acquired prior to its effective date, whatever its effect on property acquired subsequent thereto.

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Frances Lee Stewart, sometimes known as Fanny Lee Stewart, against Ernest A. Stewart. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

F. S. Reese, of Los Angeles, for appellant.

Ida May Adams, of Los Angeles, for respondent.

Allan G. Wright and Perry Evans, both of San Francisco, Burrel D. Neighbours and F. A. Jeffers, both of Los Angeles, Stoney, Rouleau, Stoney & Palmer, and Knight, Boland & Christin, all of San Francisco, Hill, Morgan & Bledsoe, Kenneth K. Wright, and Stanley S. Burrill, all of Los Angeles, Carey Van Fleet, of San Francisco, Gibson, Dunn & Crutcher, Flint & MacKay, Ingle Carpenter, and J. Wiseman Macdonald, all of Los Angeles, and Dunne, Dunne & Cook, of San Francisco, amici curiæ.

CURTIS, J. This is the second appeal in this action. Our decision of the first appeal will be found reported in 199 Cal. 318, 249 P. 197, where the facts of the case are fully stated, and for that reason it will not be necessary to repeat them here. At the first trial of this action, judgment was rendered in favor of plaintiff, which judgment was reversed by this court. On the going down of the remittitur, the case was again set for hearing. At this hearing no new evidence was introduced, but the case was submitted for decision upon the evidence adduced at the former or first hearing. Thereupon the court again rendered judgment for the plaintiff, from which the defendant has appealed, and the action is now before us on this appeal.

The respondent and the numerous amici curiæ, who appear herein and who unite with respondent in asking for an affirmance of the judgment, rest their case apparently upon two grounds: First, that this court was in error in its former opinion in this matter, wherein it reversed the judgment of the trial court rendered at the first hearing of this case; second, that the present judgment of the trial court is in accordance with the views of this court as expressed in its former opinion. We will consider these grounds in the order stated.

First. This case has been most thoroughly and ably argued by the parties hereto and the amici curiæ appearing herein. This statement applies both to arguments made at the first hearing before us as well as to those on the present appeal. The briefs on file on each of said hearings are before us, and we have carefully examined and compared them. We find with hardly an important exception that the arguments relied upon on the present appeal are those advanced and relied upon on the first appeal. One firm of attorneys appearing as amici curiæ on each appeal, and who filed a most comprehensive and exhaustive brief on the first hearing before us, has on this appeal presented a short brief of eight pages, prefacing the same, however, with the statement that "our position was fully stated in the brief and petition for rehearing filed with this court on the first appeal." We think this statement can well apply to the briefs and arguments as a whole filed in this matter.

The former opinion of this court in this action was arrived at and enunciated only after a most careful and exhaustive study of the briefs and argument of all counsel in the case, supplemented by independent examination of the statutory law of this state and the decisions of this and other jurisdictions relative to the subject of community property. In that opinion we reviewed the decisions of this court from its earliest days down to the time of the rendition of said opinion relating to the rights of the wife in property acquired by the community during the marriage state. We set forth our views therein as to the force and effect and meaning of the several acts of legislation enacted in this state, wherein the respective rights of the spouses in community property acquired by them had been considered or defined. This opinion was concurred in by five members of this court being the whole membership of this court at that time, two of its members having died only a short time before the rendition of said opinion, and their successors not having been appointed until after said decision had become final. All of the members of this court uniting in said decision are among the present members of this court. We have, therefore, the same arguments, based upon precisely the same state of facts presented to the court, largely composed of the same membership as upon the former hearing. Notwithstanding this condition, we have carefully and diligently read and considered the briefs and arguments presented by the parties and the amici curiæ appearing herein. We have endeavored to do so with an open mind, realizing the importance of the question involved, not particularly to the litigants in this action, but to that vastly larger number of persons who may be indirectly affected by the final determination of the issues involved in this appeal. The result of our deliberations thus undertaken is that we are firmly convinced of the correctness of our former decision in this case.

We see no reason why we should modify our views as expressed therein regarding any of the questions determined. We are satisfied with the treatment of the subjects considered therein and the conclusions reached by us in that opinion. It is not necessary for us to set forth in detail our reasons for arriving at this conclusion, for to state them would be in the main but to repeat the language of our former opinion. In that opinion we held that the long-established doctrine of this state was, as reiterated and confirmed by this court in Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537, that the husband was during marriage "the sole and exclusive owner of all of the community property, and that the wife had no title thereto, nor interest or estate therein, other than a mere expectancy as heir, if she survived him." We further pointed out, what was declared in more recent decisions of this court, that legislation enacted subsequent to the rendition of said last-mentioned decision had not in any manner changed or modified said doctrine as to the wife's right in community property acquired in, or prior to, the year 1918, the year the parties hereto purchased the real property described in the complaint herein. We saw no escape from that conclusion at the time of the rendition of that opinion, and nothing has since been brought to our attention to cause us to doubt the correctness of our views as thus expressed. The opinion as then rendered must now stand as a correct embodiment of the views of this court upon the questions therein considered and determined.

Second. It is also contended, by those who appear herein asking for an affirmance of the present judgment entered in this action, that said judgment is in accordance with the views of this court as expressed in its former opinion. The material parts of said judgment are as follows:

> "(1) That said plaintiff now has an interest and estate in and to an undivided one-half of the above described real property.
>
> "(2) That said defendant is entitled to the management and control of said real property during the continuance of the marriage relation of the parties hereto, but neither party hereto can sell, convey, or incumber said real property, or any interest therein, or lease said real property, or any interest therein, for a longer period than one year, except by an instrument in the execution of which both parties hereto shall join.
>
> "(3) That said interest and estate of said plaintiff in and to said real property is a much more definite and present interest therein than the expectancy of an heir apparent of said defendant, and is more than a mere possibility.

"(4) That said interest and estate of said plaintiff in and to said real property is a present right, within the protection of the provisions of section 16 of article 1 of the Constitution of the state of California, and of section 10 of article 1 of the Constitution of the United States.

"(5) That by virtue of said interest and estate of said plaintiff in said real property she will on the death of said defendant take one-half thereof in her own right, and not as his heir, provided said plaintiff survive said defendant.

"(6) That said defendant now has an interest and estate in said real property, by virtue of which he may make testamentary disposition of one-half of said real property, if said plaintiff survive said defendant, and by virtue of which, if said defendant survive said plaintiff, he will take one half of said real property in his own right and the other half thereof as the heir of said plaintiff, unless with respect to the latter one-half the law should otherwise provide.

"(7) That said interests and estates of the parties hereto, in said real property, constitute the community interest of husband and wife referred to in sections 161 and 682 of the Civil Code of the state of California.

"(8) That in the event of the dissolution of the marriage of the parties hereto by divorce, by virtue of their respective interests and estates in said real property aforesaid, they would become tenants in common thereof in equal undivided shares, unless the court having jurisdiction of such a divorce action should otherwise order, if the decree for such a divorce were rendered on the ground of adultery or extreme cruelty.

"(9) That said title, interest, and estate of said plaintiff in and to an undivided one-half of said real property be and the same is hereby quieted as against said defendant."

We think it perfectly obvious, from a mere reading of these portions of said judgment, that said judgment transgresses the letter and spirit of our former decision. By the first paragraph of said judgment the plaintiff, the wife, is decreed a present interest and estate in the community real property described therein. In practically every other paragraph, especially those purporting to describe the wife's interest in said community property, the same false note is sounded. By the last paragraph of the judgment the plaintiff's (the wife's) interest, estate, and title to the community property is quieted as against her husband. Such a decree is utterly at variance with the doctrine, held and approved by us in our former opinion, that the interest of the wife during marriage in the community property is a mere expectancy, to be realized only upon her surviving her husband, or upon the earlier dissolution of the marriage by divorce proceedings. So apparent must this be that we think further comment is not only unnecessary, but would be out of place.

It is contended, however, by the respondent and certain of the amici curiæ, that in the last paragraph of our former opinion is to be found language which gives some color of justification to the present judgment. The language referred to, and which it is claimed warrants the entry of the present judgment, is as follows:

> "We are in accord with the intimations from time to time reflected by this court in the long line of its past decisions to the effect that the interest of the wife in the property of the community during the continuance of the marriage relation, while it has not yet reached the status of a vested interest therein, is and has always been from a time reaching back into the Spanish and Mexican originals of our community property laws a much more definite and present interest than is that of an ordinary heir."

It is apparent, we think, what was in the mind of the court in the use of the above language when the entire decision is read, and particularly when attention is given to that portion of the decision immediately following the above-quoted language, wherein the court said:

> "She [the wife] has, by virtue of the share which in her own sphere she has contributed toward the acquisition and conservation of such properties, rights therein which have been always safeguarded against the fraudulent or inconsiderate acts of her husband with relation thereto, and for the assertion and safeguarding of which she has been given access to appropriate judicial remedies both before and after the time when her said rights and interests would ripen and become vested through the death of the husband or other severance of the marriage relation, whenever such rights and ultimate interests were affected by or threatened with such forms of invasion."

[1] The court in the foregoing passages from the opinion was simply stressing those rights of the wife in community property which were not possessed by an heir in property of his ancestor. Those rights were given her in order that she might protect herself against the fraudulent and inconsiderate acts of her husband, and thereby preserve the community property intact until the dissolution of the marriage. These were not new rights, but were those which existed "from a time reaching back into the Spanish and Mexican originals of our community property." This interest of the wife, which we characterized as "a much more definite and present interest than is that of an ordinary heir," was reflected "by this court in the long line of its past decisions." Unquestionably this long line of past decisions include those rendered in the cases cited by us in our former opinion, among which are In re Burdick, 112 Cal. 387, 44 P. 734, Spreckles v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, Estate of Moffitt, 153 Cal. 359, 95 P. 653, 1025, 20 L. R. A. (N. S.) 207, Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537, and Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22. These authorities hold uniformly and consistently that

during the marriage the husband is the sole and exclusive owner of all the community property, and the wife has no title thereto, nor interest or estate therein, other than a mere expectancy as heir, if she survive him.

A careful perusal of our former opinion will convince the most critical that we did not, in anything that we said therein, depart in the least degree from this long-established doctrine, so clearly and emphatically enunciated and adhered to in the many prior decisions of this court, a large number of which were referred to and discussed in our former opinion. We think this sufficiently and definitely disposes of the second contention made by respondent and certain of the amici curiæ that the present judgment is justified by the conclusions reached and expressed in our opinion on the first appeal in this action. As we read that opinion, we are satisfied that it does not in any respect support this contention.

In several of the briefs on file herein in behalf of respondent, frequent reference is made to sections 161 and 682 of the Civil Code, and it is confidently asserted that these sections of the Code definitely and conclusively determine that the interest of the wife in the community property during marriage is a present and vested interest in and to an undivided one-half of said property. Some surprise is expressed by the authors of some of said briefs that this court in its former opinion made no reference to either of said sections. The further complaint is made that neither of these sections of the Code was referred to in Roberts v. Wehmeyer, supra. These sections in their present form have been parts of the Civil Code since its adoption in 1872. They were, therefore, in full force and effect, not only at the time In re Burdick, supra, was decided, but also at all times since. Section 682 was referred to in the dissenting opinion in Re Burdick. Both sections were before the court in the first Spreckles Case, and section 682 was referred to in Estate of Moffitt, supra. After reference to that and other Code sections, as well as to certain earlier decisions of this court, which it might be here noted are decisions upon which the respondent at present relies, this court said in Estate of Moffitt, 153 Cal. 360 and 361, 95 P. 654:

> "All of these Code sections, all of these cases, and all of these arguments were most ably urged upon the attention of the court in the first two cases above cited [In re Burdick, supra, and the first Spreckels Case] and the conclusion there reached was there expressed. * * * After painstaking investigation and review, and after the fullest deliberation, this court, in Re Burdick, determined and held, as it declared in Spreckels v. Spreckels, that upon the death of the husband the wife takes one-half of the community property as heir. Every argument here advanced against that conclusion was urged by learned counsel in the other cases, and was fully met in the opinions above referred to. * * * A reading of the opinions of this court in those cases will establish how thoroughly the questions were entered into and what a complete disposition was made of them."

They were not mentioned in subsequent decisions of this court, where the question of the wife's interest in community property was involved, no doubt for the perfectly obvious reason that the court considered that it had definitely decided in its former decisions that these sections of the Code in no way entered into the determination of the question as to the character of the wife's interest in community property. Neither of these sections of the Code attempts to define the interest of either of the spouses in community property, and in determining that question we are forced to resort to other provisions of the Code, and particularly to sections 172, 172a, 1401, and 1402, and at present to section 161a of the Civil Code, enacted in 1927 (St. 1927, p. 484). In arriving at the proper construction and meaning to be given these latter sections, we are in no way aided by the provisions of said sections 161 and 682 of the Civil Code.

Our attention is called to the recently enacted section of the Civil Code numbered 161a, adopted by the Legislature at its 1927 session, wherein it is provided:

> "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property."

[2] In connection with this section of the Code counsel say:

> "The statute simply characterizes and particularly defines what the wife has been given. Certainly this definition must go back to the legislation of 1917."

If this legislation can go back to 1917, why may it not extend back to 1891? And if it can be deemed in any way controlling of legislation enacted in 1891, why should it not serve the same purpose as to the first statute of this state dealing with the subject of community property enacted in 1850, over 75 years prior to the adoption of said section 161a? As might be expected, no authority is cited by counsel in support of this novel and extraordinary doctrine, and we think simply to state it in counsel's own words is to show its utter fallacy. This section of the Code, whatever effect it may have upon community property acquired subsequent to its effective date, cannot in any manner relate to or govern the ownership of property acquired prior thereto.

The further point is made by at least one of the amici curiæ appearing herein that the court in its former opinion failed to mention the case of Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A. L. R. 1074, and that since the date of our former opinion herein this court has decided the case of Metropolitan Life Insurance Co. v. Welch, 260 P. 545, and that both of these cases were decided upon a theory completely at variance with the theory upon which our former decision in this case was based. The Taylor and Welch Cases each involved the rights of the former spouses after a decree of divorce to property which was held as community property prior to said decree of divorce. In each of these cases it was held that upon a decree of divorce, granted on grounds other than extreme cruelty or adultery, said spouses become tenants in common of the community property. These decisions simply followed the provisions of section 146 of the Civil Code to the effect that:

> "If the decree [of divorce] be rendered on any other ground than that of adultery or extreme cruelty, the community property shall be equally divided between the parties."

We are at a loss to comprehend how the decision in either of these cases is out of line with our former decision in this case. In Taylor v. Taylor, supra, it was held that, the marriage having been dissolved by a decree in Nevada, the community property in this state was not affected by such a decree, and accordingly the former spouses held said community property as tenants in common after the dissolution of the marriage. In the case of Metropolitan Life Insurance Co. v. Welch, supra, it was held that, the marriage having been dissolved by a decree of divorce, wherein all the property claimed by the plaintiff in her complaint as community property had been set aside to her, whatever other property either of the parties then owned or was interested in, in so far as its community character was concerned, was the separate property of the particular spouse in whose name it was held. Certainly neither of these cases attempted to consider, much less determine, the respective rights of the spouses in community property before the dissolution of the marriage. They are, therefore, of no assistance in determining the questions involved in the present action.

It follows, from the views above expressed, that the judgment should be reversed. From the findings and admissions in the pleadings it appears that the property involved herein was acquired on the 27th day of April, 1918, and that the purchase price thereof was wholly paid from community funds, there has been no divorce of the parties, but that the plaintiff and defendant are living together peacefully and happily as husband and wife. No question is made in the pleadings or in the findings that the real property is not the community property of the two spouses. We fail to see how any decree can be rendered in said action that would be of any value to either of the parties hereto, unless it be a decree for declaratory relief under section 1060 of the Code of Civil Procedure. Two decrees have already been entered herein, each of which has been for specific relief, and neither of which has purported to be given under the provisions of said section of the Code. It is apparent to us that a decree for declaratory relief is not what is wanted by the plaintiff herein. We doubt whether such a decree would be of any advantage to her. We are also in doubt whether plaintiff is entitled to any decree for declaratory relief, as such a decree may be granted only "in cases of actual controversy relating to the legal rights and duties of the respective parties." Section 1060, Code Civ. Proc. There appears to be no such actual controversy between these parties as will justify a claim herein for declaratory relief. The parties are living together happily. Neither is attempting to withhold from or deny to the other any right of possession or enjoyment of the community property involved herein. Under these circumstances, we can see no benefit to accrue to anybody by prolonging this litigation.

The judgment, therefore, will be reversed, with directions to the trial court to dismiss the action.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; TYLER, Justice pro tem.

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204 Cal. 524

CALIFORNIA DELTA FARMS, Inc., v. CHINESE AMERICAN FARMS, Inc.★
(Sac. 3918.)

Supreme Court of California. July 16, 1928.

Rehearing Denied and Opinion Modified Aug. 13, 1928.

1. Receivers ⚿8—Order for receiver pendente lite is largely in trial court's discretion.

Order of trial court, appointing receiver pendente lite, is largely in discretion of such court.

2. Appeal and error ⚿955—Appellate court, in passing on order appointing receiver, must view cause as appearing to lower court when making order.

Appellate court, in passing on order appointing receiver pendente lite, must, as order is discretionary, view the cause as it legally appeared to lower court at time order was made.

★Rehearing denied.

3. Vendor and purchaser 🔑299(1)—Vendor, bringing action for forfeiture of executory contract for purchase of real estate, held not entitled to receiver to collect mesne profits (Code Civ. Proc. § 564, subd. 1).

Vendor in executory contract for purchase of real property, after bringing action for forfeiture of contract, *held* not entitled to appointment of receiver pendente lite, under Code Civ. Proc. § 564, subd. 1, to collect mesne profits, without showing of fraud; vendor having no claim to fund arising from proceeds of crops, being at the most only a general creditor.

4. Vendor and purchaser 🔑194—As respects crops, purchaser in default, continuing in possession after notice of cancellation, is adverse claimant.

As respects crops, purchaser in default under an executory contract for purchase of real estate, who continues in possession after notice of cancellation, is an adverse claimant, and all privity between him and vendor ceases on such notice.

5. Vendor and purchaser 🔑300—Vendor, successfully forfeiting contract for purchase of real estate, has right of action only for value of use and occupation after cancellation.

Vendor under executory contract for purchase of real estate, if successful in action for forfeiture of contract, has right of action only for value of use and occupation of property from and after the time of cancellation, without any right to crops raised thereon.

In Bank.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by the California Delta Farms, Inc., against the Chinese American Farms, Inc., wherein defendant filed a cross-complaint. From an order appointing a receiver pendente lite, defendant and cross-complainant appeals. Reversed.

A. B. Bianchi, Albert H. Elliot, and Manson & Allan, all of San Francisco, for appellant.

Nutter, Hancock & Rutherford, and A. P. Hayne, all of Stockton, for respondent.

PRESTON, J. This, the third appeal in the above-entitled cause, is from an order made on July 10, 1925, on motion of plaintiff, appointing a receiver pendente lite. The order confers power upon the receiver to collect what is termed "mesne profits," which is therein interpreted to mean a conferring of power upon said receiver to substitute himself for the defendant, and secure and keep, pending further order of the court, all of defendant's portion, or its equivalent, of the fructus industriales after severance, produced on the real property in suit during the year 1925. Said property for said year was being cropped by various tenants of defendant under agreements providing for shares of the yield in lieu of rentals. The order is sweeping in its scope, and, in short, divests defendant of all rights as a possessor of said lands, and invests them in the receiver. The order indirectly imputes to defendant a purpose to circumvent the efforts of the receiver to gain possession of said crop and makes elaborate provisions to help him in such event.

The main action, begun on September 15, 1924, was one to declare forfeited all rights of defendant under a contract made in 1919, wherein plaintiff agreed to sell and defendant to buy some 3,400 acres of agricultural lands in San Joaquin county. The purchase price was approximately $900,000, payable in installments, some 40 per cent. of said purchase price having been paid prior to suit; the final installment thereof matured in 1928. Defendant entered into possession of the premises on January 1, 1920, and so remained at the time of the order here appealed from. Defendant duly answered, and also filed a cross-action, and, after denial of default, set up, among other defenses, the enactment in 1920 of the second Alien Land Act (Stats. 1921, p. lxxxiii), effective December 9th of said year, contending that thereby the consideration for all unexecuted portions of said contract became illegal and in violation of the penal provisions of said statute. Basing its claims upon this contention, it tendered restoration of possession of said property upon the granting to it of an accounting in equity of all payments made, itself offering to account for the value of the use and occupation of the lands, but asserting a lien under section 3050 of the Civil Code, coupled with the right to remain in possession until the lien so claimed was satisfied.

Following said enactment, and until the year 1924, apparently no heed was given by either party to the effect of said statute upon the contract. But untoward circumstances caused defendant to fall in arrears on its obligation, and as a result this action was begun. Soon thereafter the application for a receiver followed, and was predicated largely upon the apparent insolvency of defendant, provided, of course, forfeiture under said contract had occurred as claimed by plaintiff.

[1-4] We realize that the order under review is largely one in the discretion of the court, and that we have to view it as the cause legally appeared to the court below at the time it was made. Still we are unable to find any legal support for it. Apparently it is sought to justify it under subdivision 1, section 564, of the Code of Civil Procedure; but, in order to do so, either fraud must be shown in the purchase, or the plaintiff must be shown to have some right in or lien upon or claim to the fund sought to be impounded. Here no fraud is claimed, and in our view of the case plaintiff has no right whatsoever in or to

the fund, or any part thereof, and is at most in no better position than that of a general creditor. And as a general creditor we need not pause to cite authorities to show that no receiver can be legally appointed at its instance. A vendee in default under an executory contract of purchase, who continues in possession after notice of cancellation, is an adverse claimant, and all privity between him and the vendor ceases upon such notice. Hovsepian v. Eskender, 69 Cal. App. 379, 231 P. 364.

[5] Plaintiff in this action, if successful in its efforts to obtain possession of the property, would have a right of action for the value of the use and occupation of the property from and after the time of said cancellation; but this apparently is the full measure of its rights. In 39 A. L. R. page 971, the annotator states this proposition as follows:

> "The cases holding the owner of land not to be entitled to the crops raised thereon and harvested by persons not in privity with him all agree that his remedy consists in a recovery of the mesne profits"—citing Pennybecker v. McDougal, 46 Cal. 661; Groome v. Almstead, 101 Cal. 425, 35 P. 1021; Johnston v. Fish, 105 Cal. 420, 38 P. 979, 45 Am. St. Rep. 53; Rector v. Lewis, 46 Cal. App. 168, 188 P. 1018.

This right of action, however, falls far short of title to or interest in the usufruct. In fact, it negatives any claim of the true owner to it. As against such adverse claimant, the owner is not entitled to sue in trover or detinue for the crop as a chattel. Johnston v. Fish, supra; Groome v. Almstead, supra; Phillips v. Keysaw, 7 Okl. 674, 56 P. 695. In Page v. Fowler, 39 Cal. 412, 416–417 (2 Am. Rep. 462), it is said:

> "The very fact that he may recover the rents and profits of the land, shows that he cannot recover the crops; for, as was well said in the case of Stockwell v. Phelps, 34 N. Y. 363, [90 Am. Dec. 710], the owner of the land, in such cases, does not recover the value of the crops raised and harvested, but the value of the use and occupation of the land; and the annual crops of grain and grass, which contain both the value of the use of the land and the labor of the farmer, do not, under such circumstances, belong to the owner of the land. It would be an oppressive rule to require every one who, after years of litigation perhaps, may be found to have a bad title, to pay the gross value of all the crops he has raised; and it would be an inconvenience to the public if the bad title of the farmer to his land attached to the crops he offered for sale, and rendered it necessary to have an abstract of his title to make it safe to purchase his produce."

Nor could an attachment or execution be levied thereon as the property of such owner (Smith v. Cunningham, 67 Cal. 262, 7 P. 679); nor would the owner be entitled to an injunction to protect its claims (Fritcher v. Kelley, 34 Idaho, 468, 471, 201 P. 1037). The simple fact is that such a crop in the hands of a bona fide adverse claimant is not the property of the true owner, but is the property of such claimant; and this is true, whether the crop be severed or growing. Grossman v. Yip Wing, 62 Cal. App. 128, 216 P. 634. We are not concerned with the question of growing crops produced by a trespasser, and not severed on the entry of the true owner. Rector v. Lewis, supra. Moreover, the order in question contemplated the taking into custody of crops after severance and before final judgment in the cause, and hence under either theory they would not belong to plaintiff.

Construing the action as one in ejectment, in the absence of peculiar circumstances, none of which are here present, the appointment of a receiver cannot be sustained. Bateman v. Superior Court, 54 Cal. 285; San Jose Deposit Bank v. Bank of Madera, 121 Cal. 543, 54 P. 85; Miller v. Oliver, 174 Cal. 407, 163 P. 355; Scott v. Sierra Lumber Co., 67 Cal. 71, 7 P. 131; Bennallack v. Richards, 125 Cal. 427, 58 P. 65.

Finally, the whole question here involved is determined adversely to plaintiff by the fact that, under the issues as made by the pleadings, as the word "issue" is defined in section 580 of the Code of Civil Procedure (Baar v. Smith [Cal. Sup.] 255 P. 827), the court cannot administer or distribute the fund arising from such receivership, the plaintiff having no interest therein. The insolvency or supposed insolvency of the defendant is, therefore, not a factor in the question. A case similar in facts and like in principle is Golden Valley, etc., Co. v. Johnstone, 21 N. D. 101, 128 N. W. 691, Ann. Cas. 1913B, 631, approved in Roney v. Halvorsen, 29 N. D. 13, 149 N. W. 688.

The order is reversed.

We concur: CURTIS, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.

204 Cal. 595

FARBSTEIN v. WOULFE et al. (L. A. 8596.)

Supreme Court of California. July 18, 1928.

1. Appeal and error 🔑973—Order dismissing mechanic's lien enforcement action for want of prosecution cannot be disturbed on appeal, except for abuse of discretion (Code Civ. Proc. § 1190).

Order dismissing action to enforce mechanic's lien for want of prosecution under Code Civ. Proc. § 1190, cannot be disturbed on appeal, except on showing of abuse of discretion on part of trial court.

2. Dismissal and nonsuit 🔑60(7)—Dismissal of mechanic's lien enforcement suit for delay in prosecution caused by attempted settlement in another action, in which movants not parties, held not abuse of discretion (Code Civ. Proc. § 1190).

Dismissal of action to enforce mechanic's lien for delay of more than two years in bringing action on motion of certain defendants, under Code Civ. Proc. § 1190, *held* not abuse of discretion, though delay was caused by attempted settlement through receiver appointed in another action, where moving defendants were not parties to the other action, and did not countenance or encourage delay in prosecution of action, even though they were incidentally benefited by the delay.

3. Dismissal and nonsuit 🔑71—Defendants, seeking dismissal, need not show damage from delay in prosecuting action to enforce mechanic's lien (Code Civ. Proc. § 1190).

Defendants in action to enforce mechanic's lien need not show damage by reason of delay in prosecution of action, in order to have action dismissed, under Code Civ. Proc. § 1190, since law presumes injury from unreasonable delay.

In Bank.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action to foreclose a mechanic's lien by J. Farbstein against Martin Woulfe, also known as Martin J. Woulfe, and others. From an order dismissing the action for want of prosecution, plaintiff appeals. Affirmed.

Superseding opinion in 265 P. 973.

Turner & Grainger, of Los Angeles, for appellant.

Robert M. Pease, of Los Angeles, for respondent Woulfe.

SHENK, J. This is an appeal from an order dismissing for want of prosecution an action to enforce a mechanic's lien. The defendant Woulfe is the owner in fee of certain lots in the Vista Del Mar tract, in the county of Orange. On June 1, 1921, he entered into an oil and gas lease with the defendant Robert M. Pease. By assignment this lease came into the hands of the defendant Malis Aldahl Syndicate. In August, 1921, the syndicate commenced the drilling of an oil well on the premises. Between August 15 and March 8, 1922, the plaintiff furnished to the syndicate for use, and which was used in the oil-drilling enterprise, certain oil-well casing at an agreed price of $8,653, of which the sum of $2,646.54 was paid. The balance of the purchase price not having been paid, the plaintiff, on March 8, 1922, filed a mechanic's lien on said real property. On April 13, 1922, a complaint was filed to foreclose the lien.

On December 12, 1924, the defendants Pease and Woulfe moved the court, on notice, for an order dismissing said action for want of prosecution. The motion was supported by the affidavit of the defendant Robert M. Pease, setting forth that the summons in said action was not served on the defendant Woulfe until November 11, 1924, which was more than 2 years and 6 months after the commencement of said action; that said defendant Woulfe had maintained a residence and office and had actually resided in the city of Los Angeles during all of said time; that his name appeared in the Los Angeles city and telephone directories during the time, and that said real property appeared on the assessment roll of Orange county in his name, and with his office address given thereon; that the defendants Pease had resided in the city of Los Angeles during all of said time, and that the name of the defendant Robert M. Pease appeared in the city and telephone directories during said time; that no proceedings whatsoever were taken by the plaintiff to bring said action to trial during said period of more than 2½ years after the commencement thereof and that the failure to bring said action to trial was inexcusable and was not caused by act or omission of the said defendants.

The motion was granted and the action was dismissed under the specific authority of section 1190 of the Code of Civil Procedure relating to the dismissal of mechanic's lien actions, for want of prosecution. That section, among other things, provides that, in case the action to enforce the lien "be not prosecuted to trial within two years after the commencement thereof, the court may in its discretion dismiss the same for want of prosecution."

[1] The motion to dismiss the action invoked the discretionary power of the court. The showing made by the moving defendants was abundantly sufficient to sustain the order, and under familiar rules the order may not be disturbed on appeal, except upon a showing of abuse of discretion on the part of the trial court.

[2, 3] The plaintiff contends that such abuse of discretion appears from the showing made by affidavit in opposition to the motion to dismiss. The affidavit was made by one of the attorneys for the plaintiff. It ap-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

pears therefrom that immediately after the commencement of this action another action was commenced by one Gullick and others against said Malis Aldahl Syndicate in the superior court in and for the county of Los Angeles, wherein the plaintiffs therein prayed for the appointment of a receiver; that a receiver was appointed in said action, with full power to take possession of said leased premises and conduct the oil drilling and producing operations thereon; that shortly after the commencement of the Gullick action the attorney for the plaintiffs therein notified the affiant of the commencement thereof and requested the affiant not to press the present action or incur any further expense on account thereof, and represented to affiant that the claim secured by said mechanic's lien would be paid by the receiver from the production of oil on said property; that the plaintiff herein has received, pursuant to said arrangement, payments aggregating $3,050, thus reducing his claim to $2,956.46; that on the 5th day of November, 1924, the affiant first learned that the receiver had entered into a contract with one Behr wherein the latter had taken over the operation of said property and had agreed to assume and pay certain obligations, including the claim secured by said lien, but that the affiant knew nothing of the financial responsibility of said Behr, and then took steps to have summons served on the defendants Pease and Woulfe. The affidavit also states, as a conclusion of the affiant, that the defendants Pease and Woulfe have been in nowise injured by the delay in the prosecution of the present action, but, on the contrary, have profited thereby.

We find no abuse of discretion on the part of the trial court in dismissing this action. It does not appear that the defendants Pease and Woulfe, or either or any of them, were parties to the Gullick action. Nor were they parties to the arrangement between the plaintiff herein and the plaintiff in the other action. Nor does it appear that they had countenanced or encouraged the delay in the prosecution of the present action or by any act or omission on their part become estopped from pursuing their rights under the statute. The plaintiff herein and the moving defendants were at all times at arm's length. It was unnecessary for said defendants to show damage by reason of the delay. The law presumes injury from unreasonable delay. Gray v. Times-Mirror Co., 11 Cal. App. 155, 104 P. 481. Indeed, the cloud upon their title during all of said time by reason of the filing of a lis pendens at the time of the commencement of this action would constitute a prejudice if any were necessary to be shown.

The plaintiff contends that the payment of a portion of the claim by the receiver resulted in a benefit to the defendants and that therefore they should not complain. Assuming that the defendant Woulfe, who was not personally liable for the obligation incurred by the syndicate, would be benefited by a reduction of the amount of the lien, it does not appear that it was out of any consideration for the defendant Woulfe that the delay was caused by the plaintiff. On the contrary it appears that the moving cause for the delay was a request on the part of the attorney for the plaintiff in the Gullick action, coupled with an unquestioned desire on the part of the plaintiff herein to obtain satisfaction of his claim by payments in cash from the oil operations on the leased property and thus avoid further proceedings in the present action. Having started this action, he was bound to realize the consequences of delay in the prosecution thereof, and cannot be heard to complain that he selected the uncertain course.

The order is affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

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204 Cal. 599

PEOPLE v. KIRSCH. (Cr. 3105.)

Supreme Court of California. July 19, 1928.

1. Larceny 🔑14(1)—Where possession of property is obtained by fraud or trickery, title remains in owner.

Where possession of property is obtained by fraud or trickery, wrongdoer holds property without right or consent of owner, and title remains in owner.

2. Larceny 🔑8—Possession, as against wrongdoer, is sufficient interest to justify allegation and proof of ownership in larceny prosecution.

Possession alone, as against wrongdoer, is sufficient interest to justify allegation and proof of ownership in prosecution for larceny.

3. Larceny 🔑43—In prosecution of junk dealer for larceny from telephone company, evidence regarding defendant's gifts of liquor to company's employees held admissible as showing method of obtaining permission to weigh materials.

In prosecution of junk dealer for larceny, evidence that defendant gave liquor to employees of telephone company from which he obtained junk material *held* admissible to show one of methods defendant used to place himself in good graces of such employees to end that he be permitted by them to weigh material and thus enable him to defraud telephone company out of its property.

4. Criminal law 🔑178—Statement that matters alleged in counts dismissed constituted separate statement of offense stated in preceding count did not make offense stated the same as regards former jeopardy plea (Pen. Code, § 1008).

That pleader stated in each of counts dismissed that matters and things alleged therein "constitute another and separate statement of offense stated" in preceding count did not make offense particularly stated in dismissed count same offense that was stated in preceding count, as regards plea of former jeopardy, under Pen. Code, § 1008.

5. Criminal law ⚷202(2)—In larceny prosecution, pleas of former jeopardy and former acquittal did not lie, where false pretense counts were dismissed (Pen. Code, § 1008).

Where defendant was indicted on twelve counts, four for grand larceny, four for obtaining property by false pretenses, and four for embezzlement, and the court sustained a demurrer to the four false pretense counts, pleas of former jeopardy and former acquittal by reason of implied dismissal of false pretense counts did not lie under Pen. Code, § 1008, since each of the counts dismissed charged an offense separate and distinct from charge stated in any other count.

6. Criminal law ⚷204—Defendant's failure to present evidence concerning pleas of jeopardy constituted waiver of pleas (Pen. Code, § 1008).

In larceny prosecution, defendant's failure to introduce evidence concerning pleas of former jeopardy and former acquittal, under Pen. Code, § 1008, by reason of implied dismissal of false pretense counts, where court sustained demurrer to false pretense counts, constituted waiver of pleas.

In Bank.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

A. Kirsch was convicted of larceny, and he appeals. Affirmed. Superseding opinion of District Court of Appeal in 262 P. 761.

Paul W. Schenck, of Los Angeles, and Clifford K. Fitzgerald, of San Diego, for appellant.

U. S. Webb, Atty Gen., John L. Flynn, Deputy Atty. Gen., and Stephen Connell, Dist. Atty., and Ernest N. Clark and J. H. McKinney, Deputy Dist. Attys., all of San Diego, for the People.

SHENK, J. This is an appeal from a judgment of conviction and from an order denying a motion for a new trial. In January, 1927, the defendant was indicted on twelve counts, four for grand larceny, four for obtaining property by false pretenses, and four for embezzlement. Four transactions only were involved; each one of the four being pleaded three ways and charging a different offense. The trial court sustained a demurrer to the four false pretense counts and proceeded to trial on the remaining counts. The defendant was found guilty of grand larceny as charged in count IV, and of petit larceny under the charge contained in count X. The remaining six counts were eliminated by verdicts of not guilty thereon.

The Pacific Telephone & Telegraph Company operates an exchange in the city of San Diego. By contract entered into in January, 1924, with the Western Electric Company, the latter company agreed to act as agent for the telephone company in the purchase of supplies and equipment; also to receive and dispose of apparatus or supplies returned to it by the telephone company, including material which had no value except as junk. The electric company agreed to dispose of this junk material at the best possible advantage, and, after deducting a charge for its services, credit the telephone company with the net amount received from the sale.

In July, 1926, the Western Electric Company entered into a contract with the Sugarman Iron & Metal Company to sell to the latter scrap or junk material that might accumulate during the period from July 1, 1926, to June 30, 1927, the sales to take place at different localities, including the regular yard and warehouse of the telephone company at San Diego. This contract provided that the weight, count, and classification of the material delivered to the purchaser should be made by the seller. The Sugarman Company assigned its interest in said contract to the Amalgamated Metals Corporation, of which the defendant was an officer and employee. Under the supervision of the defendant, his company did the first hauling of material from the San Diego yard of the telephone company. This work was performed from September 27 to November 17, 1926. The transactions of the defendant in connection with the hauling on November 10, 1926, form the basis of the charge and conviction of grand larceny under court IV of the indictment. The evidence showed that on that day an Orndorff truck, driven by one Hammack, went to the yard of the telephone company at San Diego under the orders of the defendant; that the defendant was at the yard on the arrival of the truck and instructed the truck driver as to what material to load; that a very heavy load of lead-covered cable was thereupon placed on the truck; that the truck then proceeded to the public weighmaster's scales and was weighed by Deputy Weighmaster Matthews; that the defendant was present at the time of the weighing of the truck; that thereupon the truck went to the railroad track, where about one-third of the load was unloaded into a box car; that the defendant then instructed the driver to return to the scales and reweigh the load; that after the reweighing, the balance of the material was unloaded into the box car; that the certificate covering the second weighing of this load showed approximately 10,000 pounds less than the original weighing; that the second weight certificate was used by the defendant in reporting the weight of the load, and the seller was never advised of the first weight, nor was any accounting made to it of the difference in weight.

In regard to the transaction in which the defendant was convicted of petit larceny, it appeared that certain junk material was loaded on the truck, and, by order of the defendant, the track went direct to the box car, where a portion of the load was unloaded into the box car before any weighing had taken place; that the defendant then ordered the truck to the scale and weighed; that no accounting was made to the seller of the portion of the material removed from the truck before the weighing had taken place.

[1] It is first contended by the defendant that the crime of larceny was not, and could not have been, committed under the facts shown. It is conceded that there was no trespass necessary to constitute common-law larceny, but unquestionably there was sufficient evidence to show larceny by trick and device. There was evidence from which the jury might properly infer that the defendant so ingratiated himself with the employees of the telephone company that they permitted the defendant himself to do or supervise the weighing instead of having the same done by the seller, as the contract plainly provided, and that the conduct of the defendant in this respect was with the felonious design to place himself in such a position with reference to the weighing of the property as to enable him to deceive the seller as to the true weights and thus cheat and defraud the seller out of its property. That this element of the crime of larceny by trick and device was present can admit of no reasonable doubt. Where the possession of property was obtained by fraud or trickery, the wrongdoer holds the property without right and without the consent of the owner and title remained in the owner. People v. Hennessey (Cal. Sup.) 258 P. 49; People v. Edwards, 72 Cal. App. 102, 236 P. 944.

[2] The defendant further contends that there was a fatal variance as to the ownership of the property. The indictment alleged ownership in the telephone company, whereas it is claimed that the proof showed ownership to be in the electric company. The evidence is subject to the construction that the electric company was merely a purchasing agent or supply department of the telephone company, with right to pass the title of the junk material upon a sale in accordance with the terms of the contract between the two companies. Such a sale of the property in question had not been consummated. Furthermore, the possession of the property immediately before it was loaded into the trucks on orders from the defendant was in the telephone company. Possession alone, as against the wrongdoer, is a sufficient interest to justify an allegation and proof of ownership in a prosecution for larceny. People v. Edwards, supra.

[3] Numerous errors in the admission and rejection of evidence are claimed by the defendant to have been committed by the trial court. It is argued that the court committed prejudicial error in admitting evidence of gifts of liquor made by defendant to employees of the telephone company during the course of his transaction with them. This evidence was admissible as indicating one of the methods employed by the defendant in endeavoring to place himself in the good graces of said employees to the end that he be permitted by them to weigh the material and thus enable him to defraud the telephone company out of its property. The other assignments of error have been examined. None is such as to have invaded any substantial right of the defendant. Complaint is also made of certain instructions given and refused. It is apparent from the record that the court to a considerable extent instructed the jury orally. The exactness usually attendant upon the giving of written instructions is wanting in some instances. However, we find nothing in the instructions given which would require a reversal. Nor do we find any prejudicial error in the refusal of requested instructions.

[4-6]. It is also contended that the failure of the jury to pass upon the plea of once in jeopardy makes a new trial imperative. Following the order sustaining the demurrer to the four counts charging the obtaining of property by false pretenses, the prosecution requested permission to amend those counts. This the court refused. When the defendant was required to plead, he entered pleas of not guilty to the remaining counts, and also tendered pleas of former jeopardy and former acquittal by reason of the implied dismissal of the false pretense counts. When these pleas were interposed on February 28, 1927, argument was had, not in the presence of the jury, on the question of whether such pleas would lie on the then state of the record. The court "overruled" said pleas, and thus decided as matter of law that they would not lie. It may be assumed, as contended by the defendant, that, had the indictment charged one offense only and had the demurrer been sustained thereto without direction to amend or resubmit to the same or a different grand jury, the case would have been at an end, and the legal bar to further proceedings would have attached under section 1008 of the Penal Code. But such is not this case. Each of the counts dismissed charged an offense separate and distinct from the charge stated in any other count. The fact that the pleader stated in each of the counts dismissed that the matters and things alleged therein "constitute another and separate statement of the offense stated" in the preceding count, did not make the offense particularly stated in the dismissed count the same offense that was stated in the preceding count. In reality each dismissed count charged an offense dif-

ferent from the offense stated in the charge next preceding it, but arising from the same transaction. The defendant was in no better position by reason of the dismissal of said counts than he would have been if the demurrer had been overruled and he had been acquitted on said counts. In such case there would have been no inconsistency in the verdicts, and, under section 954 of the Penal Code his conviction on counts IV and X would likewise stand. Furthermore, had the defendant believed that his pleas of jeopardy should be passed upon by the jury, it was his duty to present some evidence concerning the same. This he did not do and his failure to do so constituted a waiver of the pleas. People v. Newell, 192 Cal. 659, 221 P. 622. There was nothing with reference to said pleas for the jury to pass upon.

We are satisfied from an examination of the record that the defendant was fairly tried; that the evidence was sufficient to sustain the conviction, and, as we find no prejudicial error in the record, the judgment and order are, and each is, affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; CURTIS, J.; TYLER, Justice pro tem.

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92 Cal. App. 400

A. N. WALDRON, Plaintiff and Respondent, v. Ernest C. LYON et al., Defendants; A. E. Wallace, J. W. Harriman et al., Defendants and Appellants. (L. A. No. 9235.) In Bank.

Supreme Court of California. Aug. 2, 1928.

In Bank.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Norman T. Mason, of Los Angeles, for appellant Harriman.

D. Joseph Coyne, of Los Angeles, for other appellants.

McGee, Sumner & Tilden, of Los Angeles, for respondent.

PER CURIAM. Appellant's petition to have the above-entitled cause heard and determined by this court after judgment in the District Court of Appeal of the First Appellate District, Division 1 (268 P. 457), is denied.

It is urged in the petition for hearing that certain points presented by the appellant were not considered by the District Court of Appeal, in its decision affecting the judgment of the court below, or, if they were considered, that the grounds of its decision as to them were not stated. We have examined the record on appeal in the light of this contention, and are of the view that the trial court and the District Court of Appeal reached a proper conclusion as to the liability of the defendants in the premises.

We therefore deem it unnecessary to grant a hearing merely for the purpose of considering the points presented in the petition.

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204 Cal. 604

ROLLS et al. v. ALLEN et al. (L. A. 9279.)

Supreme Court of California. July 19, 1928.

1. Wills ⚷58(1)—One may contract to make particular testamentary disposition of property and validly renounce power to revoke will.

One may make a contract binding upon himself to make a particular testamentary disposition of his property, and may validly renounce power to revoke his will, which agreement will be enforced in equity.

2. Wills ⚷188—One executing conjoint or mutual will does so with notice that such will is subject to revocation (Civ. Code, § 1279).

Any person executing a conjoint or mutual will with another does so with notice given by Civ. Code, § 1279, that such a will is subject to revocation.

3. Wills ⚷188—Mere concurrent execution of mutual wills is not enough to prove legal obligation to forbear revocation.

Mere concurrent execution of mutual wills with full knowledge of their contents by both testators is not enough to prove a legal obligation to forbear revocation in the absence of a valid contract.

4. Wills ⚷188—Indisputable evidence of agreement is necessary in order to attribute quality of irrevocability to mutual will.

In order to attribute to a mutual will the quality of irrevocability, there must be indisputable evidence of agreement which is relied on to change its ambulatory nature, and presumptions will not and should not take the place of proof.

5. Wills ⚷62—Mere execution of mutual will does not show contractual obligation to make such will.

Mere execution of mutual will has no tendency to show that there is a contractual obligation to make such a will.

6. Wills ⚷188—Act of surviving wife in retaining income from estate in accordance with terms of mutual will did not preclude her from exercising right of revocation.

The fact that wife after husband's death retained income from estate in accordance with terms of mutual will theretofore executed by parties *held* not to preclude her from exercising her right of revocation, in view of fact that she would nevertheless have been entitled to one-half of income in addition to family allowance and to homestead out of estate.

Department 2.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by Owen Rolls and others against W. S. Allen, as executor of the last will and testament of John Rolls, deceased, and others. Judgment for defendants and plaintiffs appeal. Affirmed.

Robert M. Clarke, of Los Angeles, and Bowker & Sheridan, of Ventura, for appellants.

Lawrence W. Allen, of Los Angeles, for respondents.

TYLER, Justice pro tem. Action in equity to establish the provisions of a joint and mutual will made by husband and wife. The case was before this court upon a former appeal taken from a decree of distribution in the matter of the estate of John Rolls, deceased. Two questions were there involved—one as to whether the assets of the estate were separate or community property, the other concerned the revocability of the joint and mutual wills made by John Rolls and his wife Leah. Estate of Rolls, 193 Cal. 594, 226 P. 608. It was there held that the property involved was the community property of the spouses. It was further held that the remedy of a person injured by the violation of a contract to make testamentary provision for others, must be pursued in a court of equity and cannot be enforced in a probate proceeding. It is admitted by both parties that the facts in the present appeal are fully stated in the decision of this court in such former appeal. Briefly, they show that John and Leah Rolls intermarried in Newfoundland in the year 1889. At the time of their marriage John Rolls was the father of eight children the issue of a previous marriage, the youngest of whom was five years of age and the oldest seventeen. Four of these chidlren survived the father, the others dying without issue, and they are the plaintiffs herein. Leah Rolls was then the mother of two children by a previous marriage, and they are defendants herein. No children were born as the issue of the marriage of John and Leah. In 1891, Rolls and his wife, accompanied by all of his children, left Newfoundland and became residents of this state. The children of Leah did not accompany them. The spouses, during their marriage, succeeded in acquiring community property of the value of about $23,660. On April 16, 1919, they executed a conjoint and mutual will in accordance with the provisions of section 1279 of the Civil Code. The will disposed of all their possessions. It was on one paper and provided that all their property, both real and personal, should be held by the survivor during his or her lifetime, the use and income thereof to be enjoyed by such survivor as he or she should deem best, during the remainder of the life of such survivor. If further provided that at the death of the survivor $1,000 was to be paid to Thomas K. Winsor, a grandson, when he became of age, and $500 to Jessie Rolls, a daughter-in-law, the balance to be equally divided among the surviving children of John Rolls. The will declares itself to be joint as well as several. The following day John Rolls died leaving surviving him his widow and his four children, the issue of his former marriage as above referred to. Upon his death his widow took possession of all the property jointly held by them and enjoyed the use and income thereafter until the date of her death, which occurred on April 11, 1921, a period of some two years. After the death of the husband and on the 6th day of November, 1920, the widow, then 80 years of age, made and executed a will whereby she revoked as to herself the conjoint will and devised her share of the community property to her daughters, Maude Agnes Prowse and Sarah Dicks, and to her grandson, Thomas K. Winsor, respondents herein, in certain proportions. No steps were taken during the lifetime of the widow to probate her husband's share of the estate. After her death defendant W. S. Allen, who was named as the executor in each of the wills, presented both documents to the court for probate, and each was duly admitted and letters testamentary were issued to Allen as executor of each will. After proceedings leading up to distribution were had, Allen as the executor of the conjoint will and the separate will of the widow petitioned the court to have one-half of the property which was jointly held by the deceased parties in their lifetime distributed in accordance with the last will of the widow. The property was distributed as prayed for, and the appeal above referred to was taken with the result as stated. In holding that the question of the right of revocation could not be litigated in the probate court, this court had occasion to say that whether or not appellants ought to prevail in a suit in equity to enforce the disposition made under the mutual will under the peculiar facts was a matter not before it and upon the subject no opinion was expressed. The instant suit is such a proceeding—it being sought to have the terms of the mutual will declared irrevocable and binding upon the defendants who are devisees and legatees named in the second will. The trial court found the last and separate will of the widow revoked her portion of the conjoint will, and that the latter was not executed pursuant to a contract or agreement with the husband, and judgment followed in favor of defendants. Appellants claim that the evidence is insufficient to justify the judgment of the trial court and that it is contrary to law.

[1-6] The pivotal questions here presented are, first, whether under the facts the widow could, after the death of her husband, make a valid revocation of their conjoint will; and, second, whether her acceptance of the benefits thereunder for the period stated estopped her from so doing. It is undoubtedly true that one may make a contract binding upon himself to make a particular testamentary disposition of his property and he may validly renounce the power to revoke his will, and equity will enforce such an agreement and not suffer him to defeat his obligation by the making of another will. The same rule applies to the case of mutual wills as equity likewise will assume enforcement of the same when attempt is made by the survivor to impair the terms thereof by subsequent testamentary disposition. In the absence of such a contract or agreement, however, the cases universally hold that either of the comakers may at any time revoke his part of the will. This principle has found expression in our Civil Code, for it is there provided that a conjoint or mutual will may be revoked by any of the testators in like manner with any other will. Section 1279. Whoever, therefore, executes a conjoint or mutual will with another does so with notice given by the statute itself that such a will is subject to revocation. Estate of Rolls, 193 Cal. 594, 601, 226 P. 608. The mere concurrent execution of mutual wills with full knowledge of their contents by both testators is not enough, therefore, as claimed, to prove a legal obligation to forbear revocation in the absence of a valid contract. A different conclusion would render our statute meaningless when it declares that a conjoint will may be revoked, for if the mere fact of its joint execution is to be deemed evidence of a contractual intention then all conjoint wills, in the absence of other evidence, must be treated and given effect in equity as irrevocable contracts. The language employed by the parties in their conjoint will is purely testamentary in character, there being not one word to indicate a contractual intent, or to indicate that the will was the result of a contract or agreement as would deprive the survivor of his right of revocation. No facts or circumstances surrounding the execution of the will are in evidence, nor is it claimed that there is any agreement other than the will itself which would support or compel the conclusion that the parties intended or undertook to bind themselves and estate irrevocably in the event of the prior death of either.

To attribute to a will the quality of irrevocability demands the most indisputable evidence of the agreement, which is relied upon to change its ambulatory nature, and presumptions will not and should not, in such cases, take the place of proof. Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265. The mere execution of the will in question, therefore, has no tendency to show that there is a contractual obligation to make such a will. Monsen v. Monsen, 174 Cal. 97, 162 P. 90. Here the court found that the mutual will in question was not executed pursuant to any contract, and that its reciprocal provisions were referable solely to the marriage relation existing between the parties. There is no evidence that would justify a contrary finding. Nor do we think that the act of the survivor in retaining the income from the estate for the limited period involved precluded her from exercising her right of revocation. Had she acted promptly she would have been entitled as of right to one-half of the income. She would also have been entitled to a family allowance and to a homestead out of the estate. Under these circumstances, and considering its modest character, we fail to see how appellants have been prejudiced, as the entire income could not have been more than sufficient for her proper support. In fact, considering her homestead rights, it would seem that appellants were benefited rather than injured by the delay. A different situation might be presented in a case where administration was had and a survivor received certain substantial benefits which he retained and enjoyed. In such a case it might well be argued that he would be estopped to exercise a right to revoke. The decree permits the children of the wife to enjoy the benefits of the estate equally with the children of the husband. It is equitable and just and should not be set aside unless for imperative reasons. The record presents none.

The judgment is affirmed.

We concur: SHENK, J.; RICHARDS, J.

204 Cal. 529

ARMSTRONG v. LASSEN LUMBER & BOX CO. (S. F. 11479.)★

Supreme Court of California. July 17, 1928.

Rehearing Denied Aug. 16, 1928.

1. Pleading 🔑236(5)—Trial court has discretion as to amendment of pleadings to conform to proof.

Allowance of amendment of pleadings to conform to proof is a matter for the exercise of discretion of the trial court.

2. Pleading 🔑333—That formal pleading after amendment was not made part of record until later held immaterial.

Where amendment of complaint to conform to proof was offered and allowed at time proof was taken, the fact that formal pleading was not made a part of record until later was immaterial, without showing that injury resulted therefrom.

3. Fraud 🔑59(1)—Measure of damages for fraud is amount which will compensate for all detriment (Civ. Code, § 3333).

Under Civ. Code, § 3333, measure of damages in case of fraud is the amount which will compensate for all detriment, whether anticipated or not, proximately caused by a breach of the obligation.

4. Sales 🔑442(6, 7)—Buyer, purchasing boiler for resale, could not recover damages for seller's misrepresentation because of loss from negligence in contracting to resell different type boiler.

Where buyer of tubular boiler for purpose of resale contracted for resale of materially different type of boiler, seller was not liable because of misrepresentation for loss resulting to buyer, because of necessity of purchasing boiler to conform to specifications; such loss arising out of its own negligence in contracting to resell something which it was not in fact purchasing, and constituting damages too remote, and not likely to follow in ordinary course of things from breach of original contract.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by L. D. Armstrong, doing business under the name and style of the L. D. Armstrong Company, against the Lassen Lumber & Box Company. From a judgment for plaintiff, and an order, made after trial and entry of judgment, allowing plaintiff to amend the second amended complaint, defendant appeals. Reversed.

Superseding Opinion of District Court of Appeal in 260 P. 810.

Rehearing denied; Langdon, J., voting for a rehearing.

Cushing & Cushing and Walter Slack, all of San Francisco, for appellant.

Frank W. Street and Horace M. Street, both of San Francisco, for respondent.

PRESTON, J. This action was brought to recover damages growing out of the sale on March 24, 1922, by defendant to plaintiff of a used 80 horse power return tubular boiler. The complaint, as finally amended, in substance alleged that prior to March 10, 1922, plaintiff informed defendant that he was about to enter into a contract with a customer, viz. Leal & Sons Lumber Company, for the sale to said company of one 80 horse power return tubular boiler, in good condition, built for 140 pounds per square inch working pressure, with all necessary fittings, etc; that defendant stated it was the owner of a boiler of the kind and character specified, which it would sell to plaintiff for the sum of $800; that plaintiff, relying upon the honesty and integrity of defendant, and upon the truth and correctness of said representations, on March 10, 1922, entered into an agreement in writing to sell said boiler, complete with fittings, to said Leal & Sons for the sum of $1,575; that on March 24, 1922, plaintiff paid defendant said purchase price of $800, and received from it a bill of sale for said boiler; that immediately thereafter said boiler was dismantled and shipped by freight from Susanville, where it was located, to Oroville, whence it was hauled by wagon to the sawmill of Leal & Sons, at a hauling cost of $140; that plaintiff was informed by said Leal & Sons that upon arrival they found said boiler was not such a one as they were entitled to receive under their contract; that it was old, worn-out, bagged, leaky, damaged, had a lamination, and was valueless; that plaintiff thereupon sent mechanics and a state inspector to try to repair and to inspect it, at a total cost of $232.10; that said inspector condemned said boiler; that plaintiff was unaware of its defective and useless condition, and thereafter settled and compromised the demand of Leal & Sons against it by furnishing them, in lieu of said defective boiler, a used water tube boiler (a boiler of a different type), procured at a cost to plaintiff of $1,933.18, for which said Leal & Sons paid only $1,575, all to plaintiff's damage in the sum of $2,305.28. The first count of said complain alleged a cause of action for deceit; the second, for breach of contract.

The answer denied the material allegations of the complaint, with the exception of sale of the boiler and execution of bill of sale therefor. The trial court found that defendant had misrepresented to plaintiff the condition of said boiler, which was, in fact, worthless and of no value, and fixed damages at $2,113.29, being $1,933.18, cost of the substituted water tube boiler and it erection, plus $180.11, plaintiff's expenses in endeavoring to service the old boiler. Judgment for said sum was ac-

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★Rehearing denied.

cordingly entered in favor of plaintiff, and there was also included therein an allowance of interest at 7 per cent. per annum on the purchase price of $800 from March 24, 1922, and costs. Defendant appealed from the judgment, and also from an order, made after entry thereof, allowing plaintiff to amend the second amended complaint.

It appears that during the trial plaintiff was granted permission to amend its second amended complaint to conform to proof. However, through neglect or inadvertence, the formal amendment was not engrossed and made part of the record until after this appeal was taken, at which time it was filed under order of the trial court, on motion of plaintiff, after hearing thereon. The amendment set forth the facts with respect to replacement of the boiler sold by defendant with a used water tube boiler. The propriety of permitting the amendment is not questioned so much as is the fact that plaintiff had more than a reasonable time within which to file it; that no showing was made of inadvertence or excusable neglect explaining his failure to do so, and by virtue of entry of the judgment and the appeal therefrom the court lost jurisdiction to entertain plaintiff's motion.

[1, 2] This was a matter for exercise of the discretion of the trial court, and it does not appear that defendant suffered prejudice by its action. Courts are liberal in the allowance of amendments, in order that pleadings may conform to proof, and here said amendment was offered and allowed at the time the proof was taken. The fact that the formal pleading was not made a part of the record until later is immaterial under the circumstances. This very question arose in the case of Stark v. Wellman, 96 Cal. 400, 402, 403, 31 P. 259, 260, and the court there said:

> "Although plaintiff announced that the amendment would be made, the amendment was not actually made until after the verdict and the entry of judgment. This is assigned as error, and the ruling is brought here by a bill of exceptions. But here, I think, we can plainly see that the defendant was not injured. * * * Here we know that the proposed amendment did not and could not have benefited the plaintiff or injured the defendant. It did not change the character of the complaint in any respect. But if its effect had been to help the complaint, the defendant still was not injured, for he tried his case with reference to it, and was not prejudiced by the fact that it was not reduced to writing until afterwards."

Appellant contends that the findings as to fraud and misrepresentation cannot be sustained by the evidence, nor can the judgment be upheld upon any theory of breach of warranty; also that, admitting the finding of fraud to be sustained by the evidence, the measure of damages adopted by the trial court was nevertheless incorrect. To our mind the latter position is sound and necessitates a reversal of the judgment; hence this contention alone will receive our consideration.

There is some conflict in the evidence, it is true, but it can scarcely be questioned that the record furnishes ample support for the conclusion that the boiler, instead of being a used boiler in good condition for 140 pounds working pressure, was in fact, by reason of burnt-out rivets, leaks, bags and a lamination, defective and practically valueless. The sufficiency of the evidence to warrant a finding of fraud is open to debate, but, as above stated, we need not definitely determine this contention. These observations are far from holding, however, that defendant should be forced to bear the burden of plaintiff's entire loss by reason of its dealings with a third party by a written contract antedating the contract with defendant, and to which defendant was not a party and of which it had no specific knowledge. The most that was told defendant by plaintiff's agent was that plaintiff desired to purchase the boiler for resale, and later defendant was given the name of the company to which said boiler should be shipped; and in this behalf said agent misrepresented the intended resale price, stating to defendant that it was to be $900 (which would give a profit of $100), instead of $1,575, the price mentioned in the Leal & Sons contract. The bill of sale executed by defendant described the article as follows:

> "One butt-strap boiler 60″ in diameter by 16′ long for 140 pounds working pressure complete *with breachings, stack, front grates, and full complement of fittings.* Boiler now located at our plant at Susanville, Cal. Above consideration includes delivery of boiler on cars *in good condition* at Susanville."

Respondent's contract with Leal & Sons covered in part:

> "* * * One 80 HP return tubular boiler, designed and built for 140 pounds working pressure. This is the boiler from Nevada * * * and is an *exceptionally fine equipment.* This boiler will be complete with all the necessary fittings consisting of *steam gauge, water column, safety valves, blow-off valves, and feed valves.* * * * There will also be furnished *one stack 24 to 28″ in diameter of No. 12 ga. steel 70′ in length.* * * * We will also furnish *working drawings of brick setting, also the arrangement of the furnace construction.* * * *"

[3, 4] Even a cursory examination of the two documents reveals that plaintiff's contract of resale covered far more than the boiler purchased from defendant. If plaintiff had submitted the Leal & Sons contract to defendant, and had only resold what it contracted to buy from defendant, the loss with some show of reason might be claimed as the measure of damages. But it is manifestly unfair to hold defendant liable for $2,113.29 under the circumstances here

shown. To do so is to hold defendant liable for plaintiff's improvident contract. The measure of damages in case of fraud, it is true, is the amount which will compensate for all the detriment, whether anticipated or not, proximately caused by a breach of the obligation. Section 3333, Civ. Code. The question here is: What detriment was proximately caused by defendant's breach? The major portion of the loss suffered by plaintiff was clearly due to its own negligence in contracting to resell something which it was not in fact purchasing. Such loss, directly occasioned by the fact that plaintiff upon resale added to and changed materially representations as to the condition of the article, cannot be laid at defendant's door. As is said in the case of California P. Mfg. Co. v. Stafford P. Co., 192 Cal. 479, 483, 221 P. 345, 346 (32 A. L. R. 114):

> "It is a well-settled rule that the damages that can be recovered for any breach of contract are only such as may reasonably be supposed to have been in the contemplation of the parties at the time of entering into the agreement, as the probable result of a breach. 'Other damages are too remote. * * * This rule does not mean that the parties should actually have contemplated the very consequence that occurred, but simply that the consequence for which compensation is sought, must be such as the parties may be reasonably supposed, in the light of all the facts known, or which should have been known to them, to have considered as likely to follow in the ordinary course of things, from a breach, and, therefore, to have in effect stipulated against. The understanding and intention of the parties in this regard must of course be ascertained from the language of the contract, in the light of such facts.' Hunt Bros. Co. v. San Lorenzo Water Co., 150 Cal. 51, 56 [7 L. R. A. (N. S.) 913, 87 P. 1093, 1095]."

The well-recognized and generally-approved rule is stated in the case of Hadley v. Boxendale, 9 Ex. 341, 26 Eng. L. & Eq. 396, 156 Eng. Reprint, 145, as follows:

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as would fairly and reasonably be considered either arising naturally; i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of contract under these special circumstances so known and communicated."

It was certainly far beyond the contemplation of defendant, and perhaps of plaintiff also, that plaintiff would undertake to resell the boiler for almost twice its purchase value, upon a highly embellished and materially different description, and then replace it with a different type of boiler costing even more than that sum. The circumstances of the resale, therefore, offer no proof upon which a valid measure of damages may be based, as the loss arising therefrom would constitute damages too remote and not likely to follow in the ordinary course of things from the breach, and certainly no special circumstances were brought home to defendant sufficient to enlarge the rule of damages.

This holding emphasizes the absence of evidence in the record upon which to predicate a proper judgment for damages. Whether section 3313, 3314, or 3333, Civil Code, is to measure the damages in this cause will depend upon the findings of fact on a retrial of the action.

The judgment is reversed.

We concur: CURTIS, J.; SHENK, J.; RICHARDS, J; SEAWELL, J.

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93 Cal. App. 126

SCOTT v. DONAHUE et al. (WRINKLE, Intervener). (Civ. 5690.)★

District Court of Appeal, First District, Division 2, California. July 10, 1928.

Hearing Denied by Supreme Court Sept. 6, 1928.

1. Insurance ⚷697—Local's sick benefit funds constitute trust for members, and without special agreement parent body cannot take funds on local's involuntary dissolution.

Associations, such as railroad brotherhoods, are not bodies politic or corporations, but are mere aggregates of individuals, and all the property said to belong to such association is in fact the property of its members, and funds acquired by association for mutual benefit of its members in case of sickness constitute a trust in favor of every member of the association in good standing, and in absence of special agreement the parent body cannot successfully claim the funds on involuntary dissolution of local association.

2. Constitutional law ⚷303—Insurance ⚷697—Where charter or by-law provides for hearing before local is dissolved and its property forfeited, forfeiture is by contract and not without due process.

Charter of a local beneficial association and by-laws of supreme body constitute contract between them, and where, by either charter or by-law, adequate provision is made for notice of hearing before local lodge is dissolved and its property forfeited to supreme body the funds of local are deemed to have been raised in accordance with contract, and the forfeiture is by contract and not without due process.

★Hearing denied by Supreme Court.

3. Insurance 🔑697—Rule that one claiming right to deprive another of property without opportunity to defend must show consent applies to forfeiture of local's funds.

As respects forfeiture of the funds of a local lodge to supreme lodge on its dissolution, rule that whoever would claim the right to deprive another of property or privilege without giving him an opportunity to defend must show some consent to such action applies.

4. Insurance 🔑697—Burden of proving contract authorizes forfeiture of subordinate body's funds to supreme body is on one asserting it.

Burden of proving that contract between supreme order and local lodge of beneficial association authorizes forfeiture of funds of subordinate body to supreme body on dissolution of local is on one asserting such authority.

5. Insurance 🔑697—Requirement that local voluntarily dissolved surrender effects to grand lodge held not to relate to sick benefit funds (Civ. Code, § 1442).

Under Civ. Code, § 1442, provision of railroad brotherhood's constitution that local lodge whose charter has been voluntarily surrendered or reclaimed by president of grand lodge shall deliver to grand lodge its charter, seal, rituals, unwritten work, all supplies furnished by grand lodge, and effects of lodge at time of dissolution *held* not, on revocation of local's charter, to authorize grand lodge to forfeit moneys belonging to local as a lodge or funds held by local in trust for its members, such as sick benefits.

6. Insurance 🔑697—Rule that funds raised by local for general purposes of parent organization cannot be diverted held inapplicable to sick benefit fund.

Rule that funds raised by a local lodge for general purposes of parent organization, such as teaching of religion or creed of general body, they constitute a trust fund for the purpose for which they were raised, and no number of members less than the whole can divert funds to other uses, does not apply to sick benefit fund raised for benefit of members of local lodge, but such members in good standing at time of its involuntary dissolution, are entitled to their proportionate share of such fund.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Robert C. Scott, in behalf of himself and all members of San Francisco Lodge No. 198 of the Brotherhood of Railroad Trainmen, an unincorporated association, against J. J. Donahue and others, in which J. S. Wrinkle intervened. Judgment for intervener, and plaintiff appeals. Reversed, with directions.

See, also, 269 P. 458.

George D. Collins, Jr., and J. H. Morris, both of San Francisco, for appellant.

Gillogley, Crofton & Payne, of San Francisco, for respondent.

NOURSE, J. Plaintiff on behalf of himself and some 200 associates, sued in replevin to recover four Liberty bonds, the property of the members of the San Francisco Lodge Number 198 of the Brotherhood of Railway Trainmen, prior to its dissolution. By order of court the parent organization of the Brotherhood of Railway Trainmen was substituted as a party defendant for defendant Donahue. who was sued as treasurer of the local lodge, and thereafter one Sully, purporting to represent the parent body, filed an answer and cross-complaint, and one Wrinkle, representing a minority of 48 of the members of Local 198, filed a complaint in intervention. Before the trial the bonds were deposited in court and the treasurer and the bank were discharged from liability. Though the action was commenced as a simple suit in replevin, it was in fact tried upon the complaint in intervention, which transformed the proceeding into one of equity to establish a trust fund. The cause was tried before the court, sitting without a jury, and resulted in a finding that the bonds constituted a trust fund for the benefit of the members in good standing of the Brotherhood who were formerly members of Local 198. This was followed by a judgment that the intervener was entitled to have the bonds as trust property for himself and such former members of the local. From this judgment the plaintiff has appealed on a typewritten record.

In the year 1920 Local 198 consisted of about 284 members. At this time dissension arose because of action taken by the local in opposition to the policy of the grand lodge relative to participation in a strike against employing railway concerns. Disobedience of the orders of the grand lodge by the local resulted in a revocation of the local charter pursuant to the rules and regulations of the parent body. The original complaint was filed by appellant on behalf of a large majority of the members, while the complaint in intervention was filed on behalf of those minority members who supported the action of the grand lodge and who later associated with Local No. 947, a new local organized under the sanction of the grand lodge.

[1] There are certain rules of law which are determinative of the controversy aside from any of the arguments advanced in the respective briefs. "Associations of this character are not bodies politic or corporations; nor are they recognized by the law as persons. They are mere aggregates of individuals called for convenience, like partnerships, by a common name. * * * All the property said to belong to it is in fact the property of its members and each man's share of it is his own private property and equally protected by the fundamental laws." Grand Grove, etc., v. Garibaldi Grove, 130 Cal. 116, 119, 62 P. 486, 487 (80 Am. St. Rep. 80).

When funds have been acquired by the association for the mutual benefit of its members, as to care for the individuals in case of sickness, such funds constitute a trust in favor of every member of the association in good standing, and, in absence of special agreement, the parent body cannot successfully lay claim to the funds upon an involuntary dissolution of the local association. State Council v. Emery, 219 Pa. 461, 68 A. 1023, 15 L. R. A. (N. S.) 336, 12 Ann. Cas. 870; Detroit Sav. Bank v. Haines, 128 Mich. 38, 87 N. W. 66; I. O. O. F. v. Donahue, 91 Ill. App. 585.

[2] The rule rests upon the sound base that property may not be taken without due process of law. Accordingly, it has been held that where the parent body seeks to dissolve a subordinate lodge by its mere fiat and to confiscate the property of the latter its action will not be upheld in the courts. Austin v. Searing, 16 N. Y. 112, 69 Am. Dec. 665; Wicks v. Monihan, 130 N. Y. 232, 29 N. E. 139, 14 L. R. A. 243; State Council, etc., v. Emery, supra; Merrill Lodge, etc., v. Ellsworth, 78 Cal. 166, 20 P. 399, 400, 2 L. R. A. 841. Some of the early decisions held that a provision in a local charter or in the by-laws of the supreme body making the supreme body entitled to the funds of the local lodge on dissolution of the latter was confiscatory and void as taking property without due process. The later decisions have recognized the local charter as a contract between the lodge and the supreme body (of which the by-laws of the latter become a part) (Grand Grove, etc. v. Garibaldi Grove, etc., 105 Cal. 219, 224, 38 P. 947), and where, by either charter or by-law, adequate provision is made for notice and hearing before the local lodge is dissolved and its property forfeited, the funds are then deemed to have been raised in accordance with the contract between the parties, and the forfeiture is a forfeiture by contract and not without due process (Subsidiary H. Ct. A. O. F. v. Pestarino, 41 Cal. App. 712, 714, 183 P. 297; 7 Cor. Jur. p. 114). Where the power to thus forfeit the property of a local lodge is given by charter or by-law the forfeiture can be effected only "for cause," and this "implies the existence of the fact of good and reasonable cause," which can be determined only after the lodge has been given due notice and a reasonable opportunity to be heard. Bannerman v. Boyle, 160 Cal. 197, 206, 116 P. 732; Taboada v. Sociedad Espanola, etc., 191 Cal. 187, 191, 215 P. 673, 27 A. L. R. 1508; K. K. K. v. Francis, 79 Cal. App. 383, 386, 249 P. 539; State Council, etc., v. Emery, 219 Pa. 461, 68 A. 1023, 15 L. R. A. (N. S.) 336, 12 Ann. Cas. 870.

[3] As applied to the forfeiture of the funds of a local lodge the language of Grand Grove, etc. v. Garibaldi Grove, etc., 105 Cal. 224, 225, 38 P. 947, 948, is pertinent:

> "Whoever would claim the right to deprive another of property or privilege, without giving him an opportunity to defend the same, must show some consent on his part to such action."

Here the several pleadings of the parties assume that Local Lodge 198 was *duly* dissolved, it seeming to be the desire of all parties to treat their fraternal relations as effectively severed. The assumption of due process is a violent one in view of the fact that the charter was revoked by order of the vice president of the supreme lodge after a one-day notice to the officers of the local to appear before him and show cause why their charter should not be suspended or revoked "for failure to conform to the constitution and general rules" of the Brotherhood. All parties, however, concede that it was not a voluntary dissolution, although a large majority of the members of the local desired to discontinue their affiliation with the parent lodge. In determining the rights of the parties to the funds in litigation we must, therefore, assume that the vice president of the supreme lodge attempted to revoke the local charter for misconduct on the part of the members and that, so far as this proceeding is concerned, his action was in accord with the constitution and by-laws of the Brotherhood.

[4, 5] In view of the well-established rule of law to which we have adverted—that the "contract" between the supreme order and the local lodge must authorize the forfeiture of the funds of the subordinate body—the burden of proof was upon respondent to show such authority. He relies solely on section 43 of the constitution of the Brotherhood, which reads in part:

> "A lodge whose charter has been *voluntarily* surrendered, or reclaimed by the president of the grand lodge, shall be known as a defunct lodge. The president of a defunct lodge shall deliver to the grand lodge, within thirty days after the dissolution of the lodge, the charter, seal, rituals, unwritten work, and all other supplies furnished by the grand lodge, and all effects of the lodge at the time of dissolution."

In view of the well-known principle that forfeitures are not favored, and that, when the right of forfeiture is claimed under contract, the condition involving the forfeiture must be strictly interpreted against the party for whose benefit it is created (Civ. Code, § 1442), we are unable to find any justification for the claim that this fund, which was created as a sick benefit fund for the members of Local 198, became the property of the grand lodge upon the revocation of the local charter. The section of the constitution quoted follows immediately the section which covers the whole subject of the suspension and revocation of a local charter for misconduct, yet in section 43 no mention is made of either suspension or revocation. This section applies only to a case of *voluntary* surrender of a charter and to a charter "reclaimed" by the president of the grand lodge. It specifies the lodge properties and regalia which must be turned over to the grand lodge, but does not mention the moneys belonging to the lodge as a lodge or the funds held by the lodge in trust for its members. We conclude, therefore, that the inherent right of every member of the lodge to the fund in dispute was not changed by any contract between the grand lodge and the local. The case is parallel to State Council v. Emery, 219 Pa. 461, 68 A. 1023, 15 L. R. A. (N. S.) 336, 12 Ann. Cas. 870, where similar language in the constitution of the grand lodge was held not to confer upon the grand lodge the right to a sick benefit fund of a local lodge upon dissolution of the latter. To the same effect is Detroit Sav. Bank v. Haines, 128 Mich. 38, 87 N. W. 66; Ind. Order of Foresters v. Donahue, 91 Ill. App. 585; Nat. Circle, etc., v. Hines, 88 Conn. 676, 92 A. 401; Wolfe v. L. C. O. of I. A., 233 Pa. 357, 82 A. 499.

[6] Respondents rely upon the rule that those who remain faithful to the parent organization are entitled to all the property of the local lodge on dissolution of the latter, citing Watson v. Jones, 13 Wall. 679, 20 L. Ed. 666; Nance v. Busby, 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801; Grand Court, etc. v. Hodel, 74 Wash. 314, 133 P. 438, 47 L. R. A. (N. S.) 927; and other cases. The rule, as stated, is too general, but, even so, it has no application here. Where funds have been raised by a local lodge, or order, for the general purposes of the parent organization, such as the teaching of the religion or creed of the general body, they constitute a trust fund for the purpose for which they were raised and "no number of the members of the order less than the whole could therefore divert the funds to other uses than the uses defined in the constitution and laws of the order." Grand Court, etc., v. Hodel, supra. The rule is based upon the sound principle that a trust fund must be devoted to the purposes for which it was raised. It has no application to a sick benefit fund raised for the benefit of all the members of the local lodge and to which all who are in good standing at the time of an involuntary dissolution of the local are entitled to their proportionate share. Thus, the judgment herein is error in its finding that these funds constituted a trust fund for the benefit of the minority members of Local 198 who affiliated with Local 947. The fund was raised for the benefit of all members—it was a trust for all and not for any particular number of them less than all.

The trial court found that all the allegations of the complaint were true except the allegation that the action was brought on behalf of plaintiff and all the members formerly belonging to Lodge 198 *and at their request.* It also found that the allegations of the complaint in intervention of Wrinkle on behalf of other members of the local named therein were true. There is no need for a new trial of any of the issues involved, but the trial court should appoint a suitable person to take possession of and sell the bonds in suit and to distribute the proceeds equally among all the former members of Local 198 who were in good standing upon the rolls at the time of its dissolution, after deducting therefrom the costs of suit and other charges and fees properly chargeable against the trust fund.

Judgment reversed, with directions to proceed as herein indicated.

We concur: KOFORD, P. J.; STURTEVANT, J.

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93 Cal. App. 795

Robert C. SCOTT, In Behalf of Himself and all Members of San Francisco Lodge No. 198 of the Brotherhood of Railroad Trainmen, an Unincorporated Association, Plaintiff and Appellant, v. J. J. DONAHUE, J. D. Murray, and the Humboldt Savings Bank, Defendants (J. S. WRINKEL, Intervener, Respondent). (Civ. 5690.)

District Court of Appeal, First District, Division 2, California. July 10, 1928.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

George D. Collins, Jr., and J. H. Morris, both of San Francisco, for appellant.

Gillogley, Crofton & Payne, of San Francisco, for respondent.

NOURSE, J. Action in assumpsit to recover $1,500 held by the defendant bank on deposit for the members of Local 198, Brotherhood of Railroad Trainmen. Before trial the money was deposited in court and is held there, awaiting distribution. A complaint in intervention was filed on behalf of a minority of the former members of Local 198, and the trial court found that the money was a trust fund for the benefit of this minority only.

Upon the authority of Scott v. Donahue (Cal. App.) 269 P. 455, this day decided, the judgment is reversed, with directions to the trial court to distribute the fund as indicated in said opinion.

We concur: KOFORD, P. J.; STURTEVANT, J.

ENGLAND v. LYON FIREPROOF STORAGE CO. (Civ. 3527.)★

District Court of Appeal, Third District, California. July 10, 1928.

Rehearing Granted Aug. 9, 1928.

1. Warehousemen 🔑34(7)—In action for damages for theft of goods in storage, evidence held sufficient to justify jury's finding theft occurred.

In action for damages for theft of goods in storage, evidence *held* sufficient to justify jury's finding that boxes were not received empty and that theft occurred.

2. Warehousemen 🔑24(4)—In absence of specific agreement, warehouseman does not become insurer of property against theft, and need only exercise ordinary care (Warehouse Receipt Act, St. 1909, p. 441, § 21).

Under Warehouse Receipt Act, St. 1909, p. 441, § 21, in absence of specific agreement to contrary, bailee or proprietor of general warehouse does not become an insurer of property against theft, but he need only exercise ordinary care for protection of owner's property, such as would be used by owner himself under similar circumstances.

3. Warehousemen 🔑24(4)—What constitutes reasonable care on part of warehouseman against theft depends on circumstances and character of property (Warehouse Receipt Act, St. 1909, p. 441, § 21).

What constitutes reasonable care on part of warehouseman against theft, under Warehouse Receipt Act, St. 1909, p. 441, § 21, depends largely on circumstances of case and upon value and character of property.

4. Warehousemen 🔑34(5)—Owner has burden of proving warehouseman was guilty of negligence, where goods were stolen.

Where goods in warehouse were stolen, owner has burden of proving negligence of warehouseman either in employment of servants or management of business, which negligence proximately contributed to loss of goods.

5. Warehousemen 🔑34(5)—Where owner has proved prima facie case against warehouseman where goods were stolen, burden is not on owner to establish warehouseman failed to operate business according to usual custom of warehousemen.

In action for damages for theft of goods in storage, where owner has proved prima facie case of negligence against warehouseman, burden is not on owner to establish fact that warehouseman failed to operate his business according to usual custom of warehousemen.

6. Warehousemen 🔑24(4)—Warehouseman must exercise ordinary care commensurate with value of goods stored and circumstances to protect property from theft from within and without.

Warehouseman must exercise due diligence and ordinary care commensurate with value of goods stored and circumstances of case to protect bailor's property from damage or theft from both within and without storehouse.

7. Warehousemen 🔑34(7)—In action for damages for theft of goods in storage, evidence of negligence held sufficient to support judgment for plaintiff.

In action for damages for theft of goods in storage, evidence of negligence of warehouseman proximately contributing to theft *held* sufficient to support judgment for plaintiff.

8. Appeal and error 🔑1001(1)—Where evidence supports jury's verdict regarding warehouseman's negligence, its findings will not be disturbed on appeal.

In actions involving negligence of warehouseman, where there is substantial evidence supporting verdict of jury, its findings will not be disturbed on appeal.

9. Warehousemen 🔑24(7)—Where there was no contract limiting warehouseman's liability regarding boxes, contents of which were made known and were stolen, warehouseman cannot claim benefit of limitation regarding other boxes stored at same time.

Where there was no contract limiting liability of warehouseman with respect to contents of particular boxes stolen, and contents were made known to foreman, who must be presumed to have known that value of each box was greatly in excess of $25, warehouseman cannot claim benefit of limitation of $25 per box under contract covering other goods stored at same time.

10. Warehousemen 🔑24(7)—Warehouseman was not relieved from liability for theft under statute limiting liability to amount warehouseman reasonably supposed was value, where there was no evidence that warehouseman had reason to suppose value was less than amount of verdict (Civ. Code, § 1840).

Warehouseman was not relieved from liability for theft of goods, under Civ. Code, § 1840, providing that liability of depositary for negligence cannot exceed amount which he is informed by depositor or has reason to suppose the thing deposited to be worth, where there was no evidence that warehouseman had reason to suppose value of goods stolen was less than amount of verdict.

11. Trial 🔑260(7)—In action for theft of goods, refusing instruction covered by instructions given held not error.

In action for damages for theft of goods in storage, refusal of instruction that burden was on plaintiff to show defendant failed to exercise due care in choice of employees and that fact that employee might prove to be dishonest was no evidence of negligence on employer's part, *held* not error, where it was fully covered by other instructions given.

12. Warehousemen 🔑34(10)—Instruction that bailor, receiving warehouse receipt listing delivery of some packages, together with notice of limited liability, acquiesced in limitation of value as to subsequent boxes delivered, held properly refused.

In action for damages for theft of goods in storage, instruction that bailor, receiving ware-

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★Superseded by opinion 271 P. 532.

house receipt on which was listed delivery of first packages, together with printed notice of $25 limitation of liability attached thereto, acquiesced in such limitation of value as to all subsequent boxes delivered because all goods were stored in same room, *held* properly refused.

13. Warehousemen 🔑24(7)—Limitation of liability on warehouseman's part depends on contract and intention of parties.

Limitation of liability on part of warehouseman depends entirely on contract, and mutual understanding and intention of parties.

14. Appeal and error 🔑1066—Instruction that warehouseman cannot limit its liability against its own negligence by contract held harmless; there being no evidence of such contract.

In action for damages for theft of goods in storage, where there was no evidence of agreement respecting limitation of liability for loss of goods stolen, instruction that defendant could not limit its liability against its own negligence by contract, and that any contract to that effect would be void, *held* harmless.

15. Appeal and error 🔑1064(1)—Judgment will not be reversed for giving of harmless instruction.

Judgment will not be reversed for giving of an instruction which does not harm appellant.

16. Appeal and error 🔑1064(1)—Judgment will not be reversed for giving of erroneous instruction on matter regarding which there is no conflict in evidence, where it appears jury was not misled.

Judgment will not be reversed for giving of erroneous instruction upon matter regarding which there is no conflict in evidence, where it clearly appears jury was not misled to thereby render an erroneous verdict.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Action for damages for theft of goods in storage by George H. England against the Lyon Fireproof Storage Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Howard S. Clewett, of Los Angeles, for appellant.

Ben F. Gray and Geo. S. Hupp, both of Los Angeles, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment and verdict of $4,000 damages on account of the theft of goods while stored in the defendant's warehouse at Los Angeles. The defendant was engaged in warehouse business at that city. The plaintiff and his family were about to leave their residence in Los Angeles to travel abroad, and on December 10, 1920, he packed their household goods in various boxes and containers and hauled them to the warehouse of defendant for storage during their absence. These goods were received by the defendant, and the packages were consecutively numbered from 1 to 57, inclusive, and listed upon duplicate warehouse receipts, one of which was retained by the defendant and the other was delivered to the plaintiff. A few days later other boxes and packages of household goods and effects were also delivered to the defendant. This second consignment included seven cases of whisky, the contents of which were made known to the defendant. These goods were also numbered and listed on the back of defendant's original warehouse receipt, but a duplicate of this last list was not given to the plaintiff. The entire consignment of goods was stored in a separate room in defendant's warehouse, and the door to the room was securely locked. No other person's goods were placed in this same storeroom. Several employees of the defendant held pass-keys to all the rooms of the warehouse, including the room in which plaintiff's goods were stored. When the pass-keys became worn and failed to operate in the locks, new ones were procured and the old ones were carelessly thrown into the wastebaskets or rubbish. Upon other occasions liquor had been stolen from the warehouse, and once another storeroom had been burglarized. The president of the defendant corporation had been warned that a certain one of his employees was a bootlegger, and, while the president admitted that he had secured a detective to investigate the charge, he retained this man in his employ.

Upon plaintiff's return after three years' absence, he called upon the defendant to reclaim his property. On going to his storeroom, the employee who accompanied him fumbled with the lock and complained about the difficulty of opening it. Upon unlocking and entering the storeroom, however, he found three boxes opened, empty, and the contents missing, including a number of valuable pictures, hand-painted china porcelain and Dresden ware, bronze and ivory statues, bric-a-brac, rugs and laces of rare value, together with the entire stock of liquor. The liquor was stipulated to be worth $400. Suit was brought against the defendant for negligently suffering theft of the goods, and a verdict of $4,000 was rendered against the defendant.

The defendant seeks a reversal of the judgment on the ground that (1) the boxes in question were received empty, and asserts that the theft never occurred; (2) the judgment is not supported by the evidence, for the reason that there is a total lack of proof of negligence proximately contributing to the theft; that (3) the liability of the defendant was specifically limited by the provisions of section 1840, Civil Code, and the language of the warehouse receipt to $25 per package; and that (4) the trial court erred in giving and refusing certain instructions.

[1] Defendant's contentions that the boxes

in question were empty when they were delivered for storage, and that the theft did not occur, are without merit. The plaintiff himself testified to the packing and specific contents of these boxes, each item of which is mentioned in the complaint. He accompanied the van which hauled them to the warehouse, and went with them to the sixth floor and saw them packed in the storeroom. Defendant's manager accepted and listed on the warehouse receipt each of these boxes. The liquor was first brought to the warehouse wrapped in heavy paper and without the necessary government permit for removal. The defendant refused to accept it for storage in this condition, and it was returned and repacked in one of the boxes in question, and then brought back to the warehouse with the government permit, which was exhibited to the foreman. These three boxes weighing about 200 pounds each, were then marked by the foreman Nos. 62, 63, and 65, respectively, and were listed by him on the warehouse receipt, in each instance as "box & con." This clearly implies that the boxes, when received by the defendant, were not empty. Upon the contrary, the indorsement on the receipt is an acknowledgment of the existence of "contents" of some sort, in the boxes. Plaintiff was present when the storeroom was first opened at the time when he went to reclaim his property, and immediately observed the broken and empty boxes and commented upon the theft to the employee. This furnishes ample evidence to support the loss of the goods.

[2-5] In the absence of a specific agreement to the contrary, a bailee or proprietor of a general warehouse does not become an insurer of property against theft. All that is required of him is the exercise of ordinary care for the protection of the owner's property such as would be used by the owner himself under similar circumstances. The question as to what constitutes reasonable care on the part of a bailee for hire depends largely upon the circumstances of the particular case and upon the value and character of the property entrusted to him. California Warehouse Receipts Act, Stats. 1909, c. 290, § 21; 25 Cal. Jur. 957, § 15; 27 R. C. L. 992, § 51; 6 C. J. 1121, § 61; 3 R. C. L. 96, § 23; Runkle v. Southern Pac. Milling Co., 184 Cal. 714, 195 P. 398, 16 A. L. R. 275; Webber v. Bank of Tracy, 66 Cal. App. 29, 33, 225 P. 41; Firestone Tire & Rubber Co. v. Pacific Transfer Co., 120 Wash. 665, 208 P. 55, 26 A. L. R. 217, and note. Mere evidence of the theft of goods left in the custody of a bailee, even though they were stolen by his servant or employee, is insufficient to charge him with negligence and liability for their loss, and the burden is upon the owner to supply evidence from which it may be reasonably inferred that the bailee was guilty of negligence either in the employment of his servants or the management of his business, which negligence proximately contributed to the loss of the goods. 27 R. C. L. 993, § 51; 40 Cyc. 472, § 6; Firestone Tire & Rubber Co. v. Pacific Transfer Co., supra, 120 Wash. 665, 208 P. 58, 26 A. L. R. 217; Exporters' & Traders' C. & W. Co. v. Schulze (Tex. Com. App.) 265 S. W. 133; Balice v. Erie Ry. Co., 208 App. Div. 427, 203 N. Y. S. 636. Where, however, the owner of the goods has proved a prima facie case of negligence against the warehouseman, the burden is not on the bailor to establish the fact that the bailee failed to operate his business according to the usual custom of warehousemen. In order that an owner may recover damages from a bailee for hire for the theft of his goods, it is necessary that the bailor should sustain the burden of showing acts, conduct, or omissions on the part of the warehouseman amounting to a lack of ordinary care of the property left in his custody, but this burden does not require the bailor to affirmatively prove the usual custom among warehousemen with relation to the operation of their business, as this is a matter of defense, the burden of which rests upon the bailee. Runkle v. Southern Pac. Milling Co., 184 Cal. 714, 721, 195 P. 398, 16 A. L. R. 275.

In 27 Ruling Case Law, 992, it is said:

> "A warehouseman is bound to exercise reasonable care to avoid the theft of the stored goods. * * * Such a company is required to use that degree of care in the safe-keeping of property which is demanded from a bailee for hire in the keeping of valuable property. He must use such care in the protection of the property from thieves without and thieves within, in the selection of its employees, and in the supervision of their conduct."

See Cussen v. Southern California Savings Bank, 133 Cal. 534, 65 P. 1099, 85 Am. St. Rep. 221.

In the case last cited, it was held that a bank was liable to the owner for a theft of valuable articles taken from a safe-deposit box, where it was shown that one of the duplicate keys to the box was left accessible to the employees of the bank, and where the vault had been placed in the custody of a 17-year old lad, employed without previous inquiry as to his honesty, and who was paid but $30 per month for his services, and remained in the service of the bank but three months. In sustaining a verdict of a jury in that case, it was said:

> "The jury might well say that proper care was not exercised in the selection" or rejection "of this employee."

In that case Justice Garoutte quoted with approval from the case of Preston v. Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. Ed. 788, as follows:

> "Persons, therefore, depositing valuable articles with them expect that such measures will be taken as will ordinarily secure the property from burglars outside and from thieves within,

* * * and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of such measures would in most cases be deemed culpable negligence so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor."

[6] It will thus be seen that a bailee for hire, who conducts a regular business of storing goods for hire, must exercise due diligence and ordinary care commensurate with the value of the goods stored and the circumstances of the case, to protect the bailor's property from damage or theft from both without and within the storehouse. He must provide buildings, storage apartments, and facilities for locking the doors and windows adequate to safeguard the goods with ordinary care against the depredations of thieves, and he must exercise due care in the employment and retaining of men about the storehouse, of known honesty and ability.

[7, 8] In the present case it may be inferred from the verdict that the jury of necessity found, not only that the plaintiff's goods were stolen, but that the defendant was guilty of negligence in the hiring and retaining of employees and the conduct of his warehouse business which proximately contributed to the theft. These findings are supported by substantial evidence sufficient to uphold the verdict and the judgment. Among the goods which were stored and stolen were seven cases of liquor. The defendant had previously lost by theft other consignments of liquor. It had been warned that a certain employee who worked about the storehouse was a bootlegger, which charge imputed dishonesty to the employee. The president of the corporation defendant was suspicious of this employee, and hired a detective to watch him, yet he was not discharged. The plaintiff's goods were stored in a separate room apart from all other goods, and the door to this room was securely locked. There was no occasion for any employee to visit this room or to have access thereto during the absence of the plaintiff, yet master keys, which fitted all the rooms of this warehouse, were supplied to several employees. When these keys became worn so that they would operate in the locks with difficulty, new ones were replaced, and the old ones were carelessly thrown into a wastebasket or in the débris, where they were accessible to the employees or loafers about the place. We are of the opinion that this evidence furnishes substantial proof of negligence sufficient to support the judgment. In actions involving the negligence of a warehouseman, the usual rule applies with respect to what constitutes ordinary diligence for the protection of the owner's goods, and, where there is substantial evidence in this regard to support the verdict of a jury, its findings will not be disturbed on appeal. 27 R. C. L. 1004, § 65; 40 Cyc. 482, § 8; Garrette v. Grangers' Business Ass'n, 58 Cal. App. 396, 208 P. 1010.

The case of Firestone Tire & Rubber Co. v. Pacific Transfer Co., supra, is relied upon by appellant in support of its contention that the evidence in the present case does not uphold the findings of negligence on its part. The facts of that case, however, were radically different from those of the present case. The record discloses the fact that plaintiff rented a space in the defendant's warehouse in which to store a large quantity of automobile tires. This space was inclosed with a lattice partition which extended only to within three feet of the ceiling, thus leaving an aperture over which one could easily climb. The plaintiff was furnished keys to this inclosure and to the warehouse, and always had free access to both. It was not assumed by the parties that this inclosure was burglar proof. It was constructed and maintained as a mere convenience by means of which to keep plaintiff's tires separate from other goods which were stored in the warehouse. No goods had been previously stolen from the warehouse, and there was neither suspicion on the part of the defendant nor warning received regarding the dishonesty of its employees. Two of the defendant's servants did, however, steal the tires. The evidence was deemed to be insufficient to uphold a finding of negligence on the part of the defendant. The foregoing recital of facts readily distinguishes that case from the present one without the necessity of comment. It is therefore not authority for the reversal of this case.

[9, 10] The appellant claims that the damages for loss of the goods in question was limited by contract to the sum of $25 per package. It is true that when the first 57 packages were received and listed a duplicate warehouse receipt signed by respondent was given to him, and contained the following provision:

> "It is agreed that said goods shall be stored at owner's risk of damage by moth, vermin, rust, fire, heat, leakage or injury to fragile articles that are not packed. * * * The responsibility of this warehouse for any piece or package, or its contents, is limited to the sum of $25, unless the value thereof is made known at the time of the storing, and receipted for in the schedule, and an additional charge made for the higher valuation. * * *"

This provision was not called to the respondent's attention, and, in listing the packages on the receipt, the foreman of appellant made no inquiry regarding the valuation of the contents of the boxes. There is no affirmative evidence in the record showing that a contract or duplicate receipt similar to the one which was issued affecting the first 57 packages was ever signed by or delivered to the respondent. No such contract appears to have been executed regarding appellant's limitation of liability for loss of the contents of boxes numbered 62, 63 and 65, which were involved in this action. It does, however, appear that, when the packages which were delivered by respondent subsequent to those which were numbered from 1 to 57, inclusive, the foreman listed the boxes and packages on the back of the original receipt held by appellant, but delivered no copy thereof to the respondent. Moreover, it appears that the nature of the contents of these boxes in question was made known to the foreman, although he neither asked for the value thereof nor indorsed it upon his receipt. The respondent testified:

> "Q. You didn't tell anybody what was in those boxes, did you? A. It wasn't necessary; they knew. * * * The foreman and the men that were—"

The court, interrupting, said:

> "He asked you a question. * * * A. Yes; I did (tell him the nature of the contents). * * * I judged at the time, and have always been under the impression that he (the man who received the goods) was the foreman; he seemed to have authority; he was around with the men and superintended the unloading of the goods. I took it for granted he was the foreman."

Regarding the appellant's failure to supply respondent with a receipt for the boxes in question, or any package subsequent to that which was numbered 57, the following colloquy occurred at the trial:

> Mr. Clewett, attorney for appellant, said: "(All the boxes) numbered up to 57, are on the original receipt."
>
> Mr. Hupp, attorney for respondent, replied: "There is no question about those articles. The only question, as I understand it, is as to articles 62, 63, and 65." Mr. Clewett responded: "Yes; the three boxes which Mr. England has testified were robbed, are the articles 62, 63, and 65 on this receipt, which the testimony shows came in later, and, of course, did not appear on the receipt when issued to him."

When the owner of goods which are stored with a warehouseman signs a receipt, which is not in conflict with the provisions of the statute, but which contains limitations as to the liability of the bailee, as to the value of the property, or otherwise, the owner ordinarily becomes bound thereby. 25 Cal. Jur. 962, § 18; 27 R. C. L. 997, § 57; Taussig v. Bode, 134 Cal. 260, 66 P. 259, 54 L. R. A. 774, 86 Am. St. Rep. 250; McMullin v. Lyon Fireproof Storage Co., 74 Cal. App. 87, 95, 239 P. 422; Cunningham v. International Committee of Y. M. C. A., 51 Cal. App. 487, 197 P. 140; Wilson v. Transfer & Storage Co., 201 Cal. 701, 258 P. 596. But the contract of a bailee for hire, which seeks to exempt him from liability resulting from his own negligence, or which seeks unfairly or in bad faith to limit the amount of his liability, will be cautiously scrutinized, and such provisions will not be upheld unless they clearly appear to conform to the intention of the contracting parties. 27 R. C. L. 998, § 57. The contract of a bailee which purports to exempt him from liability for loss or damage resulting from specified causes will not relieve him from the necessity of exercising ordinary care for the protection of the property intrusted to him. 27 R. C. L. 998, § 57; Langford v. Nevin (Tex. Com. App.) 298 S. W. 536. In the present case, since there was no contract limiting the liability of the appellant with respect to the contents of the particular three boxes in question, and since the contents of these boxes was made known to its foreman, who made no inquiry as to their actual value, but who must be presumed to have known from the character of the contents that the value of each box was greatly in excess of $25, the appellant is not entitled to claim the benefit of this limitation of value. Nor is the appellant relieved from liability pursuant to section 1840, Civil Code, which declares:

> "The liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor, *or has reason to suppose*, the thing deposited to be worth."

Knowing the character of the contents of these boxes in question, the appellant had reason to suppose they were worth vastly more than $25 per box. It was stipulated that the liquor alone was worth $400. There is no evidence to indicate that appellant had reason to suppose the value of the contents of these boxes was worth less than the amount of the verdict.

[11] Finally, the appellant assigns as error the giving and refusing of certain instructions by the court. Defendant's instruction No. 17, which was refused, charged the jury that:

> "* * * An employer is presumed to have exercised due care in the choice of his employees, and the burden of proof is on the plaintiff to show that the defendant failed to exercise such care, and the mere fact that an employee may prove to be dishonest is no evidence of negligence on the part of the employer, or of failure to exercise due care in the choice of such employee."

The refusal of this instruction was not error, since it was fully covered by other instructions which were given. The court charged the jury that a bailee for hire was not an insurer of the safety of property intrusted to him, but was required to use only ordinary care to protect it from damage or loss such as a prudent man would exercise for the preservation of his own property. And the jury was further instructed:

> That the defendant "was required to use such (ordinary) care in the selection of its employees and in the supervision of their conduct after they were employed."
>
> And further that, "if it is established that the property was stolen * * * by the servants of the bailee, * * * it is then incumbent

upon the bailor to introduce evidence from which the jury might legitimately infer that the loss or theft was due to lack of ordinary care on the part of the bailee."

And also that "the burden * * * is on the plaintiff to show that the defendant failed to exercise due care in the choice of its employees, and the mere fact that an employee may prove to be dishonest, is no evidence of neglect on the part of the employer, or of failure to exercise due care in the choice of such employee."

These and other instructions along this line, fully advised the jury that the burden was upon the plaintiff to prove the negligence of the defendant in the employment of dishonest servants, before it could be held liable on that score.

[12, 13] The court also refused to give defendant's instructions numbered 2D, 13, 13A, and 15, to the effect that, by delivering to respondent the duplicate warehouse receipt upon which was listed the first delivery of packages numbered from 1 to 57, inclusive, together with the printed notice of a $25 limitation of liability thereto attached, he acquiesced in such limitation of value as to all subsequent boxes delivered, for the reason that all the goods were stored in the same room, and the plaintiff failed to disclose to the defendant the actual value of the property. The refusal to so instruct the jury was not error, since there was no evidence in the record that such limitation of value applied to the boxes and packages subsequently delivered, among which were the three involved in this action. The limitation of liability on the part of a bailee depends entirely upon contract, and the mutual understanding and intention of the parties. It would be a violent presumption which would limit an owner of three boxes of valuable art goods worth $4,000, to a recovery of $75 for their theft, through the negligence of a bailee, merely because a warehouse receipt was issued for a previous consignment of goods containing a stereotype limitation, even though all the goods were stored in the same room. This is particularly true when no receipt is given for the subsequent consignment, and the character of the goods is made known to the bailee, who lists them and makes no inquiry regarding their actual value. The facts of the present case completely refute the inference that there was an agreed limitation of valuation of the contents of the three boxes in question.

[14-16] The record is absolutely devoid of evidence indicating that either an oral or a written agreement existed between the parties respecting a limitation of liability for the loss of the contents of the three boxes numbered 62, 63, and 65. Therefore there was no harm in the court instructing the jury, as it did, that:

> "The defendant cannot limit its liability against its own negligence by contract, and any contract to that effect would be void."

A judgment will not be reversed for the giving of an instruction which does not harm the appellant, or for the giving of an erroneous instruction upon a matter regarding which there is no conflict in the evidence, where it clearly appears that the jury was not misled to thereby render an erroneous verdict. 2 Cal. Jur. 1026, § 611; Estate of Gharky, 57 Cal. 274. Moreover, the jury was fully, fairly, and correctly instructed regarding the measure of damages for the loss of goods resulting from the negligence of a bailee, as follows:

> "It is an express provision of the law that the liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose the thing deposited to be worth." Section 1840, Civil Code.
>
> And, "if you believe from the evidence that the plaintiff did not inform the defendant of the value of the contents of the boxes in question, its liability cannot exceed the amount which it had reason to suppose the contents of the box to be worth."
>
> And also that, "if you believe from the evidence that the plaintiff did inform the defendant that said boxes contained whisky, but did not inform the defendant that they contained any other valuable articles, and that the defendant did not have reason to suppose that they contained other valuable articles, then, even if you find the defendant was negligent, nevertheless, its liability cannot exceed the value of the whisky which was stipulated to be $400."

For the foregoing reasons, the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

92 Cal. App. 778

PEOPLE v. STANLEY et al. (Cr. 1648.)

District Court of Appeal, Second District, Division 2, California. June 27, 1928.

1. Criminal law 🔑780(3)—Instruction submitting question of "accomplice" to jury held not erroneous where facts were disputed (Pen. Code, § 1111).

Instruction that accomplice is one liable to prosecution for identical offense charged against defendants and whether one is accomplice is for jury was not erroneous because court did not instruct jury that witness testifying at trial, charged by information with same offense for which defendants were on trial, was accomplice as matter of law, since facts were disputed and since under Pen. Code, § 1111, except where rule is altered by special statute, "accomplice" is one who has been connected in commission of crime whether directly or by aiding and abetting in its commission or advising and encouraging its commission and is liable to prosecution for identical offense charged against defendant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

2. Automobiles 🔑356—Larceny 🔑68(2)—Felonious intent held for jury where defendants charged with grand theft and violation of act abandoned automobile (Vehicle Act, § 146).

Felonious intent of defendants charged with grand theft and violation of Vehicle Act, § 146 (Deering's Gen. Laws, Act 5128) in taking automobile *held* for jury, where car was stripped of tires and abandoned.

3. Larceny 🔑79—Evidence held to warrant instruction on grand theft.

Instruction defining grand theft and charging jury that if they found from evidence that defendants did take, steal, or drive away automobile with a criminal intent, they were guilty of grand theft, *held* warranted by evidence.

4. Criminal law 🔑1172(8)—Defendants convicted of grand theft and violation of act could not complain of instruction defining offense of receiving stolen property where they were not affected (Vehicle Act, § 146).

Defendants convicted of grand theft and violation of Vehicle Act, § 146 (Deering's Gen. Laws, Act 5128) could not ccomplain of instruction defining offense of receiving stolen property, where they were not convicted of offense and defendant convicted was released on habeas corpus.

5. Larceny 🔑79—Failure to instruct that defendants convicted of grand theft and violation of act could only be convicted of petty larceny because value of stolen car was not shown held not error (Vehicle Act, § 146; Pen. Code, §§ 484, 487, subds. 1, 2, 3, as amended by St. 1927, p. 1046).

Where defendants, convicted of grand theft and violation of Vehicle Act, § 146 (Deering's Gen. Laws, Act 5128) assigned as ground for reversal failure to instruct jury that they could only be convicted of petty larceny because there was no testimony relating to value of stolen car, *held* that under Pen. Code, § 487, subd. 3, as amended by St. 1927, p. 1046, providing grand theft is committed when property taken is automobile, assignment was not ground for reversal, section 484, as amended by St. 1927, p. 1046, providing rule of evidence for determining value under section 487, subd. 1, not operating as limitation on subdivisions 2 and 3.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Carl J. Stanley was convicted of receiving stolen property, and Kenneth George and Edward McSorley were convicted of grand theft and of violation of California Vehicle Act, § 146. Defendant first named was discharged on habeas corpus. The last two defendants named appeal. Affirmed.

W. H. Springfield, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and John L. Flynn and John D. Richer, Deputies Atty. Gen., for the People.

THOMPSON, J. The defendants Kenneth George, Edward McSorley, and Carl J. Stanley were jointly charged by an information, containing two counts, with grand theft and also with the offense of violating section 146 of the California Vehicle Act, which section provides that:

> "Any person who shall drive a vehicle not his own, without the consent of the owner thereof and in the absence of the owner, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, shall be deemed guilty of a felony. * * *" Deering's Gen. Laws 1923, p. 1896.

The jury returned a verdict of guilty of both offenses against the defendants Kenneth George and Edward McSorley and guilty of the offense of receiving stolen property against the defendant Stanley. The defendant Stanley was subsequently discharged on a writ of habeas corpus (see 265 P. 561), and the other defendants prosecute this appeal from the judgment pronounced upon the verdict and from an order denying their motion for a new trial.

[1] The appellants' complaint is limited to three instructions which they say were improperly given and the failure of the trial judge to give an instruction. The first instruction given reads as follows:

> "An accomplice is one who is liable to prosecution for the identical offense charged against the defendants on trial, and whether or not one is an accomplice as defined in these instructions is for the jury to determine from all the testimony and circumstances in proof in the case."

The basis of appellants' objection to this instruction is that Louis Barone, a witness who testified at the trial, was, at the very time at which the testimony was given, charged by information with the same offense for which appellants were on trial, and they argue therefrom that it was the duty of the court to instruct and inform the jury that Barone was, as a matter of law, an accomplice. Counsel for appellants rely upon People v. Allison, 200 Cal. 404, 253 P. 318, as authority for their position, but that case only declares that one who has been convicted of "the identical offense charged against the defendant * * *" is an accomplice of the defendant, as a matter of law. The next citation of appellants, People v. Truax, 30 Cal. App. 471, 158 P. 510, is clearly of no assistance to appellants, for it was there held that:

> "It is for the jury to determine from the evidence whether as a matter of fact the witness is an accomplice, if the facts are disputed. It is only where, the acts and conduct of a witness being admitted, they necessarily establish the witness' participation in the guilty act, or guilty relation thereto, that the court should determine and instruct the jury as a matter of law that the witness is to be regarded as an accomplice. People v. Coffey, 161 Cal. 433, 436, 119 P. 901, 39 L. R. A. (N. S.) 704."

In the present action the facts involving the guilt of Barone were disputed. In the case of People v. Swoape, 75 Cal. App. 404, 242 P. 1067, also relied upon by appellants, objections were sustained to a question asked on cross-examination whether the witness had been charged by information with the same crime, and also to a question whether he had been arrested for the same offense. The court was there of the opinion that the trial court had fallen into error, particularly if the witness was in fact an accomplice, but held the error to be without prejudice, saying:

> "The defendants were therefore entitled to show by this witness just what was his position with reference to the situation then before the court. That right having been denied the defendants, it follows that in that regard the defendants were injured by the action of the court, were it not for the further fact that within the testimony of the same witness his complicity appears in that it was shown that he did take part in the commission of the crime. The error of the court, therefore, became immaterial. * * *"

It is apparent that appellants can find no consolation in this case and that it utterly fails to support their assertion. In fact, if their assertion be true that one who is charged by information or indictment with the same offense as that for which another is on trial, the former is, as a matter of law, an accomplice of the latter, how could it be said that testimony showing his complicity in the matter would cure the error of rejecting testimony to establish that fact, unless the testimony was of such conclusive character as to establish that he was an accomplice as a matter of law? This assertion is not made in the text of the opinion, and, therefore instead of being authority for appellants' position, it may be taken as indicating the contrary.

The case of People v. Howell, 69 Cal. App. 239, 230 P. 991, while not coinciding with the facts of the present situation, more nearly approaches the instant problem. It was there argued that because of the presence of the witness at the scene of the crime and other circumstances indicating "probable cause" that he was liable to prosecution for the same offense and therefore an accomplice within the meaning of section 1111 of the Penal Code, which defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial. * * *" The court answers this contention in the following language:

> "Any person, however innocent, is 'liable to prosecution' in the broad sense of the phrase. The determination of the question of his being in law an accomplice with one who is charged with crime must depend upon whether or not he may be properly 'liable to prosecution'; otherwise, every innocent person might be an 'accomplice' of every other person who committed a criminal offense."

We are inclined to agree with these words, but at the same time we think it necessary to define their meaning. If it be said that the phrase "properly 'liable to prosecution'" contemplates one a magistrate or grand jury has said is "properly 'liable to prosecution,'" then every person prosecuted by information or indictment for the identical offense for which the defendant is on trial is an accomplice even if the facts involving his guilt are disputed, and even regardless of his innocence. This would indeed be a strange anomaly. It would mean that one wholly innocent and free from stain might be an accomplice, in the eyes of the law, of the most degraded felon. Such was never the intent of the amendment of 1915 to section 1111 of the Penal Code. The rule of law with respect to the testimony of accomplices is akin to the old rule of common law which sealed the lips of the convicted felon, and a modification of the maxim of the Roman law that nemo allegans turpitudinem suam est audiendus. Under the common-law doctrine accomplices included "all particeps criminis, whether they are considered, in strict legal propriety, as principals in the first or second degree, or merely as accessories before or after the fact." In re Rowe (C. C. A.) 77 F. 161. And so in California it is said:

> "Manifestly, the single, sole determinative consideration is the part which the witness has borne in the crime perpetrated. If the wit-

ness has committed the crime, if he has knowingly aided and abetted in its commission, or if he has advised and encouraged its commission, the existence of any one of these facts admitted or established stamps his status as that of an accomplice. This is the precise language of the law, and this, and this alone, is the governing principle of the law."

And, again, in the same case:

> "One is an accomplice, we repeat, because of what he has done and not because of the form of punishment which the law may mete out for his acts. Wherever the law has denounced as a separate crime the particular act of participation by an accessory or accomplice, the sole logical and legal effect is not to destroy the relationship of accomplice, but merely to effect a modification of section 31 of the Penal Code, as though by an express proviso it should read, 'all persons concerned in the commission of a crime,' etc., 'are principals in any crime so committed, provided that they shall not be indicted as principals in any case where the law has denounced their participation as a separate crime and declared that they shall be prosecuted exclusively for such separate crime.' But this, as we have said, does not and cannot, by any species of legal hermeneutics or legerdemain, relieve an accomplice of his character of accomplice. It is merely prescribing a separate punishment for the particular act of one who is still an accomplice." People v. Coffey, 161 Cal. 433, 119 P. 901, 39 L. R. A. (N. S.) 704.

Such was the state of the law prior to the amendment of 1915 to section 1111 of the Penal Code, and regardless of our opinion of the wisdom of the policy the legislative intent is manifest to again somewhat modify the rule with respect to accomplices so that we may now say that except in those instances where the rule is altered by special statute, an accomplice is one who has been concerned in the commission of a crime, whether he has directly committed the act or aided and abetted in its commission or advised and encouraged its commission and is liable to prosecution for the identical offense charged against the defendant. As thus construed it does no violence to our sense of justice by saying that an innocent man may as a matter of law be the accomplice of a debased felon and is entirely consistent with those authorities which hold that persons are not accomplices, who, although present for one reason or another, are not guilty of criminal participation. Under this view it is obvious that the witness Barone was not an accomplice, as a matter of law, and that this instruction was not erroneous for that reason.

[2, 3] The next instruction of which complaint is made is as follows:

> "Theft, in so far as it applies to this case, is the felonious stealing, taking, carrying, riding or driving away the personal property of another:
>
> "When the property taken is an automobile, it is grand theft.
>
> "If you find from the evidence beyond a reasonable doubt that the defendants or any of them on or about the date charged did take. steal and drive away an automobile, as charged in count I of the information or knowingly and with criminal intent, aided, encouraged or instigated the driving away of said automobile, then you are instructed to find such defendant guilty as charged in said count I."

The objection to this instruction is that "there was no evidence to justify such an instruction," because after the automobile was stripped of its tires and "had been driven some four or five blocks from the home of defendant Stanley," it was abandoned. The evidence discloses that a Chevrolet car belonging to E. R. Plummer was taken from Seventh and Los Angeles streets in Los Angeles on November 20th. At the time the automobile was taken it was equipped with four new tires and three used tires on the rack. On November 21st, when it was found a few blocks from Stanley's home, its tires had been removed. One of the new tires was found on Stanley's Ford and the three others under his house. The automobile was driven to Stanley's home by the defendants and the change of tires was there made. When they attempted to start the Chevrolet, they called the witness Louis Barone and asked him to help push the car, stating that they had a loose connection. This witness testified with regard to this incident:

> "And then he said, 'Come on, push it,' because everything was done in a rush, and he was kind of nervous there, and I looked down and seen one tire off. I give it a push, and when I done that it run over the street a ways and all four of them were off."

The four referred to included the two appellants. Under these circumstances the jury were fully justified in believing that it was the intention of the appellants to steal the automobile and that on account of ignition trouble and the necessity for haste they determined to abandon it rather than attempt repairs, with its attendant delay. It is true that the appellants gave a different version of the affair, but it was for the jury to say under the conflict thus produced and all of the circumstances whether the automobile was taken by them with felonious intent. There being sufficient evidence to warrant this deduction, the instruction was properly given.

[4] The third instruction which is made the subject of attack defines the offense of receiving stolen property. Undoubtedly this was error for the reason that it is not an offense included within the offense of theft. However, these appellants may not be heard to complain for the reason that neither of them was affected thereby. It is difficult to conceive of any manner in which they might have been prejudiced, and none is suggested. The defendant Stanley, who was convicted of that offense, as has already been suggested,

was released on habeas corpus. Ex parte Stanley (Cal. App.) 265 P. 561.

[5] The fourth and last reason assigned for reversal is the court's failure to instruct the jury that the appellants could only be convicted of petty larceny "for the reason that no testimony relating to the value of the alleged stolen Chevrolet was introduced by the prosecution." Appellants do not say that they requested such an instruction, and a failure on their part to make such request would probably preclude them from raising the question. However, a plain and inescapable answer is found in section 487 of the Penal Code (as amended by St. 1927, p. 1046), the pertinent portion of which reads as follows:

> "Grand theft is theft committed in either of the following cases: (1) * * * (2) * * * (3) When the property taken is an automobile," etc., * * *.

It has already been shown that there was evidence from which the jury might have inferred that defendants had stolen the automobile and not merely the tires. Because section 484 of the Penal Code (as amended by St. 1927, p. 1046), among other things, provides a rule of evidence for the determination of value when necessary under subdivision 1 of section 487, it cannot possibly be argued that it operates as a limitation upon the plain and unambiguous language of subdivisions 2 and 3 thereof.

Judgments and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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93 Cal. App. 97

STANLEY et al. v. WESTOVER.★
(Civ. 3498.)

District Court of Appeal, Third District, California. July 6, 1928.

Rehearing Denied Aug. 4, 1928. Hearing Denied by Supreme Court Sept. 4, 1928.

1. Execution 🔑118—Levy of execution, made after judgment debtor's death and sale thereunder, were void (Code Civ. Proc. §§ 686, 1505).

Under Code Civ. Proc. §§ 686, 1505, levy of execution, made after judgment debtor's death, was void, and sale under such execution was likewise void.

2. Quieting title 🔑20, 23—To authorize action to quiet title under McEnerney Act, public records must be lost or destroyed, and plaintiff must be in actual peaceable possession (McEnerney Act).

To authorize action to quiet title under McEnerney Act June 16, 1906 (St. 1906 [Ex. Sess.] p. 78), the public records of the county must be lost or destroyed in whole or in part by flood, fire, or earthquake, and plaintiff must at the time of bringing action be in actual and peaceable possession, and these requirements are jurisdictional, and, unless each exists when action is commenced, there is no right to bring action.

3. Action 🔑65—Plaintiff's right of action must exist when he commences action.

Plaintiff's right of action must exist when he commences his action, for rights of parties are to be judged by conditions existing at that time.

4. Judgment 🔑443(1)—Fraud, to constitute equitable ground to vacate judgment, valid on face, must be extrinsic or collateral.

In action in equity to vacate a judgment, valid on its face, on the ground of fraud, such fraud, to constitute a ground for equitable relief, must be extrinsic or collateral to the question examined or determined.

5. Quieting title 🔑52—Judgment quieting title of purchaser at execution sale held void on its face (McEnerney Act, § 4).

Judgment quieting title of purchaser at execution sale under McEnerney Act June 16, 1906 (St. 1906 [Ex. Sess.] p. 78), providing for quieting title to realty in case of loss or destruction of public records, *held* void on its face because particular description of realty was not set forth in complaint, summons, or lis pendens because plaintiff's affidavit showing character of his title and possession was insufficient, and because of insufficient publication under section 4.

6. Quieting title 🔑35(2)—Affidavit of purchaser at execution sale seeking to quiet title, that he could not state dates and parties from whom he obtained realty because records were destroyed, held insufficient (McEnerney Act).

In action to quiet title under McEnerney Act June 16, 1906 (St. 1906 [Ex. Sess.] p. 78), providing for quieting title to realty in case of loss or destruction of public records, mere statement in affidavit of purchaser at execution sale, that reason affiant could not state dates and parties from whom he obtained realty was because all deeds and records in his possession were destroyed by fire on April 19, 1906, *held* not sufficiently to show reason for such disability.

7. Quieting title 🔑19—Statute providing for quieting title in case of loss or destruction of public records must be substantially complied with (McEnerney Act, § 4).

Because McEnerney Act June 16, 1906 (St. 1906 [Ex. Sess.] p. 78), providing for establishing and quieting title to realty in case of loss or destruction of public records, is remedial and should be liberally construed to effect its purposes, does not dispense with necessity of substantially complying with its requirements.

8. Adverse possession 🔑88—Quieting title 🔑29—Claim of title under void execution deed did not ripen into valid title because judgment debtors took no steps to remove cloud of which they had notice.

Void sheriff's deed to purchaser at execution sale, who was never in possession of real-

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★Rehearing denied. Hearing denied by Supreme Court.

ty, and only paid taxes thereon, could not ripen into title because of failure of judgment debtors to take any steps to remove cloud on their title created by the void deed, though they had notice thereof.

9. Adverse possession 🔑13—To constitute "adverse possession," adverse claimant must be in actual, continuous possession for five years.

To constitute "adverse possession," adverse claimant must be in actual possession of the realty for continuous period of five years.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adverse Possession.]

10. Execution 🔑255—Execution sale will not be set aside without refunding purchase money applied to debtor's benefit.

Under the principle that he who seeks equity must do equity, execution sale will not be set aside at the instance of judgment debtor without refunding to purchaser the purchase money which has been applied to judgment debtor's benefit.

11. Executors and administrators 🔑231—Judgment creditor's failure to present claim against deceased judgment debtor's estate did not extinguish debt.

Judgment creditor's failure to present his claim against estate of deceased judgment debtor did not operate as an extinguishment of the debt.

12. Money paid 🔑1—Voluntary payment of another's debt is not recoverable, in absence of promise of repayment.

The general rule is that there can be no recovery for the voluntary payment of the debt of a third person without request and with no promise of repayment by person whose debt is paid.

13. Execution 🔑255—Purchaser at execution sale held not entitled to reimbursment for taxes and assessments paid by him as condition precedent to setting aside such sale.

Persons claiming under judgment debtor were not required, as condition precedent to setting aside judicial sale under void execution, to reimburse purchaser at such sale for taxes and assessments against realty paid by him.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Samuel B. Stanley and another, executors of the last will and testament of Fanny L. Stanley, deceased, and others, against Delbert Westover, sometimes known as D. L. Westover. From the judgment, both parties appeal. Affirmed in part, and in part reversed, with directions.

Grant & Zimdars and William H. Bryan, all of San Francisco, for appellants.

J. S. Hutchinson and Walter Slack, both of San Francisco, for respondent.

JAMISON, Justice pro tem. This action was brought by plaintiffs, respondents appellants, hereinafter referred to as the Stanleys, against the defendant, appellant respondent, hereinafter referred to as Westover, to set aside a judgment rendered by the superior court of the state of California, in and for the city and county of San Francisco, on October, 1907, wherein D. L. Westover was plaintiff and all persons, etc., were defendants, numbered 2490, and adjudging the Stanleys to be the owners of the real property described in the complaint filed in this action.

Judgment in this action went for the Stanleys, that they were the owners of the said real property, subject to a lien thereon in favor of Westover for taxes paid by Westover that were assessed against the land in controversy during the years 1919 to 1924, inclusive, amounting to some $1,832.39, and the sum of $165 paid by stipulation, without interest, and the further sum of $3,424.85 paid by Westover for taxes, sewer assessments, and Twin Peak tunnel assessments on said real property up to May 14, 1917.

The Stanleys appeal from that portion of the judgment which awards Westover the $3,424.85, and Westover appeals from that portion of the judgment that decrees title in said real property to be in the Stanleys and from that portion of the judgment that fails to allow him additional amounts for taxes, assessments paid out by him on said real property, and $853.01 paid on execution sale in case of Mason v. Stanley.

It is conceded:

That Fanny L. Stanley was the owner of the real property described in the complaint on February 1, 1897. That she died on July 8, 1898, leaving a will by which she devised the said real property to her two sons, Samuel B. Stanley and Joseph P. Stanley, and her daughter, Fanny Stanley Andreen, and appointed her said two sons her executors. That at the time of her death she resided in the city of San Francisco, and the said will was, during the year 1898, duly probated in the superior court of the city and county of San Francisco and said sons were appointed executors of said estate, and that said estate is still pending in said court.

[1] On March 19, 1897, one F. M. Mason recovered judgment in the superior court of Mendocino county, Cal., against the said Fanny L. Stanley for the sum of $653.22, and thereafter, on April 8, 1897, duly filed a transcript thereof in the office of the county recorder of said city and county of San Francisco.

On May 19, 1898, said Mason assigned the said judgment to the Sonoma Lumber Company in partial satisfaction of a debt owing by Mason to said company; Westover at that time being a large stockholder of said company and the general manager thereof.

On May 21, 1898, said Westover had an execution issued on said judgment, which was levied upon said real property on June 20, 1898. That said real property was noticed for sale and was sold under said execution on July 20, 1898, and at said sale Westover purchased same, but, payment of purchase money not having been made, the said execution was returned unsatisfied.

Another execution was issued on said judgment on March 11, 1899, was levied upon said real property on March 14, 1899, and advertised for sale for April 7, 1899, and at that time was sold to Westover for the sum of $853.01, and thereafter, on September 19, 1900, a deed for said property was duly executed by the sheriff under said execution sale to Westover, who held it as trustee for said Sonoma Lumber Company. That in 1902 the said Sonoma Lumber Company was disincorporated and the claim of said company to said real property was distributed to said Westover.

It is manifest that the sale under this levy of the execution was wholly void and conveyed no title, for the reason that Fanny L. Stanley had died on July 8, 1898, and the levy of the execution under which the sale was made was after her death, to wit, on March 14, 1899, and the deed executed to Westover by the sheriff under said execution was a nullity. Code Civ. Proc. § 686; Code Civ. Proc. § 1505; Smith, Adm'r, etc., v. Reed, 52 Cal. 345.

On July 13, 1907, Westover commenced an action in the superior court of the state of California in and for the city and county of San Francisco, being No. 2490, in which action said Westover was plaintiff and all persons claiming any interest in or lien upon the property described in the complaint, or any part thereof, were defendants, and he therein prayed that he be declared the owner of the eleven twenty-fourths of the real property therein set forth.

This action purported to be instituted under the provisions of "An act to provide for the establishment and quieting title to real property in case of loss or destruction of public records," approved June 16, 1906, and being commonly known as the McEnerney Act. St. 1906 (Ex. Sess.) p. 78. It is this judgment that plaintiffs seek to set aside and cancel in this action.

Section 1 of said act provides that, whenever the records in the office of the county recorder of any county shall be lost or destroyed in whole or in any material part by flood, fire, or earthquake, any person who claims an estate of inheritance, or for life in, and who is, by himself or his tenant, or other person, in the actual and peaceable possession of any real property in such county may bring and maintain an action in rem against the whole world in the superior court for the county in which such real property is situate to establish his title to such property and determine all adverse claims.

Section 2 of said act provided that the action shall be commenced by the filing of a verified complaint, in which the party so commencing shall be named as plaintiff and the defendants shall be described as all persons claiming an interest in or lien upon the real property therein described, or any part thereof, and shall contain a statement of the facts enumerated in section 1 of the act, a particular description of the real property, and a specification of the estate, title, or interest of the plaintiff therein.

In his complaint filed in that action, Westover stated that he claimed an estate in fee simple absolute, and by himself was in actual and peaceable possession of the said real property, except that in his complaint it was described as eleven twenty-fourths of a strip of land described by metes and bounds and designated as being a portion of block No. 124, block 125, and block 126 of Sunset district.

Section 3 of said act provides that, upon the filing of the complaint a summons must issue under the seal of the court, and, among other things, must set forth a particular description of the property.

Section 4 provides that the summons shall be published in a newspaper of general circulation published in the county in which the action is brought at least once a week for a period of two months, and that to each publication thereof there shall be appended a memorandum in substance as follows:

> "The first publication of this summons was made in (here insert name) newspaper on the —— day of ——, A. D. (inserting the date)."

Section 5 of said act provides that at the time of filing his complaint the plaintiff shall file with the same his affidavit fully and explicitly setting forth and showing the character of his estate, right, title, interest, or claim in, and possession of, the property, during what period the same has existed and from whom obtained; that he does not know and has never been informed of any other person who claims or may claim any interest in or lien upon the property, or any part thereof, adversely to him, or, if he does know, or has been informed of any such person, then the name and address of such person.

The court found:

That the evidence supports the findings that at the time Westover began said action he had no right, title, or interest of any kind in the real property in controversy in this action; that at the time he commenced said action he was not in the possession of the real property in controversy in this action, either actual or otherwise, and had never been in such possession; that prior to the commencement of this action he did know that others claimed an interest in the said real property, but at time of filing said action had forgotten same.

That prior to 1898 Joseph P. Stanley held a power of attorney from his mother, Fanny L. Stanley, and by virtue of said power of attorney had conveyed to Joseph Hutchinson as security for loans made to Fanny L. Stanley various properties of Fanny L. Stanley, including the real property which is the subject of this action in the instant case. Joseph Hutchinson was an attorney at law, and acted as attorney for the said executors of the estate of Fanny L. Stanley.

That, at the time of the death of Fanny L. Stanley, Westover knew that the title to said real property stood in the name of Joseph Hutchinson, and during all other times until the death of Joseph Hutchinson, which occurred in 1910, knew that it so stood.

That some time between the years 1900 and 1903 Westover called on Joseph Hutchinson with reference to the payment of taxes assessed against the said real property, claiming that Hutchinson should pay the same, and was advised by Hutchinson that he was not responsible for the taxes, and shortly thereafter Westover called on Hutchinson again and sought to persuade him to pay them. And in the year 1906 or the early part of 1907 Westover called on Hutchinson at his office regarding the redeeming of said real estate from a sale of said real estate which had been made for the taxes of 1904. Joseph Hutchinson died in 1910, and at the time of his death had no interest in said real property.

That Westover knew prior to the sale under the first execution issued in the case of Mason against Fanny L. Stanley that the interest of said Fanny stood in the name of Hutchinson, and was informed and had knowledge as early as 1902 of the claim of the Stanleys in and to said real property, and knew that Fanny L. Stanley died in 1898. The court also found that neither Westover or the Sonoma Lumber Company ever filed any claim against the estate of Fanny L. Stanley.

The records of the deed by which Westover acquired his claim to said real property had not been destroyed by the fire of April 18, 1906. That said records were in the office of the county recorder of said city and county of San Francisco, and were at all times accessible to the public, and maintained as public records in the office of said recorder, and that Westover would have been able to state the dates and times and names of the parties who had deeded said property to him had he examined said records.

The court further found that Westover had forgotten that Hutchinson had any interest in said real property, and that he did not have in mind the fact of the death of Fanny L. Stanley and the claims of plaintiffs herein to said real property, and in making the aforesaid affidavit did not have the conscious intention of making any false statement in regard to said death and the said claims of the Stanleys.

It would appear from this last finding of the court in the instant case that, at the time Westover commenced his action 2490 by filing his complaint and making the affidavit, his mind was in that convenient state where it could only contain one conscious train of thought, the self-centered thought that he would procure a decree to said real property under the McEnerney Act. And so obsessed was he with this single train of thought he forgot to examine the records to see whether or not the records of his claim had been destroyed. He forgot that he was not then, nor ever had been, in the possession of said real property, actual or otherwise, and forgot that Hutchinson or the Stanleys ever had any claim to said real property.

On October 21, 1906, said action 2490 came on for hearing before the court, and Westover was sworn and testified that there were no improvements on said real property and that it was not fenced. Westover's attorney then asked permission of the court to have the hearing continued in order that Westover might put a fence around the said property, and said permission was granted, and the hearing of said case was continued until such time as Westover could build said fence. Thereafter on October 29, 1906, Westover again appeared in court and testified that he had inclosed said real property with a fence, and thereupon judgment was rendered in his favor.

We have here Westover's own sworn statement that when he filed his complaint and commenced his action No. 2490 he was not in possession of said real property, actual or otherwise, and that he had no possession of any kind of said real property until about 2½ months after he had filed his complaint in said action.

In the case of Lofstad v. Murasky, 152 Cal. at page 70, 91 P. 1011, the court, after commenting upon what was meant by the words "actual possession" as used in the McEnerney Act, said, "And upon the hearing before the court for the purpose of obtaining the decree authorized under the act he [plaintiff] must prove actual possession of the property at the time of filing his complaint * * * as it is defined by these authorities."

[2] To authorize the bringing of an action under the McEnerney Act, the public records of the county must be lost, or destroyed in whole or in part by flood, fire, or earthquake, and the party bringing the action must, at the time of bringing the action be in the actual and peaceable possession of the real property. These requirements are jurisdictional, and, unless each of them exists at the time the action is commenced, no right arises to bring an action under this act.

[3] It is a settled rule that a plaintiff's right of action must exist when he commences his action, for the rights of the parties are to be judged by the conditions existing at the time the action was begun. Cal. Jur. vol. 1,

p. 377; Westerfeld v. New York Life Ins. Co., 129 Cal. 84, 58 P. 92, 61 P. 667.

At the hearing of the said case No. 2490 on October 21, 1906, when it appeared by the testimony of Westover that, when he commenced his said action against all persons, etc., he was not in the actual possession of the real property, described in his complaint, the court should have dismissed the said case for want of jurisdiction.

[4] However, it is the well-settled rule in this state that, in an action in equity brought for the purpose of vacating a judgment, valid on its face, on the ground of fraud, such fraud, to constitute a ground for equitable relief, must be extrinsic or collateral to the question examined or determined.

[5] Aside from the question of fraud in procuring the judgment in this case, we think that the judgment is void on its face for the following reasons:

(1) For the reason that the complaint in said action No. 2490 did not set forth a particular description of the real property, nor was such particular description set forth in the summons or in the lis pendens. The description of the real property as it appeared in the complaint filed by Westover in case No. 2490 described it as being block 1024, 1025, and 1026 in the Sunset district, whereas the correct description of said real property was and is Outside Lands blocks 1024, 1025, and 1026.

The court found upon this matter as follows: In all papers, documents, records, and proceedings where description of the property is made in action 2490, the premises hereinbefore referred to were erroneously described in the following respects, to wit: Said premises were described as being in portions of block 1024, 1025, and 1026 of the Sunset district, whereas a correct description of said lands should be a portion of Outside Lands blocks 1024, 1025, and 1026.

(2) Section 5 of the McEnerney Act provided that the affidavit shall be a part of the judgment roll. This section further provides that the affiant shall set forth fully and explicitly "the character of his estate, right, title, interest or claim in, and possession of the property, during what period the same has existed and from whom obtained." And it further provides "that if the plaintiff is unable to state any one or more of the matters herein required, he shall set forth and show, fully and explicitly, the reasons for such inability."

In the attempted compliance with said last-named requirement, plaintiff set forth in his said affidavit the following:

> "That all deeds and records in the possession of the said plaintiff were destroyed by fire on or about the 19th day of April, 1906, and for that reason said plaintiff is unable to state the dates and times or the names of the parties who deeded said real estate described in the complaint, and hereinafter described to plaintiff. That said plaintiff has been in actual, open, notorious, and peaceable possession of said real estate for many years."

In the case of Potrero Nuevo Land Co. v. All Persons, 158 Cal. 731, 112 P. 303, the court held the affidavit to be insufficient which stated:

> "That said title to said property was sold and conveyed by the state of California to one John Bensley in 1855, and by him through divers mesne conveyances conveyed to said plaintiff, who is now the owner and holder thereof and has been for the last ten years."

Commenting thereon, the court said:

> "To say that one has owned an estate for ten years and more is not fully and explicitly showing how long in fact he has owned and enjoyed it. And a statement that one acquired title by 'divers mesne conveyances' from one John Bensley, to whom the state conveyed the property in 1855, is not a full and explicit showing, description, or characterization of the person 'from whom obtained.' The provision of the statute requiring a full and complete statement in these particulars is manifestly designed for the benefit of the defendants, in enabling them, by verifying plaintiff's claim, to prevent fraud and safeguard their own rights. For these reasons a full and fair compliance with the provisions is a just exaction from every plaintiff."

[6] And merely stating, as Westover did in his affidavit, that the reason he cannot state the dates and times and parties from whom he obtained said real property is because all the deeds and records in *his* possession were destroyed by fire on April 19, 1906, does not show fully and explicitly the reason for such inability.

(3) Section 4 of the McEnerney Act provides that the summons shall be published once a week for a period of two months and that to each publication there shall be appended a memorandum, in substance, as follows: First publication of this summons was made in (here insert name) newspaper on the ——— day of ———, A. D. ——— (inserting date). The proof of publication filed in case 2490 shows that only to the first of the eight weekly publications was the said memorandum attached.

[7] Because the act is remedial and should be liberally construed to effect the purpose contemplated does not dispense with the necessity of substantially complying with its requirements. Cal. Jur. p. 651. In his concurring opinion in the case of Potrero Nuevo Land Co. v. All Persons, 158 Cal. at page 736, 112 P. 307, Shaw, J., said: "I agree that the procedure prescribed in the act should be followed closely."

(4) It appears from an examination of Westover's complaint filed in action 2490, that he did not therein set forth that he was in the actual and peaceable possession

of the eleven twenty-fourths of the real property described therein as portions of blocks 1024, 1025, and 1026 of the Sunset district. His allegations in said complaint in that respect are as follows:

> "The plaintiff claims an estate in fee simple absolute and by himself is in the actual and peaceable possession of all those certain lots, pieces, and parcels of real property situate, lying and being in the city and county of San Francisco, state of California, and described as follows: (Here follows description of real property not involved in this action.)
>
> "That plaintiff is the owner of an undivided eleven twenty-fourths interest in the following described property in fee simple absolute:" Then follows a description by metes and bounds of each of the three tracts in blocks 1024, 1025, and 1026 in Sunset district, and nothing further is stated in the complaint regarding the possession of Westover.

It will be noted that Westover does not join the two descriptions by the conjunction "and"; that is to say, he does not set forth that he is the owner and in possession of certain lots, describing them, and of certain other lots, describing them. But, on the contrary, he says that he claims an estate in fee simple absolute and by himself is in the actual and peaceable possession of certain lots, describing them. Then he starts anew and says that he is the owner of eleven twenty-fourths of the following described property in fee simple absolute.

Westover claims that the Stanleys' cause of action is barred by the provisions of sections 318, 319, and 320 of the Code of Civil Procedure, upon the theory that the Stanleys had not been possessed of the real property within five years previous to the commencement of their action.

The court found, and rightfully so, that the Stanleys had been in possession of said real property since a date long prior to 1896 and up to the date that this action was tried. The court further found that the action under consideration was not barred by the provisions of section 338 of said Code, nor by section 343 of said Code. The instant action was commenced on February 20, 1914, the Stanleys having no knowledge whatever of the rendition of the judgment in action No. 2490, or of any claim of Westover to said real property by reason thereof until April, 1913.

[8] Westover also claims that the Stanleys are barred from bringing and maintaining this action by reason of their laches; that as early as 1902 the attorneys representing the Stanleys had knowledge of the existence of the sheriff's deed executed to him as trustee of the Sonoma Lumber Company under the execution sale upon the judgment of Mason v. Fanny L. Stanley, and knew that all rights acquired under said deed by said company had been distributed to Westover; that said deed was of record and imparted notice of its existence to the Stanleys. But the fact is that Westover was, at no time, ever in the possession of said property, and the only thing he had ever done was to pay the taxes accruing against it.

In the case of Secret Valley Land Co. v. Perry, 187 Cal. 425, 202 P. 451, the court said:

> "One cannot acquire title to the land of another by paying the taxes on it, nor will a claim of title under a void deed, although recorded, ripen into a fee by lapse of time, nor will limitations run against the owner of record in favor of a claimant not in possession, nor is it incumbent upon the owner to sue for cancellation of a void deed, or to take steps to remove a cloud upon his title. * * * If he desires to have the cloud removed the law affords a remedy, but he is not compelled to go to that expense, and his failure to do so cannot be considered laches, nor will it operate as an estoppel against him."

[9] Westover also claims title to the said real property by adverse possession. One of the elements necessary to constitute adverse possession is that the adverse claimant must have been in the actual possession of the real property for a continuous period of five years. In the instant case the court found that Westover had never been in the possession of said real property either actual or otherwise. As this finding is supported by the evidence, it disposes of Westover's claim that he has obtained title to the real property in controversy by adverse possession.

[10] Westover set up his answer that his grantor, the Sonoma Lumber Company, paid, as purchasers of the said real property under the execution sale upon the judgment of Mason v. Fanny L. Stanley, the sum of $853.01, which was applied in satisfaction of said judgment, that said company paid the taxes on said real property for the years 1899, 1900, and 1901 and that since that last-named date Westover has paid the taxes and assessments assessed against said real property, and he asked that, in the event that it be adjudged that the Stanleys are the owners of said real property, he be reimbursed for said sums so paid out.

It appears that the judgment rendered in the case of Mason v. Stanley was a valid judgment; that it was satisfied by the amount bid by Westover at the execution sale had under the said judgment.

The Stanleys set forth in their complaint facts showing that the said execution sale was void and the deed executed to Westover thereunder was a nullity, and in their prayer for relief asked that their title to said real property be quieted against all claims of Westover to said property. In other words, they attacked the validity of said deed and asked that it be held to be void.

They have come into equity asking equitable relief, which, if granted, will invalidate the aforesaid sale under execution and deed executed thereunder. Upon the principle that he who seeks equity must do equity, the general rule, according to the weight of authority, is that an execution sale will not be set aside at the instance of the debtor without refunding to the purchaser his purchase money which has been applied to the benefit of the debtor. R. C. L. vol. 10, p. 1323.

[11] The failure of Westover to present his claim against the estate of Fanny L. Stanley did not operate as an extinguishment of the debt. Whitmore v. S. F. Savings Union, 50 Cal. 149; Bull v. Coe, 77 Cal. 63, 18 P. 808, 11 Am. St. Rep. 235.

In the case of Keohane v. Keohane, 38 Cal. App. at page 408, 176 P. 387, Lennon, C. J., said:

> "'A party seeking to quiet his title to the realty or remove a cloud thereon will as a condition precedent to the relief be compelled to do equity.' * * * 'A court of equity setting aside a judicial sale under a void execution as a cloud on title should decree that the purchase money be refunded.'"

[12, 13] Westover claims that, having paid all taxes and assessments assessed against said real property, he should, in the event that the Stanleys are adjudged to be the owners of said real property, be reimbursed for same. No case has been called to the attention of the court where the owner of property has been required to reimburse one who has paid the taxes accruing against it, as a condition of quieting his title, except in this case where he seeks to remove a tax deed or sale as a cloud on his title or to obtain a judgment which would in effect invalidate such sale or deed.

It is a general rule that there can be no recovery, for the voluntary payment of the debt of a third party without request and with no promise of repayment by the party whose debt is paid. McGlew v. McDade, 146 Cal. 553, 80 P. 695; Huddleston v. Washington, 136 Cal. 514, 69 P. 146; Curtis v. Parks, 55 Cal. 106. In the case of Iowa Homestead Co. v. Valley Railway Co., 17 Wall. (84 U. S.) 153, 21 L. Ed. 622, the court held that, while the taxes on the lands involved were the debts of the defendants, their refusal or neglect to pay them did not authorize the contestant to make them its debtor by stepping in and paying the taxes for them without being requested so to do; that, if the appellants, owing to their great confidence in their title, have risked too much, it is their misfortune, but they are not on that account to have the taxes voluntarily paid by them refunded by the successful party to the suit.

Pomeroy, in his work on Equity Jurisprudence, in interpreting the maxim that he who seeks equity must do equity, said, in section 385:

> "That whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he acknowledge and concede, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adverse party and growing out of or necessarily involved in the subject-matter of the controversy."

In the instant action the payment of the taxes did not grow out of, nor was it necessarily involved in the subject-matter of the controversy. It was projected into the case by the answer of Westover and partakes of the nature of a counterclaim. The payment or nonpayment of taxes was foreign to the issues that were involved in the case now under consideration.

It is true that the court found that the taxes were paid by Westover, based upon the facts heretofore found; that he claimed to be owner of said property and not in pursuance of any scheme or design to defraud plaintiffs or any one. But, in the case of Iowa Homestead Co. v. Valley Railroad Co., supra, the court said:

> "It seems that the appellants, during this litigation, paid the taxes on a portion of these lands, and claim to be reimbursed for this expenditure in case the title is adjudged to be in the defendants, on the ground that they paid the taxes in good faith and in ignorance of the law. But ignorance of the law is no ground for recovery, and the element of good faith will not sustain an action where the payment has been voluntary, without any request from the true owners of the land, and with a full knowledge of all the facts."

Under our view of the case, the court erred in that portion of its judgment which required the Stanleys to reimburse Westover for any taxes or assessments upon said real property that accrued and were paid by him prior to the date of the stipulation of November 24, 1919.

That portion of the judgment of the trial court to the effect that the Stanleys are the owners of the real property in controversy and quieting their title to same against the claims of Westover is affirmed, and that portion of the said judgment that decrees the payment by the Stanleys to Westover of the taxes and assessments accruing against said real property and paid by him prior to the date of the stipulation of November 24, 1919, is reversed, and the trial court is hereby directed to enter judgment in favor of Westover for the amount of all taxes paid by him under the stipulation of November 24, 1919, also for the sum of $165 paid by him pursuant to stipulation of the parties, and also for the aforesaid sum of $853.01, being the amount bid by him at the execution sale under the judgment in the case of Mason v. Stanley, with interest on said last-named sum of $853.01 from April 7, 1899, at the rate of 7 per cent. per annum, and that said amounts so adjudged in favor of said Westover be made a lien on the real property involved in this controversy.

We concur: HART, Acting P. J.; PLUMMER, J.

93 Cal. App. 113

WESTOVER v. ALL PERSONS, etc.★
(Civ. 3499.)

District Court of Appeal, Third District, California. July 6, 1928.

Rehearing Denied Aug. 4, 1928. Hearing Denied by Supreme Court Sept. 4, 1928.

Quieting title ⟹47(1)—Court held without authority to try action to quiet title without proof that parties to prior actions had been personally served (McEnerney Act, §§ 6, 8, 14).

Where judgments under McEnerney Act June 16, 1906 (St. 1906 [Ex. Sess.] p. 78), providing for quieting title to realty in case of loss or destruction of public records, had been entered prior to commencement of another action under same act involving same property, trial court was not authorized to proceed with trial of later action until proof was made that all persons who appeared in first actions or their successors in interest had been personally served with papers mentioned in section 6 of said act, as required by section 14, though bill of exceptions did not disclose whether time to plead had expired under section 8.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Delbert L. Westover, otherwise known as D. L. Westover, against all persons claiming an interest in or lien on the real property herein described or any part thereof, to establish title. From the judgment, plaintiff and defendants Samuel B. Stanley and another, as executors of the last will and testament of Fanny L. Stanley, deceased, and others appeal. Reversed.

J. S. Hutchinson and Walter Slack, both of San Francisco, for appellants.

Grant & Zimdars and William H. Bryan, all of San Francisco, for respondents.

JAMISON, Justice pro tem. This action was brought by plaintiff, respondent appellant, under the provisions of an act to provide for the establishment and quieting title to real property in case of loss or destruction of the public records, approved June 16, 1906, and commonly known as the McEnerney Act St. 1906 (Ex. Sess.) p. 78.

The plaintiff will be hereinafter referred to as Westover, and the defendants as the Stanleys.

Judgment went in this action for the Stanleys that they were the owners of the real property described therein subject to lien thereon in favor of Westover for taxes and assessments paid by Westover, that were assessed against the said real property during the years of 1919 to 1924, inclusive, amounting to $1,832.39, and the sum of $3,424.85 paid by Westover for taxes, sewer assessments, and Twin Peak tunnel assessments on said property up to May 14, 1917.

The Stanleys appeal from the portion of the judgment which awards Westover the $3,424.85, and Westover appeals from that portion of the judgment that decrees title to said property to be in the Stanleys and from that portion of the judgment that fails to allow him additional amounts for taxes and assessments paid out by him on said real property.

This case and the Civil No. 3498, Samuel B. Stanley and Joseph Stanley, etc., et al. v. Delbert L. Westover, 269 P. 468, were tried at the same time, and the evidence in each is, in the main, practically the same, and the judgments are identical.

In the instant case, Westover sets forth in his complaint that he is the owner of all of three tracts of land described by metes and bounds, being part of blocks 1024, 1025, and 1026, Outside Lands. Upon the trial of this case, it was proven that Westover was not, at the date of the commencement of the action, the owner of the whole of said three tracts, but only claimed an interest in eleven twenty-fourths thereof, and that one Frank A. West owned the other thirteen twenty-fourths. It was further established that prior to the commencement of this action the said Frank A. West had brought suits under the provisions of the said McEnerney Act, and has secured judgments decreeing title to him to twelve twenty-fourths and to one twenty-fourth of said real property. It further appeared that in this action the said Frank A. West had never been served with the summons and papers mentioned in section 6 of the said McEnerney Act.

Section 14 of the said McEnerney Act provided:

> "Whenever judgment in an action hereby authorized shall have been entered as to any real property, no other action relative to the same property or any part thereof maintained under this act shall be tried until proof shall first have been made to the court that all persons who appeared in the first action or their successors in interest have been personally served with the papers mentioned in section 6 of this act either within or without this state more than one month before the time to plead expired."

It is provided by section 8 of said act that the time to plead expires within three months after the first publication of the summons.

This appeal was brought up on a bill of exceptions, and, while there is no showing in said bill of exceptions as to when the first publication of the summons was made in the

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★Rehearing denied. Hearing denied by Supreme Court.

case now under consideration, and consequently it does not appear just when the time to plead expired, yet, it having been established that judgments under the said act had been entered, prior to the commencement of this action, affecting the real property in controversy in this action, the trial court was not authorized to proceed with the trial in the instant action until proof was made to the court that all persons who had appeared in said first actions, or their successors in interest, had been personally served with the papers mentioned in section 6 of said act. This was not done, and therefore the court was without authority to proceed with the trial.

The judgment is reversed.

We concur: HART, Acting P. J.; PLUMMER, J.

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92 Cal. App. 550

PEOPLE v. LE BARON. (Cr. 1018.)

District Court of Appeal, Third District, California. July 14, 1928.

Poisons 🔑4—That possession of narcotics was joint is no defense in prosecution for violation of State Poisons Act.

The fact that possession of narcotics was joint *held* not to constitute a defense in prosecution for violation of the State Poisons Act.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

On application for rehearing. Petition denied.

For former opinion, see 268 P. 651.

Edward Bickmore, of Merced, and Edwin V. McKenzie and J. H. Sapiro, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant petitions for a rehearing of the above-entitled cause and states that in its original opinion this court misapprehended the testimony in certain particulars. The petition states that there is not any testimony showing that Dewie Dale found the hypodermic needles in a room occupied by the defendant and her husband alone. The record clearly shows that the chief of police stated that the hypodermic needles were found in a room which the defendant said was occupied by her. It is true that the defendant stated the same room had been occupied part of the time by Dewie Dale, but the defendant herself admitted that when she was at the house she occupied said room. The fact that Dewie Dale occasionally occupied the room does not militate in the least against any inference to be drawn from the fact that the defendant and her husband occupied said room whenever they were at the house.

The defendant also states that the toilet in which the narcotics were found was not connected directly with the room above referred to, but was connected with the room at the "other" end of the hallway. The testimony is not clear upon this proposition; but it is of little importance when compared with all the circumstances of the case taken together.

We do not propose to go over the petition for a rehearing in detail. It merely repeats the argument made in the original briefs. We are satisfied that the testimony and the circumstances developed thereby go beyond the mere corroboration of the testimony of Dewie Dale as required by the statute, and that the jury were well warranted in finding from all the circumstances that the defendant and her husband had possession of the narcotics referred to. As stated in the original opinion, it might be true that the possession of the narcotics was joint; that is, jointly held by defendant, her husband, and Dewie Dale for their purposes. As likewise stated, however, that fact would not be a defense in the case of the defendant. On all other points, we adhere to the conclusions announced in the original opinion.

The petition for a rehearing is denied.

204 Cal. 557

McKAY v. LAURISTON et al. (S. F. 12691.)

Supreme Court of California. July 18, 1928.

1. Husband and wife 🔑247—Amendment giving spouses power to make testamentary disposition of half community property held not to enlarge wife's interest in community property previously acquired (Civ. Code § 1401, as amended by St. 1923, p. 29, § 1).

Amendment in 1923 to Civ. Code, § 1401 (St. 1923, p. 29, § 1), providing that upon the death of husband or wife one-half the community property belongs to the surviving spouse and the other half is subject to testamentary disposition, *held* not to enlarge wife's interest in community property acquired before the amendment became effective.

2. Husband and wife 🔑265—Wife's interest in community property acquired in 1918 held contingent on her survival of husband (Civ. Code, §§ 172a, 1401; St. 1923, p. 29, § 1).

Under Civ. Code, §§ 172a, 1401, wife's interest in community property acquired in 1918 *held* contingent on her survival of her husband, since the 1923 amendment to section 1401 (St. 1923, p. 29, § 1) did not enlarge wife's interest in community property previously acquired.

3. Husband and wife 🔑273(1)—Wills 🔑6—Wife's attempt to devise community property held ineffectual, since such property on wife's death belonged to husband without administration, notwithstanding statutory amendment (Civ. Code, §§ 172a, 1401; St. 1923, p. 29, § 1).

Wife's attempt to devise community property acquired at a time when her right therein was contingent on surviving her husband *held* ineffectual, since under Civ. Code, § 172a, and § 1401 (prior to 1923 amendment [St. 1923, p. 29, § 1]), such property on wife's death belonged to husband without administration, and 1923 amendment could not enlarge wife's interest in community property acquired previously.

4. Wills 🔑3—Law at time community property was acquired, and not at wife's death, determines whether wife has devisable interest (Civ. Code, § 1401, as amended by St. 1923, p. 29, § 1).

Law at time community property was acquired, and not at the time of wife's death, determines whether she has a devisable interest, under Civ. Code, § 1401, as amended by St. 1923, p. 29, § 1.

5. Descent and distribution 🔑68—Right to inherit from ancestor is mere expectancy.

The right of an heir to inherit from his ancestor is a mere expectancy, and is not in any sense a vested interest prior to ancestor's death.

6. Constitutional law 🔑94—Statutes governing right of inheritance may be amended without infringing upon any vested right of heir.

Statutes governing rights of heirs to inheritance may be changed in any manner without infringing upon or violating any vested right of an heir, since the right of an heir to inherit from his ancestor is a mere expectancy.

7. Descent and distribution 🔑6—Statutes in force at time of death control disposition of intestate's property.

Statutes governing the right of inheritance in force at time of intestate's death control the disposition of his estate.

8. Husband and wife 🔑273(1)—Husband held not to take community property, on wife's death, by descent or succession, and hence statutory amendment giving wife power to devise community property was not controlling (Civ. Code, § 1401; St. 1923, p. 29, § 1).

Where community property was acquired prior to 1923 amendment of Civ. Code, § 1401, husband *held* not to take the community property, on the death of the wife, by descent or succession, and hence 1923 amendment (St. 1923, p. 29, § 1), providing that spouses might devise one-half of the community property, which amendment was in effect at the time of the wife's death, was not controlling.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Claude F. Purkitt, Judge.

On rehearing. Former opinion adopted, and judgment affirmed.

For former opinion, see 263 P. 1013.

James J. Harrington, of San Francisco, for appellants.

Richard Fitzpatrick, of San Francisco, for respondent.

CURTIS, J. A rehearing of this case was granted, for the reason that this court desired to consider, before the final determination of this appeal and in connection with it, the case of Stewart v. Stewart, then pending on its second appeal to this court, and in which many of the same questions were involved as are presented by the appeal in the present proceeding. The decision of this court on the second appeal in the case of Stewart v. Stewart, 269 P. 439, has this day been filed.

In the consideration of the questions involved in the two cases and after a careful study of the arguments presented therein, we have come to the conclusion that our former opinion herein is a correct statement of the law applicable to the facts and subject-matter of this action. We accordingly see no necessity of making any substantial change in our former opinion.

It is contended by at least one of the amici curiæ appearing herein that the doctrine announced in Re Rowland, 74 Cal. 523, 16 P. 315, 5 Am. St. Rep. 464, was repudiated by this court in Re Burdick, 112 Cal. 387, 44 P. 734, in so far as it was held in Re Rowland that "the husband does not, upon the death of his wife, as to the community property, take by descent or succession, but holds the community property as though acquired by himself, and as if his deceased wife had never existed." The case of In re Burdick, supra, makes no reference to the case of In re Rowland, and while there is language to be found in Re Burdick which is directly contrary to the doctrine expressly enunciated, in Re Rowland, we find that the question as to whether the husband succeeded to the community property in his own right, or by succession as heir of his wife, was not before the court in Re Burdick. The court in that case was dealing solely with the interest of the wife in the community property. The language, therefore, relied upon in Re Burdick as overruling In re Rowland was not necessary to the decision of any issue therein, and cannot, therefore, be regarded as declaratory of the law upon the subject-matter in reference to which it was employed. We find that, while the case of In re Burdick has frequently been cited and considered by the appellate courts of this state, it has never, in any decision of which we have any knowledge, been referred to as an authority in support of the claim that the husband upon the death of his wife succeeds to the community property as her heir. In 5 California Jurisprudence, p. 364, we find the following statement of the law upon this question:

> "He [the husband] does not take the property by succession or descent, but holds it as owner, and, it has been said, as if his wife had never existed."

In support of this proposition of law there is cited In re Rowland, supra, and Johnston v. S. F. Savings Union, 75 Cal. 134, 16 P. 753, 7 Am. St. Rep. 129. No reference is made to In re Burdick, supra, as laying down a contrary doctrine. Evidently the author of the subject of community property in this most useful and valuable compilation on the laws of California did not regard the decision in Re Burdick as repudiating or in any manner affecting the doctrine enunciated in Re Rowland. It is true that the Legislature in 1923 (St. 1923, p. 694), by an amendment to the Inheritance Tax Act (St. 1917, p. 880) provided that the community property, "which goes to the husband" upon the death of the wife, should not be subject to an inheritance tax under the provisions of said act. It took similar action at its session held in 1925. St. 1925, p. 471.

It is suggested by counsel that in the opinion of the Legislature the property thus going to the husband on the death of his wife might have been liable for the payment of a tax as property to which the husband succeeded as heir of his wife; hence the adoption of this amendment for the purpose of relieving him from the payment of said tax. As early as 1905 the statutes of this state (St. 1905, p. 341) provided for the collection of an inheritance tax on all property which shall pass by will or by the intestate laws of this state, provided the value of the property passing exceeded certain specific exemptions mentioned in the statute. Under the statute enacted in 1905 it was held in Estate of Moffitt, 153 Cal. 359, 95 P. 653, 1025, 20 L. R. A. (N. S.) 207, that the surviving wife's share of the community property passed to her as the heir of her husband upon his death, and was therefore liable to the payment of an inheritance tax. We know of no reported case, however, that has held the husband liable upon the death of the wife for the payment of an inheritance tax on the community property acquired prior to her death.

We understand it has been the uniform practice of the officers of this state charged with the collection of this species of taxes, from the date of the enactment of the earliest statute imposing such taxes down to the present time, to regard the community property, after the death of the wife, as the absolute property of the husband, and that the same was not liable for any tax upon the death of the wife. Had the husband succeeded upon the death of his wife to any interest in the community property as her heir, he would have, until the amendment of the statute in 1923, been liable for the payment of an inheritance tax thereon upon her death. The fact that this tax was never exacted from the husband can be accounted for only upon the theory that the administrative officers of this state, whose duty it was to enforce the payments of such taxes on all persons liable therefor, were during all these years of the opinion that the husband received no part of the community property from his wife as her heir, and was therefore not liable to the payment of any inheritance tax thereon.

It is quite evident that neither these officers nor their legal advisers relied upon In re Burdick, supra, as establishing the law of this state that the husband succeeded to the community property as the heir of his wife. This fact may be of slight consequence in determining the legal effect of this decision, but, coupled with the further fact that this decision has never been cited as an authority on this particular point in any case in any court of this state, leads to the conclusion that In re Burdick has never been regarded as an authority sustaining the doctrine that the husband succeeds to any of the community property upon the death of his wife as her heir. We are satisfied that the doctrine that the husband does not take any part of the community property as heir of his wife, which doctrine was approved in Re Rowland, supra, is the law of the state, and has been for many years, as to all community property acquired prior to or during the year 1918, the date the property herein involved was acquired.

The opinion heretofore rendered and which we hereby adopt and approve as the opinion of this court at this time, is as follows:

It appears by written stipulation of the parties hereto, and admissions made by the pleadings herein, that certain real property, described in the complaint and situated in the city and county of San Francisco, was acquired as community property by the plaintiff on the 9th day of November, 1918, at which time plaintiff and Hattie A. McKay were husband and wife. No change in the ownership of said real property was made up to the 16th day of August, 1926, on which date the said Hattie A. McKay died, leaving a last will and testament by the terms of which she sought to devise an interest in said real property to her husband, the plaintiff herein, an undivided one-half, and to the defendants Heneretta Lauriston and Mary Frances De Mello the other undivided one-half thereof. Said defendants were named as executrices of said last will and testament, and in due time and after proceedings duly had in the probate court of the city and county of San Francisco, said will was admitted to probate, and said Heneretta Lauriston and Mary Frances De Mello were appointed by said court executrices thereof. This action is brought by plaintiff to quiet his title to said real property, he claiming to be the sole owner of the whole thereof. The defendants, individually and as such executrices, assert that they are the owners by virtue of said last will and testament of an undivided one-half of the interest of the said Hattie A. McKay in said real property at the time of her death. The court gave judgment in favor of plaintiff, quieting his title to the whole of said real property against all claims of said defendants. From this judgment the defendants have appealed, and the same is before us upon the judgment roll in which is incorporated said stipulation of the parties above referred to. The only question involved in this proceeding is whether Hattie A. McKay at the time of her death was the owner of any interest in said real property which she could devise by will and testament. It is conceded that if the said Hattie A. McKay had any interest in said real property at the time of her death, which was subject to her testamentary disposition, she acquired said interest and continued to retain the same by virtue of the fact that said real property became upon its purchase in November, 1918, community property and remained such during her lifetime, and that at the date of said purchase and up to the time of her death she was the wife of Patrick J. McKay, the respondent. At the time said real property was acquired by Patrick J. McKay, section 1401 of the Civil Code read as follows:

> "Upon the death of the wife the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition, goes to her descendants, or heirs, exclusive of her husband."

In 1923 said section 1401 was amended, and at the date of the death of said deceased read as follows:

> "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary diposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of section one thousand four hundred two of this Code."

There is no claim that said real property or any part thereof had ever been set apart to Hattie A. McKay by judicial decree or otherwise, for her maintenance or support, or for any purpose whatsoever. It is also apparent that the provisions of section 1402 of the Civil Code have no direct bearing upon the question of the ownership of Hattie A. McKay of an interest in said real property.

At the time said real property was conveyed to plaintiff, section 172a of the Civil Code read as follows:

> "The husband has the management and control of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or incumbered; provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record, title to community real property, to a lessee, purchaser or incumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate."

In the recent case of Stewart v. Stewart, 199 Cal. 318, 249 P. 197, this court after an exhaustive review of the decisions of this court, as well as those from other jurisdictions where the community property law prevails, considered and determined the right of the wife in community property acquired under the laws in force in this state immediately following the adoption of said section 172a and the amendment in the same year of section 172 of the Civil Code, relating, in its amended form, to community personal property. In that case we held that under the laws of this state as in force in the year 1918, relative to the rights of the wife in community property acquired while such laws were in effect, the wife had no present vested interest in the community property during the continuance of the marriage relation, except that she might by resort to appropriate judicial remedies protect and safeguard the community property against the inconsiderate and fraudulent acts of the husband. In the course of the opinion in that case this court gave utterance to the following language:

> "It is most earnestly contended by and on behalf of the respondent herein that the changes in the laws relating to community property effectuated by these two latter amendments were such as to create in the wife, if such had not theretofore existed, a vested interest in an undivided one-half of the community property immediately upon the acquisition of such property by the spouses or either of them, and to continue thereafter during the existence of the marriage relation. We are unable for the following reasons to give our approval to that contention. The Legislature in framing these two amendments which, taken together, worked a revision of the former section 172 of the Civil Code did not state therein 'in plain language,' as it was pointed out in the second Spreckels Case it might easily have done, 'that the purpose of these amendments was to *vest* in the wife during the marriage a present interest or estate in the community property.' The Legislature did not even by said amendments to the Civil Code go so far as it had done in its revision of the inheritance tax law, coincidently adopted, so as to state that the 'one-half of the community property which goes to the surviving wife on the death of the husband * * * shall not be deemed to pass to her as heir of her husband but shall * * * be deemed to go, pass or be transferred to her for valuable and adequate consideration.' Had the Legislature seen fit to so declare in the language employed by it in the coincident statute, no doubt could have existed as to its intent to work such a radical change in the former and long-established status as to render the interest of the wife in the community property thereafter to be acquired a present vested estate and interest therein from the date of its acquisition. The Legislature did not do this nor anything like it. All that the Legislature by these amendments did do or attempt to do was to cast about the interest of the wife in both the real and personal property of the community during the continued existence of the marriage relation added safeguards and protection against the fraudulent or inconsiderate acts of the husband in the exercise of his control and dominion over these properties of the nature of those already provided for in earlier statutes and especially in and by the 1891 amendment to section 172 of the Civil Code. It follows, to our minds, irresistibly that the same reasoning which was applied to the earlier amendment of section 172 of the Civil Code equally applies to those changes in and revision thereof accomplished by the Legislature in 1917. Additional force is, if needed, given to this conclusion when the particular provisions of section 172a as added to the Code in that year are subjected to careful consideration; for it is made to therein appear that the sole lease, contract, mortgage or deed of the husband holding the record title to community real property to a lessee, purchaser or incumbrancer in good faith, without knowledge of the marriage relation, shall be presumed to be valid and shall be so unless an action to avoid such instrument shall be commenced within one year from the recordation thereof. This provision renders the conveyance of the whole of the community real estate to a purchaser or incumbrancer thereof in good faith voidable but not void; a condition entirely inconsistent with the existence of a present and vested ownership in the wife of an undivided one-half of such property, and also with an intent on the part of the Legislature by said amendments to effectuate such a radical change in a long-established rule of property. We are, therefore, clearly of the opinion that the amendments to the Civil Code, adopted in 1917, did not operate to change such rule to the extent of creating in the wife a present vested interest in the property of the community during the continuance of the marriage relation."

The real property in controversy was acquired by the plaintiff under precisely the same legal conditions as was the real property involved in the case of Stewart v. Stewart. Accordingly, Mrs. McKay took no present interest therein which she could dispose of by last will and testament.

[1] It is claimed, however, by appellants that by the subsequent amendment of section 1401 of the Civil Code in 1923, which section was in force as thus amended at the date of

the death of said Hattie A. McKay, she was given power to make testamentary disposition of one-half of the community property. There is no question but that by said section 1401 of the Civil Code, as amended in 1923, the wife at her death has been given the power to dispose by will of whatever interest in community property she may have at the time of her death. We have already seen, however, that at the time said real property was acquired the provisions of the Code then in force gave to the wife no right in the community property which she could dispose of by will. Could a subsequent statute or an amendment to the statute in force at the time the property was acquired invest the wife with a right which she did not possess prior to the enactment of said statute or amendment? This question has frequently been before the courts of this state, and particularly in proceedings where the nature and extent of the interest of the wife in the community property of herself and husband have been the subject of controversy. It has been consistently and repeatedly held by this court, beginning with the case of Spreckels v. Spreckels, reported in 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, down to cases of recent determination that amendments whereby it was sought to lessen, enlarge, or change in any manner the rights of the respective spouses in community property will not be given retroactive effect so as to affect the respective rights of the parties in community property acquired prior to the enactment of such amendments. Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; Estate of Frees, 187 Cal. 150, 201 P. 112; Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22; Schubert v. Lowe, 193 Cal. 291, 223 P 550; Estate of Drishaus, 199 Cal. 369, 249 P. 515; Stewart v. Stewart, 199 Cal. 318, 249 P. 197.

The decisions of the District Court of Appeal upon this question have been to the same effect. Clavo v. Clavo, 10 Cal. App. 447, 102 P. 556; Jacobs v. All Persons, 12 Cal. App. 163, 106 P. 896; Scott v. Austin, 57 Cal. App. 553, 207 P. 710; Scott v. Austin, 58 Cal. App. 643, 209 P. 251; Copp v. Rives, 62 Cal. App. 776, 217 P. 813.

[2-4] At the time of the purchase of said real property the respondent took the absolute title thereto subject to whatever rights his wife had therein by virtue of the fact that the same was the community property of himself and his wife. This right of his wife was the right to receive upon the death of her husband, and subject to his debts, one-half of the community property. In other words, the wife was given a right in the community property contingent upon her surviving her husband, and upon the happening of this contingency such right would have ripened into a vested interest in her in and to the said community property. Her death, however, prior to that of her husband, made the happening of this contingency impossible and thereupon the entire estate belonged to the husband without administration. Civ. Code, § 1401, prior to its amendment in 1923. These rights of the respective spouses in the community property attached to the property and were acquired by the parties at the time of the conveyance of the property, and, as we have seen, said rights cannot be impaired or destroyed by subsequent legislation. The courts, as above noted, have uniformly held that any legislation affecting the rights of the parties in such cases will not be given a retroactive construction, but that the law in force at the date of the acquisition of the property is determinative of the rights of the parties therein. It is plain, therefore, that the right of Hattie A. McKay in said real property at the time of her death must be determined by the law in force at the time said property was acquired by the respondent and herself, and that as the law then in effect gave her no right to make any testamentary disposition of any of said community property or any part thereof, the provision in her last will and testament by which she sought to devise to appellants an interest in said real property is ineffectual to vest title in appellants to any part or portion of said real property.

[5-7] Appellants further contend that the statute under which the husband succeeds to the community property is a statute of succession and inheritance, and therefore the law in effect at the death of the wife governs the disposition of the property of her estate. There is no question but that the right of an heir to inherit from his ancestor is a mere expectancy and is not deemed in any sense to be a vested interest in any property of his ancestor prior to the death of the latter. Statutes governing this right may be amended in any manner the Legislature may see fit, without infringing upon or violating any vested right of the heir. It is equally well settled that the statutes governing the right of inheritance in force at the time of death control the disposition of property left by an intestate. Did the community property acquired by McKay in 1918, upon the death of Mrs. McKay, become the property of respondent by descent and inheritance, or was he the sole owner thereof at all times since its purchase, subject to a half interest therein in his wife, in case she survived him? If a wife had any interest in said real property which would, upon her death, descend to her husband as her heir, then the husband would take the same by descent and inheritance, and the law in force at the time of her death would govern. The decisions of this court, however, have been to the effect that the husband does not, upon the death of the wife, succeed to the community property by de-

scent or succession. This was definitely decided in the early case of In re Rowland, 74 Cal. 523, 16 P. 315, 5 Am. St. Rep. 464, in which case this court employed the following significant language:

> "The *estate in expectancy* of the wife in the community property is dependent upon her survivorship; and in the event of her death before her husband, it is deemed never to have existed. If we are correct in this, the husband does not, upon the death of his wife, as to the community property, take by descent or succession, but holds the community property as though acquired by himself, and as if his deceased wife had never existed."

While In re Rowland and many of the later cases enunciating this same doctrine were decided by this court in construing the sections of the Code prior to the amended form in which they were in force in 1918, at the time the McKay property was acquired, yet in more recent decisions, and particularly in Stewart v. Stewart, supra, the same doctrine has been adhered to as was enunciated in the earlier cases. We quote again from the Stewart Case:

> "We are, therefore, clearly of the opinion that the amendments to the Civil Code, adopted in 1917, did not operate to change such rule to the extent of creating in the wife a present vested interest in the property of the community during the continuance of the marriage relation."

[8] Therefore, if, under the law of this state as it stood after the various amendments up to and including those enacted in 1917, the wife had no vested interest in the community property during the continuance of the marriage relation, and upon her death her mere expectancy or inchoate interest therein ceased and terminated, after her death there was no property, nor any interest in any property, to which either the husband or any other person could succeed to by descent or succession or by any other means or method. Accordingly it must be held that the respondent did not, upon the death of his wife, take interest in the community property by descent or succession. On the other hand, it is plain that whatever interest the wife had in said community property ceased and terminated at her death and thereupon the husband was the sole owner of said community property. The contention, therefore, of appellant, that the law in force at the death of Mrs. McKay controls the descent and disposition of said community property, cannot be sustained for the conclusive reason that the husband took no interest in said property by descent or succession. On the other hand, whatever interest the parties had in said property became fixed and determined by the law in force at the time said property was acquired by them; their rights therein thus acquired could not be diminished, enlarged, or in any way affected by subsequent legislation; and as said property at the time it was acquired by Mr. and Mrs. McKay became their community property, upon the death of Mrs. McKay said property in its entirety belonged to McKay without administration. It follows, therefore, that the plaintiff was, at the commencement of this action, the sole owner of said real property, and that the judgment should be affirmed.

It is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; TYLER, Justice pro tem.

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204 Cal. 667

HOTCHKISS et al. v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

(S. F. 13097.)

Supreme Court of California. Aug. 3, 1928.

1. Mandamus 🔑16(1)—Mandate will not lie to compel performance of a useless act.

Writ of mandate will not be granted to compel the performance of a useless act.

2. Exceptions, bill of 🔑53(5) — Mandate to compel judge to settle bill of exceptions preparatory to appeal must be denied, where facts alleged in petition for writ showed appeal would have to be dismissed (Code Civ. Proc. § 942).

Where, from facts alleged in petition for writ of mandate to compel settlement of bill of exceptions preparatory to appeal, under Code Civ. Proc. § 942, it appeared that appeal would have to be dismissed, mandate must be denied.

In Bank.

Application by O. E. Hotchkiss and Constance Lake for writ of mandate, to be directed to the Superior Court in and for Alameda County, and Hon. T. W. Harris, Judge thereof. Petition denied.

Geo. F. Witter, of Oakland, for petitioners.

PER CURIAM. [1, 2] Petitioners filed an application for writ of mandate to compel the respondent to settle a proposed bill of exceptions preparatory to an appeal from a judgment against sureties on an appeal bond entered on motion after the affirmance of the judgment appealed from. Code Civ. Proc. § 942. From the facts alleged in the petition for the writ, it appears that, on timely motion, the appeal of the sureties from the judgment will have to be dismissed. Duerr v. Sloan, 50 Cal. App. 512, 516, 195 P. 475. See, also, Meredith v. Santa Clara etc. Ass'n, 60 Cal. 617, 621, and Gray v. Cotton, 174 Cal. 256, 258, 162 P. 1019.

Mandate will not lie to compel the performance of a useless act. The petition is therefore denied.

205 Cal. 6

TULARE IRR. DIST. et al. v. LINDSAY-STRATHMORE IRR. DIST.

(Sac. 4001.)

Supreme Court of California. Aug. 8, 1928.

1. Costs ⚷266—Judge's disqualification on first trial does not prevent allowance of costs to prevailing party on second trial.

Disqualification of judge on former trial does not prevent allowance of costs to prevailing party on second trial, if such costs are otherwise properly chargeable.

2. Costs ⚷266—Bill of exceptions at second trial, including costs under stipulations at first and second trials, sufficiently showed costs at first trial were chargeable.

Where bill of exceptions at second trial set forth pleadings and memorandum of costs claimed by plaintiff on account of proceedings in both trials pursuant to stipulation for costs entered into at first and second trials, it sufficiently appeared from bill, in absence of some showing to contrary, that costs on former trial were necessarily incurred and were legally chargeable pursuant to stipulation.

3. Costs ⚷266—Bill of exceptions settled by successor to judge at first trial could not be disregarded in determining costs at second trial under record of stipulation at first trial (Code Civ. Proc. § 653; Supreme Court Rule No. 27).

Under Code Civ. Proc. § 653, providing that judge may settle bill of exceptions before or after he ceases to be judge, and Supreme Court Rule No. 27, providing that bill of exceptions may be settled by successor in office of judge who dies, bill of exceptions settled by successor in office of trial judge at first trial could not be disregarded in determining costs to be taxed at second trial, where record of stipulation for costs at first trial was before judge at second trial on motion to tax costs.

4. Costs ⚷266—Bill of exceptions, showing verified memorandum of costs, constituted prima facie showing of necessary costs, and is controlling unless controverted.

Bill of exceptions, showing that memorandum of costs was duly verified, constituted prima facie showing that items therein were necessarily expended or incurred, and, unless controverted, should control decision of trial court, where charges appear on face thereof to be for proper and necessary disbursements.

Department 2.

Appeal from Superior Court, Tulare County; Albert Lee Stephens, Judge.

Action by the Tulare Irrigation District and others against the Lindsay-Strathmore Irrigation District. From an order taxing costs, plaintiffs appeal. Reversed.

W. R. Bailey, of Visalia, Wheaton A. Gray, of Los Angeles, and Farnsworth, Burke & Maddox, of Visalia, for appellants.

Sloss & Ackerman, of San Francisco, W. G. Irving, of Riverside, and Power & McFadzean, of Visalia, for respondent.

SHENK, J. This is an appeal by the plaintiffs from an order taxing costs. The main action is one to determine conflicting claims to water rights. It was commenced on July 15, 1916. Upon issue joined, two trials were had. The first trial was commenced on October 16, 1917, before the honorable W. B. Wallace, since deceased. After the cause was submitted for decision, the court indicated that judgment would be ordered for the plaintiffs; whereupon the defendant instituted proceedings in this court to prohibit the trial judge from making any further order in the cause, on the ground that he was disqualified on account of interest in the subject-matter of the litigation. The peremptory writ was granted. Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056. The second trial commenced on November 28, 1921, before the honorable Albert Lee Stephens, judge presiding. Before judgment was entered on the second trial, a petition for a writ of prohibition to test the validity of a contemplated injunctive order pending appeal was filed in this court, and the peremptory writ was denied. Tulare Irr. Dist. v. Superior Court, 197 Cal. 649, 242 P. 725. On May 16, 1925, findings of fact and conclusions of law in favor of and awarding costs to the plaintiffs herein were signed and filed. On May 21, 1925, the plaintiffs served and filed their cost bill aggregating $22,534.80. In this cost bill the plaintiffs included their items of costs on the first trial in the total sum of $11,875.40, which was made up of the following items: $820 on account of one-half of the reporter's per diem; $8,912 on account of one-half of the cost of the reporter's transcript; and $2,143.40 on account of witness fees and mileage. On the defendant's motion to tax costs, the court entered an order striking out the items of costs claimed by the plaintiffs on account of the first trial, and taxed the costs at the sum of $10,659.40. This appeal is from that portion of the order which struck out the costs incurred at the first trial.

Two bills of exceptions were prepared and settled, the first by the honorable Frank Lamberson, one of the regular judges of the superior court in and for the county of Tulare and the successor in office of Judge Wallace. This bill of exceptions was settled on September 20, 1926, and set forth, among other things, the record of a stipulation, made in open court and entered in the minutes, between counsel for the respective parties, on October 27, 1917, and during the course of the first trial. That stipulation was to the effect that the official reporter transcribe three copies of the testimony and proceedings taken and to be taken during the trial, one copy

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

for each side and one copy for the court; "each party to pay one-half of the cost thereof, the prevailing party to recover the amount so paid by it as costs expended herein." The second bill of exceptions was settled by the honorable Albert Lee Stephens, judge presiding, and set forth, among other things, the complaint, the answer, and the plaintiffs' memorandum of costs and disbursements, which includes in detail the items claimed by the plaintiffs for reporter's fees and costs, witness fees and mileage, on account of the proceedings in both trials.

The motion to tax costs by striking out all of the items pertaining to the first trial was made on the following grounds:

> "A. Because each such item and every part thereof is not legally chargeable as costs in this action, and not a necessary disbursement therein. B. And also because the proceeding in which each and all such items and expenses are alleged to have been incurred was coram non judice, and one of which the above-entitled court did not have jurisdiction; all its acts in said proceeding, including the taking of testimony and evidence, being null and void."

The motion was based on the papers, records, and files, including minute entries and minute orders entered by the clerk of the superior court in said action and on "the papers, records, files, orders, and judgment of the Supreme Court of the state of California, in the case of Lindsay-Strathmore Irrigation District v. Superior Court of County of Tulare, State of California, decided on the 20th day of February, 1920, and reported in 182 Cal. commencing at page 315, 187 P. 1056." No affidavit or other evidence was presented to the trial court to show that the items complained of were not necessarily incurred or were not proper disbursements on the former trial.

[1] The record shows that in the trial court the defendant placed its sole reliance on the contention that the costs on the first trial were not legally chargeable, in that they were incurred on a trial which could result in no legal judgment because the trial judge was disqualified. However, it is not now contended that the disqualification of the judge on a former trial would prevent the allowance of costs to the prevailing party on the second trial, if such costs are otherwise properly chargeable. That such costs are allowable is settled by the case of Meyer v. City of San Diego, 132 Cal. 35, 64 P. 124. See, also, Senior v. Anderson, 130 Cal. 290, 62 P. 563; Stoddard v. Treadwell, 29 Cal. 281.

[2-4] In support of this appeal, the defendant relies on the familiar rule that all intendments are in favor of the ruling of the court, and that any alleged error must appear on the face of the record on appeal, and it is contended that the Lamberson bill of exceptions may not be considered in deciding the appeal on its merits, and that error is not shown by the Stephens bill of exceptions, which, it is argued, must be held to comprise the entire record on appeal. Considering the Stephens bill of exceptions alone, it appears therefrom that the items for reporter's fees and transcript in the proceedings before Judge Wallace were claimed "pursuant to stipulation of October 27, 1917," and that the items for similar costs in the proceedings before Judge Stephens were claimed "pursuant to stipulation of November 28, 1921." The costs claimed pursuant to the stipulation last mentioned were allowed and are not questioned. The record in the Stephens bill of exceptions with reference to the stipulation is precisely the same as the record of the stipulation in the proceedings before Judge Wallace, except only as to the date. In other words, the record as to the one item is the same as the record as to the other item, and no reason appears why the one was allowed and the other rejected, except the untenable reason that the costs on the former trial were not legally chargeable. It is not contended by the defendant that the stipulation of October 27, 1917, was not entered into, but only that, without the aid of the Lamberson bill of exceptions, the record does not show that it was entered into. We think it sufficiently appears from the Stephens bill of exceptions, in the absence of some showing to the contrary, and there was none, that the costs on the former trial were necessarily incurred, and that they were legally chargeable pursuant to stipulation. Furthermore, we would not feel justified in disregarding the Lamberson bill of exceptions. Its sole purpose was to set forth the record of the stipulation of October 27, 1917. This stipulation was entered in the minutes in the proceedings before Judge Wallace. Section 653 of the Code of Civil Procedure provides that a judge may settle a bill of exceptions after, as well as before, he ceases to be such judge; that, if the judge dies, or if there is no mode prescribed by law for the settlement of a bill of exceptions, it shall be settled and certified in such manner as the Supreme Court may, by its order or rules, direct. Rule XXVII of this court, in effect at all of the times here in question, provided that, when the judge before whom an action was tried is dead, any unsettled bill of exceptions may be settled and certified by his successor in office. It appears on the face of the Lamberson bill of exceptions that Judge Wallace was dead at the time the said bill was settled, and that Judge Lamberson was his successor in office. Although the stipulation of October 27, 1917, was not entered into in the proceedings before Judge Stephens, the record of said stipulation was before him on the motion to tax costs, and there would appear to be no doubt that the bill of exceptions settled by him appropriately could have set forth the record of said stipulation. However, when said record was incorporated in a bill of exceptions settled by the successor in office of the deceased judge, we think the stat-

ute and the rule of the court were applicable and were complied with. The Stephens bill of exceptions shows that the memorandum of costs was duly verified. As such it constituted a prima facie showing that the items therein were necessarily expended or incurred, and, unless controverted, should control the decision of the trial court where, as here, the charges appear on the face thereof to be for proper and necessary disbursements. Fay v. Fay, 165 Cal. 469, 132 P. 1040; Miller v. Highland Ditch Co., 91 Cal. 103, 27 P. 536.

No satisfactory reason appears on the record before us, with or without the Lamberson bill of exceptions, why the defendant should not be held to its stipulation. The order appealed from is therefore reversed, with directions to the trial court to enter a judgment for costs in favor of the plaintiffs in the sum of $22,534.80.

We concur: RICHARDS, J.; LANGDON, J.

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205 Cal. 17

HARTZELL v. DOOLITTLE et al.
(L. A. 9071.)

Supreme Court of California. Aug. 13, 1928.

1. Vendor and purchaser 🔑39—Contract for sale of real property, described according to map which was not filed for record, held unenforceable and void (St. 1907, p. 290, as amended).

Agreement for sale of real property, describing property according to map which had never been filed for record in the office of the county recorder, *held* unenforceable and void, under St. 1907, p. 290, and amendments thereto, as containing no legal description of property.

2. Vendor and purchaser 🔑44—Evidence held to sustain finding that purchaser of contract for sale of real estate was without business experience and unacquainted with property.

Evidence *held* to sustain finding that purchaser of contract for sale of real property through broker was without business experience and unacquainted with city where property was located.

3. Vendor and purchaser 🔑44—Evidence held to sustain finding that broker misrepresented location of property to purchaser of sale contract.

Evidence *held* to sustain finding that broker negotiating sale of contract of sale of real property misrepresented to purchaser the location of property.

4. Vendor and purchaser 🔑44—Evidence held to sustain finding that broker acted in bad faith in sale of contract of sale of real estate.

Evidence *held* to sustain finding that broker negotiating sale of contract for sale of real estate acted in bad faith in reference to sale thereof.

Department 1.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Catherine Hartzell against C. I. Doolittle and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

George B. Toland, of Los Angeles, for appellant Doolittle.

Lucas F. Smith, of Los Angeles, for respondent.

Jas. W. Bell, of Los Angeles, for defendant Barlow.

CURTIS, J. [1] This appeal is from a judgment in favor of plaintiff and against defendants. The defendant Doolittle alone has appealed, and filed a brief in support of his contention that the judgment is erroneous. No appearance herein has been made by the respondent, and we have not been favored by any brief or points and authorities in her behalf.

The sole contention of appellant is that the evidence is not sufficient to support the findings. Appellant makes a number of assignments as to the insufficiency of the evidence to support the findings. The first of these is that there is no evidence that "the real property was not of the reasonable value of the price paid by respondent." Under representations made by the appellant to the respondent regarding certain real property, the respondent decided to purchase the same, and there was executed and delivered to her an assignment of a certain writing which she was informed was an agreement of sale of said real property. What she in fact received for the money paid out by her under the representations of appellant was an agreement of sale made by one Barlow to Mrs. E. H. Tomlinson. This agreement had been assigned by Mrs. Tomlinson, and through various subsequent assignments became the property of S. H. Roberts, from whom the respondent, under the advice of appellant, purchased the same, and received from said Roberts and wife a written assignment of said agreement. The property described therein was described as real property situated in the county of Los Angeles, state of California, and particularly described as "lot 51 as of the map hereto attached and made a part of this agreement." It appears that this map had never been filed for record in the office of the county recorder of said county, and that said agreement further provided that the agreement itself should never be filed for record, and, in case it was so filed, it should become null and void. By an act of the Legislature of this state, it is provided that no person shall sell or offer for sale any lot or parcel of land by reference to any map or plat unless the map or plat has been filed for record in the office of the

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

county recorder of the county in which the land is situated, and that any violation of the provisions of said act is made a misdemeanor. Stats. 1907, p. 290, and amendments thereto. The effect of the provisions of this act upon the agreement assigned to respondent was to render said agreement unenforceable and void. Smith v. Bach, 183 Cal. 259, 262, 191 P. 14; Wallace v. Zinman, 200 Cal. 585, 588, 254 P. 946. The agreement, therefore, contained no legal description of any real property. More than that, it was void. The value, therefore, of the real property which appellant assumes was described therein, becomes of no consequence, as the respondent acquired no interest therein by the agreement assigned to her, and which she purchased upon the advice and representations of the appellant.

[2] The contention of appellant that the evidence does not show that appellant acted as agent for respondent is so lacking in merit that we deem it unnecessary to further discuss it. Almost the same statement might be made regarding appellant's claim that there is no evidence to show "respondent unacquainted with Los Angeles and without business experience." It was shown that respondent was a resident of San Francisco. She had made two visits to Los Angeles prior to her last visit there, on the occasion of which she made the supposed investment in said real property. One of these visits was eighteen years before her third visit, when she remained about two months. Her second visit was twelve years before her last visit. She remained, on the occasion of this visit two years, when she returned to San Francisco. There was, therefore, an interval of ten years between her second and third visit. She was in Los Angeles only from February to June, 1923, when she met appellant, and the purchase of the contract from Roberts followed a few days thereafter. This evidence we think, is sufficient to support the court's finding that respondent was unacquainted with Los Angeles. The evidence further shows that respondent had been, for some time previous to her third visit to Los Angeles, in the employ of the government as disbursing clerk in the quartermaster's department and in the treasury department at San Francisco, and at the time of the trial was employed as a stenographer with the Defense League. Outside of a few investments made by respondent, through banks in San Francisco, in various stocks, some of which she sold at a loss, the evidence shows that respondent was without business experience.

[3] As to the contention of appellant that there was no misrepresentation by him as to the location of the property in which respondent is supposed to have purchased an interest, appellant concedes that respondent testified that appellant told her that it was "on a main highway, or a short cut, from Pasadena to Long Beach," but that her testimony was disputed by appellant. The evidence shows that the property was not located as represented by appellant to respondent. The latter's evidence is therefore sufficient to support the finding as to misrepresentation made by the appellant regarding the location of the property.

[4] Finally, appellant contends that the evidence does not show that appellant acted in bad faith in reference to the contract. We think the evidence is sufficient to support the findings in this respect. Appellant was a licensed real estate agent, and held himself out as qualified to advise prospective purchasers of real estate, and expressly so represented himself to respondent. Upon his first meeting with respondent, he designedly or otherwise impressed the respondent with confidence in his ability to make investments which would result profitably to those who entered into them through his advice. After a brief acquaintance, the respondent met appellant at the latter's office in the city of Long Beach. On the occasion of this visit, appellant told respondent that he had the best buy that had ever come into his office, "and, if they had the money, they would go right out and get it themselves." Upon inspecting what was supposed to be the property which respondent was to purchase, she desired to wait and consult her friends in San Francisco about the investment, but appellant persuaded her to act at once, telling her: "It will probably be gone before morning. You can't let anything like this wait. You have to put down some money to hold it." As a result of these importunities by appellant, respondent was induced to make a payment on the same day on account of the purchase price of said real property, and in a few days thereafter consummated the transaction by paying to Mr. Roberts a sum of money in the neighborhood of $1,420, and received from him the assignment of the agreement of sale, which, as we have already seen, was illegal and without any value. Respondent had informed appellant that she knew absolutely nothing about real estate, and would have to leave the whole matter to his judgment. Appellant received a commission of $150 from Roberts for making the sale, but did not inform respondent that he was acting as the agent of Roberts. We think, on the whole, that there is sufficient evidence to support the finding that appellant did not act in good faith toward respondent in his dealings with her in this transaction. He knew respondent relied solely upon him in this entire matter, and he owed her a duty to see that she secured a reasonably safe and legal investment. As we have already seen, the court found that the appellant had falsely represented to respondent that the property which respondent sup-

posed she was purchasing was situated on a main highway from Pasadena to Long Beach. This alone was sufficient to indicate bad faith on the part of appellant toward respondent.

Other assignments as to the insufficiency of the evidence are made by appellant, but they either go to immaterial issues or they are without merit.

Judgment affirmed.

We concur: SEAWELL, J.; PRESTON, J.

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204 Cal. 678

PEOPLE v. GORDON. (Cr. 3128.)

Supreme Court of California. Aug. 6, 1928.

Criminal law 🔑1111(1)—Appeal will not be dismissed for failure to file statement of grounds when filed in time but marked as filed thereafter (Pen. Code, § 1247).

Appeal will not be dismissed for failure to file statement of grounds of appeal within time required by Pen. Code, § 1247, where it is shown from the record that order directing preparation of clerk's and reporter's transcripts, reciting therein that required statement had been made and filed, and order confirming such proceedings were made within time, though not marked "Filed" until thereafter; appellate court in such situation not being irrevocably committed to filing date affixed by clerk.

In Bank.

M. M. Gordon appeals. On motion to dismiss appeal. Motion denied.

Superseding opinion 265 P. 879.

Laird L. Neal and Burke, Catlin & Burke, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

PRESTON, J. Motion to dismiss appeal for alleged failure to file, within the time required by Penal Code, § 1247, statement of grounds of appeal.

Judgment was imposed on defendant on November 16, 1927. On November 21, 1927, the court gave and made an order directing the preparation of clerk's and reporter's transcripts, which recited therein that the required statement above referred to had been made and filed as a part of the application therefor. On November 22 there was made and filed a second order confirming these proceedings, in that it directed that, on the appeal, the original exhibits might be used. It is true that the order for preparation of the transcripts was not marked "Filed" until November 29th, and the same is true of said statement of grounds of appeal, but it is demonstrable from the record that the filing date should have been attached at least on November 21st, which was in due time. We are in such a situation not irrevocably committed to the filing date affixed by the clerk. 2 Cal. Juris. p. 684, § 390; Duncan v. Times-Mirror Co., 109 Cal. 602, 42 P. 147.

Motion denied.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

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204 Cal. 679

MARCHETTI et ux. v. SOUTHERN PAC. CO. et al. (Sac. 4058.)

Supreme Court of California. Aug. 6, 1928.

1. Negligence 🔑93(1)—Automobile driver's negligence cannot be imputed to guest not having any control over driver.

Negligence of driver of automobile cannot be imputed to guest therein, in absence of evidence that guest exercised some control over driver or possessed power to supervise manner of machine's operation.

2. Automobiles 🔑224(3)—Railroads 🔑327(12)—Guest in motor vehicle approaching crossing is not bound to warn driver of approaching train.

Guest in motor vehicle approaching railroad crossing is under no legal obligation to warn driver of presence of tracks or of approaching train, where view is unobstructed, and driver is reasonably competent, but guest has right to assume that driver will exercise due care.

3. Death 🔑58(1)—In action for death, it is presumed deceased exercised due care.

In action for death, resulting from defendant's negligence, there is a presumption that deceased used due care and did all that reasonably was required of him for his protection.

4. Automobiles 🔑245(87)—Railroads 🔑350(21)—Guest in automobile, killed in crossing collision, view of which was obstructed, held not contributorily negligent as matter of law for failure to look and warn driver.

In action against railroad and driver of automobile for death of guest in automobile, resulting from crossing collision, at point where view of trains from highway was obstructed, deceased, who merely sat in car, looking straight ahead, without assuming to exercise any control over its operation, was not as matter of law guilty of contributory negligence for failure to look and warn driver.

5. Negligence 🔑136(14)—Defendant's negligence is generally fact question for jury.

Negligence of defendant is generally question of fact for jury.

6. Trial 🔑139(1), 143, 165—Motion for nonsuit admits truth of plaintiff's evidence, and should be denied, if there is evidence tending to support plaintiff's action or if evidence is conflicting.

Motion for nonsuit admits truth of plaintiff's evidence, and, if there is any evidence tending to support plaintiff's action or if evidence is conflicting, nonsuit should be denied; evidence being interpreted most strongly against defendant.

7. Trial ⚷165—Plaintiffs, on motion for nonsuit, are not concluded by testimony of adverse parties called by plaintiffs for cross-examination (Code Civ. Proc. § 2055).

Plaintiffs, on defendants' motion for nonsuit, are not concluded by testimony of adverse parties called for cross-examination by plaintiffs, under Code Civ. Proc. § 2055; court being required to accept evidence most favorable to plaintiffs.

8. Railroads ⚷350(5, 9, 11)—Negligence of railroad held question for jury, in action for death at obstructed crossing, under evidence of failure to maintain automatic signals or give warning of train's approach, and excessive speed.

In action against railroad for death of guest in automobile at crossing of main traveled highway, view of which was obstructed, evidence of negligence of railroad in failing to equip crossing with automatic signals, and of failure of railroad's employees to sound bell or whistle, and of excessive speed of train at the time it entered the crossing, made question of negligence for jury.

Department 1.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Angelo Marchetti and wife against the Southern Pacific Company and others. From an order granting a nonsuit, plaintiffs appeal. Reversed.

David F. Bush, of Oakdale, and Frank J. Creede, of San Francisco, for appellants.

J. M. Walthall, of Modesto, for respondents.

CURTIS, J. Action by plaintiffs to recover damages for the death of their minor son, Dan Marchetti. The defendants Duree and Adair were the engineer and fireman, respectively, in charge of the train of the defendant the Southern Pacific Company at the time of the collision which resulted in the death of plaintiffs' son.

[1] The deceased at the time of his death was 18 years of age, and was then and for some time had been in the employ of W. L. Rodden, who was engaged in farming and stock raising near the city of Oakdale, in the county of Stanislaus. William J. Connors was also in Rodden's employ as his foreman. The deceased was killed in a collision with defendants' train while riding as a passenger in Connors' machine, as the two were traveling along A street, in said city. At the close of plaintiffs' evidence, the court granted a nonsuit, and, from the order granting the same, the plaintiffs have appealed. The opinion of the trial court, given at the time of granting the nonsuit, is set out in full in the record. It appears therefrom that the order was granted solely upon the ground that the evidence showed that the deceased was guilty of contributory negligence which proximately caused his death. In this we think the court was in error. The evidence bearing upon this point was undisputed. The deceased was riding with Connors under the latter's direction, and had no control whatever over the operation of the automobile in which they were riding. There can be no question of Connors' negligence in driving the machine onto the railroad crossing without taking the proper precautions to observe whether a train was or was not approaching. The negligence of the driver of a machine, however, cannot be imputed to a passenger therein, in the absence of any evidence showing that the latter exercised some control over the driver or that he possessed the power to supervise or direct the manner in which the automobile should be operated. Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 P. 385; Irwin v. Golden State Auto Tour Corp., 178 Cal. 10, 171 P. 1059; Nichols v. Pacific Electric Ry. Co., 178 Cal. 630, 174 P. 319. In this case there was no such evidence. The deceased, as we have before stated, was simply going with Connors, in the latter's machine, for the purpose of attending to some matter of business regarding their employer's property. Connors was the foreman of his employer, and the deceased was subject to his orders. Connors had entire control of the machine, and was operating the same without any assistance or direction on the part of the deceased. If the deceased, therefore, was guilty of contributory negligence, it must have been by some act either of commission or omission on his part which of itself constituted contributory negligence. There was no evidence in the case tending to show any such act of negligence on the part of the deceased. All the witnesses agree that the deceased was simply sitting in the machine at the side of Connors, and that he was looking straight ahead of him while they were traveling along A street and just before their machine collided with the defendants' train. No witness testified, nor is there any evidence from which it may be inferred, that the deceased exercised or attempted to exercise any control or direction over the operation of the automobile by Connors.

[2-4] Respondents argue, however, that the evidence shows that, as the deceased was looking straight ahead, he could not have been looking to his left and along the railroad track on which the train was approaching, and that this failure of the deceased to look for the approaching train constituted contributory negligence on his part, which would defeat a recovery in this action. This argument, we think, is satisfactorily and

completely answered by the following statement of the law on this subject, found in 3 Cal. Jur., pp. 853 and 854:

> "A passenger in a motor vehicle approaching a railway crossing is under no legal obligation to warn the driver, either of the presence of the tracks or of an approaching train; the view being unobstructed and the driver reasonably competent and vigilant. And, while it is the passenger's duty to look and listen, it is not his duty to stop for a successful observation, since he has no authority over the driver, but is wholly subject to the latter's action. The passenger has a right to suppose that the driver, on approaching a railway crossing with which he is familiar, will exercise due care for the protection and safety of his passengers, and that, even when so near the crossing as to be in apparent danger of collision with an on-coming train, he will or may take some action which will avert an accident. Nor is the passenger obliged, even when the danger of collision becomes suddenly imminent, to displace the driver, seize the operating levers, and endeavor to avoid the impending catastrophe. Nevertheless, it has been said that the passenger must look out for himself, and may not, in a place of danger, as on approaching a railway crossing, rely blindly on the driver. But a passenger in a machine operated by another cannot be said as a matter of law to have been negligent in not calling the chauffeur's attention to the danger of a collision."

Respondents contend that under the authority of Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709, and Parmenter v. McDougall, 172 Cal. 306, 156 P. 460, that a passenger in a vehicle operated by another is bound to exercise ordinary care for his own safety, and that, if such passenger is aware that the operator is carelessly rushing into danger, it may be incumbent upon him to take steps for his safety. These cases undoubtedly contain a correct statement of the law upon the subject of a passenger's duty in case of known danger. They have little or no application to the present case, for the reason that it does not appear that there was anything that could have been done by the deceased which would have averted the collision. Had he looked in the direction the train was approaching, he could not, owing to the obstructions between him and the railroad right of way, have seen it until it had almost reached the street upon which he was traveling. Furthermore, had he seen it in time to have warned the driver, there is no assurance that the latter could have brought his machine to a stop before reaching the railroad track. There is a presumption that the deceased used due care and for his protection did all that reasonably was required of him. There is absolutely no evidence in this case to overcome or dispel this presumption. It was error, therefore, for the trial court to have granted defendants' motion for a nonsuit on the ground that the evidence on the part of plaintiffs showed that the deceased was guilty of contributory negligence.

[5-8] Respondents contend, however, that, notwithstanding such error, the order should be sustained on the ground that there was no evidence that the defendants were negligent in the operation of their train at the time of the collision. Ordinarily negligence is one of fact to be determined by the jury. Runkle v. Southern Pacific Milling Co., 184 Cal. 714, 195 P. 398, 16 A. L. R. 275; Lamport v. Southern Pacific Co., 183 Cal. 326, 191 P. 527. "A motion for nonsuit admits the truth of the plaintiff's evidence and upon such motion the evidence should be interpreted most strongly against the defendant. If there is any evidence tending to sustain the plaintiff's action, or if the evidence is conflicting, a nonsuit should be denied without passing upon the sufficiency of the evidence." 19 Cal. Jur. 740. In the present action there was evidence tending to show that the crossing made by the railroad right of way and A street was dangerous to those traveling along A street. While the defendant company had placed the ordinary warning signs found at railroad crossings at the crossing where the collision happened, it had not equipped the same with any automatic signal, although some two years before, and probably just after A street was paved, the city authorities had requested the company to do so. It was held in Green v. Southern Pacific Co., 53 Cal. App. 194, 202, 199 P. 1059, 1062:

> That the law imposed "upon a railroad company the duty to use reasonable care, corresponding to the circumstances constituting the probable danger, to avoid injury to persons lawfully traveling upon the public highway crossed by the company's tracks and trains. It then becomes a question for a jury to decide whether or not it was negligence for the company to run its cars across the highway without providing a flagman or some means of warning to travelers at the place of crossing. And, where the facts in evidence prove that usually or frequently there are obstructions which interfere with the opportunity to see moving trains while travelers on the highway are approaching a much-traveled crossing, it cannot be held that as a matter of law it is not negligence to run trains there without warning signals other than those usually given by engines and cars."

The evidence in this case shows that A street is the main traveled highway, for persons entering the city of Oakdale from the north by automobiles, and that there is a considerable amount of travel thereon. On the lot of land located along the northerly line of A street and extending to the railroad right of way there was, on the day of the collision, a grove of large olive trees, and near the southwest corner of this lot and about 60 feet east of the center line of the right of way is a shed or barn. These trees and building obstruct the view of persons traveling westerly on A street to such an extent that they are unable to observe the railroad track north of the street until they pass by the barn or building on said lot. These obstructions also prevent those operating trains on said track and coming from the north from observing persons or objects on A street east of the barn or building until they are practically within the crossing. This was the evidence given by the engineer. The evidence was also in conflict as to the extent and number of warnings given by the railroad crew as they approached this crossing. There were two eyewitnesses to the accident, Mr. and Mrs. White. Mr. White testified that the only whistle he heard was given when the train was 200 or 300 feet from the crossing. He testified that he saw before this whistle was sounded, "the exhaust such a whistle would make," but did not hear any sound of the whistle at that time. He also said he saw the bell on the engine moving, but could not hear any sound, as the engine of his automobile was running. Mrs. White, who was in the automobile with her husband, said that she heard no sound either of the whistle or the bell, but that she was under great excitement at the time, as she saw the two men, the deceased and Connors, approaching the railroad crossing on A street from the east at the same time the train was approaching the crossing from the north. Mr. and Mrs. White were traveling easterly on A street, and, when they saw the train coming from the north, they stopped their automobile some 50 or 60 feet west of the track, and remained there until after the collision. The only other witness, besides the two trainmen, who testified upon this subject, was L. D. Hardwick, who kept a filling station on A street, about 300 feet east of the right of way. He said he heard no bell and only one sound from the whistle, and immediately afterwards he heard the crash. While the two trainmen, who were called for cross-examination under section 2055 of the Code of Civil Procedure, testified that they gave the required signals, both by ringing the bell and sounding the whistle, the plaintiffs, especially upon a motion for a nonsuit, would not be concluded by their evidence; it being the duty of the court upon a motion for a nonsuit to accept the evidence most favorable to the plaintiffs.

A third consideration bearing upon the negligence was the evidence in regard to the speed the train was traveling at the time and just before it entered the crossing. While the witnesses generally gave the speed at about 25 miles per hour, which might or might not be considered by the jury as a negligent rate of speed under all the facts and circumstances in evidence in the case, one witness, Mrs. White, testified that it appeared to her that the train was gaining on the car in which Connors and the deceased were traveling, and that, at the time Mr. White stopped his car, the distance the locomotive was from the crossing "was as much again" as the distance the Connors machine was from the crossing; that "the locomotive gained on the automobile at every instant; the locomotive entirely crossed the crossing before it collided with the machine." The evidence, without much, if any, conflict, was that the automobile was traveling, at the time Mrs. White observed it, at 25 miles per hour. The inference might be reasonably drawn from her testimony that the locomotive was traveling at a speed of 50 miles per hour at the time it entered the crossing and at the time of the collision. Taking this evidence as a whole, we do not believe the court would have been justified in holding that, as a matter of law, it failed to show that the defendants were negligent in the operation of the train across A street. It at least tended to show negligence on defendants' part, which proximately caused the injury to deceased, and this is all that is required, when considered upon a motion for a nonsuit.

The order granting defendants' motion for a nonsuit is reversed.

We concur: TYLER, Justice pro tem.; PRESTON, J.

204 Cal. 646

QUIST et al. v. EMPIRE WATER CO.★
(Sac. 4028.)

Supreme Court of California. July 31, 1928.

Rehearing Denied Aug. 30, 1928.

1. **Waters and water courses 🔑232—Water company, acquiring water rights under agreement requiring distribution to certain lands, held trustee, with mere naked legal title for use of beneficial owners.**

Water company, acquiring certain water rights and system of irrigation by reason of conveyance from land company, as part of and to carry out scheme of subdivision, under agreement that water company as agent had right to take water and to distribute same to lands through its water system, *held* a trustee, with mere naked legal title for use of beneficial owners, and a mere agent of land company for purpose of distributing the waters in accordance with the agreement.

2. **Waters and water courses 🔑247(1)—Evidence held to sustain finding that water company was about to sell shares of stock in water system.**

Evidence, in suit to enjoin water company from disposing of certain shares in water system and in water and water rights represented thereby, *held* to sustain finding that defendant was about to sell and transfer such shares to an irrigation company.

3. **Waters and water courses 🔑247(2)—Owners of land in irrigation district held entitled to injunction to restrain water company from disposing of stock in water system.**

Owners of land within irrigation district *held* not to have such a plain, speedy, and adequate remedy at law so as to preclude injunction to restrain water company from disposing of shares of stock in water system and water and water rights represented thereby; mandamus being an inadequate remedy because of fact that rights to perpetual water right could not be adjudicated therein.

4. **Equity 🔑43—Mere fact that there may be remedy at law does not oust jurisdiction of court of equity.**

Mere fact that there may be a remedy at law does not oust the jurisdiction of a court of equity, in that, to have such effect, the remedy must also be speedy, adequate, and efficacious to the end in view, and must reach the whole mischief and secure the whole right of party in perfect manner at present time.

In Bank.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Suit by George Quist and others against the Empire Water Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Scarborough & Bowen, of Los Angeles, for appellant.

Clark Clement, of Lemoore, and M. L. Short, of Hanford, for respondents.

TYLER, Justice pro tem. Suit to enjoin and to restrain defendant corporation from disposing of certain shares of stock in a water system and the water and water rights represented thereby.

The complaint is somewhat voluminous. The facts show that in 1902 defendant, Empire Water Company, hereinafter designated as the water company, acquired certain water rights and a system of irrigation and diverted from Kings river waters for irrigation and other purposes. In January, 1906, the Empire Investment Company, hereafter described as the land company, was the owner of a large tract of land, comprising some 18,712 acres, situated in Kings county, which it desired to subdivide for purposes of sale. The land company at the same time owned 8⅝ shares of capital stock in a company known as the Lemoore Canal & Irrigation Company, hereinafter designated as the canal company, which shares it conveyed to the water company as a part of and to carry out the scheme of subdivision. On the 8th of January, 1906, the land company, for the purpose of furthering its plan, entered into a certain agreement with the water company. This agreement sets forth the ownership of the real property by the land company, and it recites that all of said lands are riparian to Kings river; that the water company is the owner of of a complete water distribution system over and through said tract of land by means whereof the entire tract is irrigable; that the water company also has the right, as the agent of the land company to take from the said river the water to which the lands of the tract are entitled as riparian to the river and to distribute the same to the lands through its water system; that the water company owns 8⅝ shares of the capital stock of the canal company and the water to which said shares are entitled. The contract then provides that both the land company and the water company mutually desire to create, establish, and maintain a binding and permanent arrangement whereby the water system shall be properly maintained, and that all the water of both companies, through and by means of such system, be perpetually delivered and distributed to all the landowners of said tract by said water company, and that, in the delivery and distribution thereof, such available water shall be prorated and divided to each subdivision in certain proportionate shares, at the rate of $1 per acre. It further provides that the rights and benefits granted and the duties and liabilities imposed upon each purchaser shall remain appurtenant to and binding upon each subdivision and not to be separated except by written agreement by the interested parties.

On the day the contract was made, the land company, by deed, conveyed to the water company all of its ditches, canals, weirs and rights of way over the lands. The deed con-

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★Rehearing denied.

tained a provision which empowered the water company, as agent of the land company, to take the water of Kings river flowing over the lands or to which such lands were entitled, and to distribute the same over the tract through the system of the water company in accordance with the terms of the contract made between the parties. The deed expressly provided, however, that it was not the intention of the land company to convey to the water company any riparian or water rights, but that such waters and water rights in said river to which said lands were entitled by reason of their riparian character should remain a part of and be appurtenant to said lands; the water company having only the right to take and distribute the same as the agent of the land company and its assigns and successors in interest. Then follow allegations to the effect that all the lands described in the complaint are agricultural in character and have been used for raising crops and other purposes and cannot be so used without irrigation or without the use of the 8⅝ shares of the capital stock of the canal company. Under this arrangement, the lands were sold, and each and every parcel conveyed by the land company to plaintiffs or their predecessors in interest contained the recital that the land company granted to the purchasers all appurtenances, water, and water rights thereunto belonging, including that proportion of the waters of Kings river to which the tract owned by the grantor was entitled as riparian to the river, subject, however, to the rights and privileges of the water company under its contract with the land company.

The complaint then charges that the water company, in violation of the rights of plaintiffs, and for the purpose of depriving them of the benefits of the 8⅝ shares of the capital stock of the canal company and of the water which plaintiffs are or may be entitled thereunder, is attempting to sell to a neighboring irrigation district the said shares of stock and the water rights represented thereby for the sum of $69,000, and, unless prevented, such sale will be consummated, and the waters diverted, to the irreparable damage of plaintiffs. It is then alleged that plaintiffs have no plain, speedy, or adequate remedy at law, and an order is prayed for permanently restraining defendant from selling to the irrigation company the shares above referred to. Defendant company, by answer, admitted with certain qualifications, all of the averments of the complaint. It denied the allegations to the effect that defendant threatened and was about to sell the water stock, or that such act would cause plaintiffs irreparable injury by depriving their lands forever of the water represented by the shares in question, and it also denied that plaintiffs have no speedy and adequate remedy at law. The action was tried and findings made in favor of plaintiffs, and judgment was entered restraining defendant from selling said shares of stock or the water or water rights obtained thereunder. It is here claimed that the evidence is insufficient to justify certain of the findings.

The portions objected to are, in substance, as follows: (1) That the water company was the mere agent of the land company and its successors and assigns for the purpose of distributing water represented by the shares of stock; that it held title to such stock as trustee, and plaintiffs own a pro rata interest in such shares. (2) That defendant water company is about to sell and transfer such shares and the water rights and use thereof represented thereby. (3) That the sale will cause irreparable injury by depriving plaintiffs' lands forever of the use of the water represented by the shares of stock. (4) That plaintiffs have no plain, speedy, or adequate remedy at law.

[1-4] Defendant, appellant herein, contends that it is the owner in fee of its water system and the shares of stock in the canal company, together with the water rights attached thereto, and does not hold such property as trustee or in trust for plaintiffs, but does, on the contrary, own and operate the entire system, subject only to the duty or obligation to furnish and deliver water to plaintiffs' lands upon the payment of the water rate provided for in the water contract. There is no merit in this claim. Upon this subject, as pointed out in the findings, the record shows that the parties stipulated at the trial that each of the plaintiffs had a substantial interest in and right to the use of the waters obtained by the defendant under the shares of stock in question, and that such right or interest is legally, and also by virtue of the contract, appurtenant to the lands owned by each of the plaintiffs. The water agreement and the deed under which the land company transferred its ditches and the shares of stock in the canal company in order to carry out the scheme were also in evidence. By the terms of these instruments the water which defendant company was obligated to supply was of two sorts—that deliverable upon the stock of the canal company and that which was riparian to the land. No distinction whatever was made in the contract between the riparian and canal waters. Under the water agreement, defendant company was expressly made the agent of the landowners for the purpose of distributing the riparian waters, and it was manifestly the intention of the parties when the land company transferred to defendant the water shares for the use and benefit of its lands, and as appurtenant thereto, to likewise make it its agent as to these waters for the same purpose. No distinction whatsoever is made in the contract as to the different sorts of waters; they being referred to through-

out the contract as the waters. Both sorts of waters being appurtenant to and part of the land itself, defendant has no interest or title therein other than its right to convert and distribute them in conformity with the terms of its agreement. Having no interest or title in or to the waters it is beyond its power to make any legal conveyance of the same. Upon this subject the court found defendant to be the mere agent of the land company for the purpose of distributing the waters in accordance with the agreement. It also found that the effect of the agreement was to make defendant a trustee of the water stock and to clothe it with the mere naked legal title for the use of the beneficial owners. The evidence fully supports this finding, which finding is in accord with the conclusion of this court in Stratton v. Railroad Commission, 186 Cal. 119, 122, 198 P. 1051, where it had occasion to analyze this identical contract. The view was there expressed that defendant company was a mere instrumentality for the purpose of diverting and distributing the waters to which the owners were entitled under the terms of their agreement with the land company.

Nor does the fact that the duty or obligation which was imposed upon the water company was likewise imposed upon "its successors and assigns" give rise, as claimed, to any different conclusions. By the employment of the term in question, it was manifestly the intention of the parties to have the successors or assigns of the water company bound by the agreement in the event of a sale of its water distributing system, a duty that the successors were required to perform irrespective of this covenant if they bought with notice. Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 P. 858, 15 L. R. A. (N. S.) 359; South Pasadena v. Pasadena Land Co., 152 Cal. 579, 93 P. 490. Equally without merit is the claim that there is no evidence to support the finding that defendant water company is about to sell and transfer to an irrigation company the shares in question and the water rights and use thereof represented thereby. It appears therefrom that there are 53 shares of stock in the canal company, including the shares in question, and that there is a tentative agreement existing for the sale of the same to the irrigation company at $8,000 per share or $424,000 for the entire issue. The court found it to be the intention of the canal company by the sale to divert the water represented by the shares upon lands other than the tract in question, and this is the only reasonable inference that can be drawn from the testimony.

Nor is there any merit in the further claim that such diversion would not cause irreparable injury to plaintiffs, or that plaintiffs have a plain, speedy, and adequate remedy at law. It was stipulated at the trial that the question of damages was not to be considered. The case was tried under the stipulation, upon the theory that, if the plaintiffs could be or would be deprived of the water appurtenant to their lands by the sale of the water stock by the defendant, the plaintiffs, and each of them, would suffer very serious damage sufficient to justify the issuance of an injunction, and there was evidence to show that without the waters represented by the shares there would be an insufficient supply to irrigate the lands in question. It is plain under all the circumstances of the case that mandamus would be an inadequate remedy to plaintiffs, because of the fact that their rights to a perpetual water right could not be adjudicated in such a proceeding. Townsend v. Fulton Irr. Dist., 17 Colo. 142, 29 P. 453. The undoubted purpose of plaintiffs is, by this proceeding, to obtain a judgment settling their rights so as to determine for all time any claims and contentions that may arise in the future. To such a decree they are entitled. The mere fact that there may be a remedy at law does not oust the jurisdiction of a court of equity. To have this effect, the remedy must also be speedy, adequate, and efficacious to the end in view. 10 Cal. Jur., § 10, p. 467. It must reach the whole mischief and secure the whole right of the party in a perfect manner at the present time and not in the future. Otherwise equity will interfere and give such relief and aid as the exigencies of the case may require. Dingley v. Buckner, 11 Cal. App. 181, 104 P. 478. Here the action is one primarily to prevent a sale of trust property. It may be conceded that defendant is entitled to sell its water system, but it has no authority to sell the shares therein owned by plaintiffs or the water and water rights represented thereby, which it does not own, and which are appurtenant to plaintiffs' lands.

The judgment restraining such sale is hereby affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; SHENK, J.; LANGDON, J.

205 Cal. 22

CAMPBELL v. MILLER et ux. (L. A. 9282.)

Supreme Court of California. Aug. 13, 1928.

1. Vendor and purchaser 🔑44—Evidence held to sustain finding that purchaser at time of purchasing real property knew of existence of lease thereon and took title subject thereto.

Evidence in action to recover on note given as part payment for real property *held* to sustain finding that defendant at the time of purchasing such property knew of the existence of a lease thereon and purchased such property with knowledge thereof and with agreement that title was to be taken subject to terms of lease.

2. Evidence 🔑441(8)—Rule that deed cannot be varied by parol evidence has no application to escrow agreement.

Where evidence explaining that deed was taken subject to existing lease on property was not in parol but was in a writing signed by purchaser pursuant to transfer through escrow, rule to effect that deed cannot be varied by parol evidence has no application.

3. Evidence 🔑441(8)—Admitting escrow agreement explaining that deed was subject to existing lease held not obnoxious to law providing written agreement supersedes previous negotiations (Civ. Code, § 1625).

Admission of evidence consisting of escrow agreement to effect that deed was subject to existing lease on property *held* not obnoxious to provisions of Civ. Code, § 1625, to effect that a written agreement supersedes all negotiations or stipulations concerning its matters which precede or accompany execution of instrument.

Department 1.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Addie S. Campbell against E. H. Miller and wife, wherein defendant named filed a cross-complaint. Judgment for plaintiff, and defendant named appeals. Affirmed.

William M. Rex, of Los Angeles, for appellant E. H. Miller.

Kemp, Partridge & Kemp, of Los Angeles, for respondent.

CURTIS, J. [1] Action brought to recover the amount due on a promissory note, given as part payment of certain real property, sold by the plaintiff to the defendant E. H. Miller, who will be referred to hereafter as the defendant. Alice A. Miller, the other defendant, is his wife, and her only interest in said real property is by reason of this relationship. By an amended answer and cross-complaint defendant sought to recover damages for an alleged breach of an implied covenant of the grant deed, executed by plaintiff to defendant E. H. Miller and conveying to said defendant the said real property. Said breach consisted, according to said amended answer and cross-complaint, of an outstanding lease of said premises, executed by plaintiff prior to said conveyance, whereby plaintiff leased said premises as a storeroom for a term extending some two years beyond the time of the purchase thereof by said defendant. The court found that "the said defendants had full notice and knowledge of the existence of the said lease and purchased the said premises with such full knowledge and with the agreement that they took the title thereto subject to the terms of said lease." Judgment was in plaintiff's favor for the full amount sued for. From this judgment the defendant has appealed, and the sole point made by him for a reversal of the judgment is that the evidence does not support the above finding of the court.

There was substantial evidence before the trial court to show that defendant E. H. Miller was well acquainted with the said real property before the purchase thereof by himself; that he owned the adjoining property; and that he knew of the lease of said premises at the time of said purchase. The transfer of the property from plaintiff to him was consummated through escrow. At the same time defendants were selling half of said real property to a third party, and this second transaction was also carried on and completed through escrow. The escrowed instructions with plaintiff and also those with said third party were each signed by defendant E. H. Miller, and the former contained the following provision: "I waive your securing lease through escrow; rent to be adjusted outside of escrow." And the latter escrowed instruction contained a similar statement in these words, "I waive your securing lease through escrow; no rent to be adjusted through this escrow." After the execution and delivery of the deed the defendant for some months collected the rents due under the lease from the tenant in possession. Some two months after the date of the deed defendant called upon plaintiff and asked for said lease, which was given him by the plaintiff. After this suit was brought, the defendant called upon plaintiff's attorneys and secured a stay of proceedings in the action upon the promise that he would be able in a short time to secure the money and pay the note in suit. Up to this time defendant never made any claim that he purchased the property free of said lease, nor did he make any objections to plaintiff or her attorneys as to the existence of the lease. This evidence is amply sufficient to support the finding of the court that at the time he purchased said real property he knew of the existence of said lease and purchased said real property with knowledge thereof. It is also sufficient in our opinion to support the finding that he purchased said real property "with the agreement that he took title thereto subject to the terms of said lease." If we shut our eyes to the conduct of defendant E. H. Miller subsequent to the purchase, when he accepted rent from the lessee, secured the written lease from plaintiff, without making any objections that it was an incumbrance on the property he purchased, and promised and agreed after suit was instituted to pay the amount due on the note provided an extension of time was granted in which to make said payment, and look solely to the agreement of the parties at the time they were negotiating for the sale and purchase of said real property, we are convinced that we will find sufficient evidence to support the finding last referred to. We refer particularly to the written escrow instructions, which were signed by the parties and under which the grant deed to defendant was prepared and executed. These refer to the lease upon the premises, and contain an express waiver by defendant that the escrow holder need not secure this lease and that the rent thereunder would be adjusted outside the escrow. It is difficult to understand what the parties meant by this language unless they intended that the sale should be made subject to the lease. The agreement that the rent should be adjusted outside the escrow was a clear indication that the lease should continue on the property after its purchase by defendant and that the rent due under the lease would be adjusted, undoubtedly by the plaintiff receiving her pro rata share of the rent of the property up to the date of the purchase, and the defendant to receive the rent thereafter. If defendant under this agreement was to receive the rent of the property after the purchase, then the lease was not to terminate upon the purchase. While the escrow agreement does not specify the term of the lease, yet it mentions the lease, and, as there was only one lease of the premises, it must be assumed that it was the lease under which the tenant in possession held the premises, to which the parties referred in their escrow agreement. Defendant contends that he was entitled to rest upon his grant deed and the implied covenant therein against incumbrances suffered by the grantor. Ordinarily this would be so, but in the present instance, by an agreement in writing under which the deed was drawn and thereafter executed and delivered, he expressly waived this implied covenant and agreed to accept the title to the property subject to the lease.

[2] Defendant has cited authorities to the effect that the deed cannot be varied by parol evidence. This rule has no application to the facts in the present action for the reason that the evidence by which it is sought to explain the deed was not in parol but was in a writing signed by the defendant, directing the omission from the deed of the very matter upon which he now seeks to rely. In Mann v. Montgomery, 6 Cal. App. 646, 92 P. 875, the grantee sought to recover damages for the breach of the implied covenants in a grant deed by reason of the existence of a lease upon the premises at the time of their purchase. It was held that as the grantee required and obtained an assignment of the lease, the deed and assignment must be construed as one instrument, and the deed must be held subject to the lease.

[3] For a like reason the admission of this evidence was not obnoxious to the provisions of section 1625 of the Civil Code, which provides that a written agreement supersedes all negotiations or stipulations concerning its matters, which precede or accompany the execution of the instrument. Savings Bank of So. Cal. v. Asbury, 117 Cal. 96, 48 P. 1081; Sivers v. Sivers, 97 Cal. 518, 32 P. 571. In the first of these two cases this court said:

> "The rule that an agreement in writing supersedes all prior or contemporaneous oral negotiations or stipulations concerning its matter has no application to a collateral agreement upon which the instrument is silent, and which does not purport to affect the terms of the instrument."

If this rule of the Code has no application to a collateral agreement, it certainly would not apply to escrow instructions under which the deed was prepared and the purpose of which was to direct and specify the subject-matter or contents of the deed.

Judgment affirmed.

We concur: SEAWELL, J.; PRESTON, J.

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204 Cal. 687

FERAUT v. CITY OF SACRAMENTO et al.

(Sac. 4019.)

Supreme Court of California. Aug. 8, 1928.

1. Injunction ⚿118(3)—Complaint to enjoin enforcement of zoning ordinance, alleging only that plaintiff was prevented from using property for other than limited residence purposes, held demurrable.

Complaint in action to enjoin enforcement of a municipal zoning ordinance, alleging only that plaintiff was prevented from using real property for business and commercial purposes, while other persons were permitted to use property for such purposes in other districts more thickly populated and densely settled and exclusively devoted to residence purposes, *held* demurrable, as failing to state any fact or facts that would tend to invalidate ordinance.

2. Municipal corporations ⚿601—Zoning ordinance held not illegal because establishing commercial zone directly across street from residence zone.

Municipal zoning ordinance *held* not illegal because of fact that commercial zone is situated

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

directly across street from residence zone, on ground that it thereby favored those owning property on side of street permitting use for commercial purposes.

3. Municipal corporations 🔑601—Zoning ordinance held not invalidated because property in business district directly across street from residential district was greatly enhanced in value, because of classification.

The fact that property situated within business zone directly across street from residence zone was greatly enhanced in value by the sole reason of its being classified as commercial property, and that said residence property opposite the commercial property was greatly reduced in value, *held* not to invalidate zoning ordinance, since every exercise of police power affects adversely property interest of somebody.

4. Municipal corporations 🔑601—City council, in establishing zones, has large discretion in determining what property is commercial.

Determination as to whether property placed in residential zone is as a matter of fact commercial rests largely in discretion of city council.

5. Municipal corporations 🔑601—That placing property in residence district immediately across street from business district depreciated value held immaterial.

Fact that zoning ordinance establishing residence district across street from business district operated to depreciate value of property in residence district *held* immaterial, as being what might legitimately follow from proper and legal inclusion of property in a zone or district different from that in which adjacent property was included.

6. Municipal corporations 🔑601—System adopted in creating municipal zoning districts held sufficiently general, uniform, and comprehensive.

System employed in establishing municipal zoning districts, including territory along river and railroads as industrial property and adjacent territory, as business property, with certain small areas in residential district known as business property, *held* sufficiently general, uniform, and comprehensive.

7. Municipal corporations 🔑601—Municipal authorities have large discretion in adoption of proper system of zoning.

The adoption of a proper system of zoning is largely in the power and discretion of municipal authorities.

Department 1.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Ella Feraut against the City of Sacramento and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Hughes, Bradford, Cross & Prior and Bradford, Cross & Prior, all of Sacramento, for appellant.

R. L. Shinn, of Sacramento, for respondents.

CURTIS, J. Action against the city of Sacramento and its officers by a property owner of said city to enjoin the enforcement of a zoning ordinance enacted by the city council of said city. A general demurrer to plaintiff's complaint was sustained by the trial court, and, upon her refusal to amend said complaint, the court entered its judgment in favor of defendants. From this judgment plaintiff has appealed. The facts recited herein are those set out in the complaint. The city of Sacramento, on April 19, 1923, passed a general zoning ordinance, in which the territory within its limits was divided into five separate districts, therein designated as first residential, second residential, commercial, light industrial, and heavy industrial. It was further provided in said ordinance that no land or buildings in the commercial district should be used for any other purpose than for stores and other commercial purposes specifically named therein, and that all land and buildings in the second residential district should be restricted to family dwellings, apartment houses, hotels, and other noncommercial purposes, except that in hotels or apartment houses containing a certain number of rooms or apartments 25 per cent. of the lot area might be devoted to retail business generally carried on in such buildings. Under the terms of said ordinance, plaintiff's said land was included in the second residential district. Plaintiff desired to erect a building upon her said land, to be used as a store, and made application therefor upon blanks provided for that purpose by the building inspector. She was informed by the building inspector that by reason of said ordinance she was prohibited from erecting a store building on her said lot, as the same was located in the second residential district, and her said application was denied. The building inspector informed plaintiff that, if she attempted to erect such a building upon her said lot without such a permit, she would be prosecuted by the municipal authorities for the violation of said zoning ordinance. Thereupon plaintiff instituted this action. The ordinance referred to is set out in full in the complaint, and as a part thereof is a map of the city of Sacramento, on which are delineated the respective zoning districts into which said city is divided, and the location of plaintiff's said lot in said city. Plaintiff's lot is situated on the south side of J street, which is one of the main thoroughfares of said city and one of the two main arteries from Sacramento to Fair Oak, Folsom, and other communities lying easterly of said city. This map shows plaintiff's said lot to be located in a large residential district extending on either side of said J street. None of the property along J street within 2,000 feet of plaintiff's property on either side of said street is located within other than a residential district except two contiguous blocks on the north side of said street, one of which blocks is immediately opposite plaintiff's property. That portion of said two blocks facing on J street, with a depth of 100 feet or more, is zoned as business property. Upon that portion of these two blocks zoned as business property, and within 250 feet of plaintiff's lot, there is located a gas station, grocery store, drug store, butcher shop, hardware store, dry goods store, a delicatessen, "and what is now or formerly was a sanitorium." It appears from the complaint, we think, that this commercial district opposite plaintiff's property was in existence at the time of the adoption of the ordinance. Plaintiff has alleged a number of reasons, some of which rest upon pleaded facts, others upon mere legal conclusions, why said ordinance is invalid, and her first contention is that she should be permitted to prove these allegations of her complaint, and thus show the invalidity of the ordinance in the respects wherein its validity is questioned, and that without such an opportunity she is deprived of her substantial rights. This would be true only in case the facts so pleaded are sufficient to show the invalidity of said ordinance. If the facts so alleged are not sufficient for that purpose, then plaintiff's complaint fails to state a cause of action, and the general demurrer was properly sustained.

[1] Plaintiff asserts that her complaint was drawn to plead a situation analogous to those considered in Re Application of Throop, 169 Cal. 93, 145 P. 1029, Curtis v. City of Los Angeles, 172 Cal. 230, 156 P. 462, and Pacific Palisades Ass'n v. Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A. L. R. 782. The first of these cases involved the validity of an ordinance of the city of South Pasadena, dividing said city into districts or zones, and providing that a stone crusher should not be operated in district No. 3, while the same might be carried on in district No. 2. This court held that:

> "An ordinance which prevents the operation of a stone crusher in a sparsely settled territory of 2,163 acres, 500 of which are undeveloped and practically uninhabited and allows its operation in a small area of 11.65 acres in the center of a city surrounded by 'poorer classes of residences,' does not subserve the ends for which the police power exists."

In Curtis v. City of Los Angeles, supra, the validity of a city ordinance was involved which prohibited the establishment of a livery stable in a certain district of the city. It was held that the ordinance, in that it absolutely prohibited the maintenance of stables within a small district of the city which was comparatively sparsely settled, while permitting their maintenance in other districts more thickly populated and densely settled, and as exclusively devoted to residence purposes as was the sparsely settled district, was oppressive, discriminatory, and void. In the case of Pacific Palisades Ass'n v. Huntington Beach, supra, a general demurrer was sustained to the plaintiff's complaint, and this court, after reviewing the decisions of this and other jurisdictions upon the question of a municipality's power to regulate by ordinance an enterprise of that character within said municipality, held that:

> "It is apparent from the averments of the complaint that appellant has attempted to plead a situation analogous to those considered in the two decisions of this court last cited. [In re Application of Throop and Curtis v. City of Los Angeles.] It has been fairly successful, and presents a case in which a property owner is prohibited by the municipality from installing machinery and operating an oil well on its property, while in other districts of the city, more thickly populated and densely settled, and devoted to residence purposes, the conduct of like operations is permitted. * * * For these reasons, appellant should be accorded the opportunity to establish, if it can, the unreasonableness and discriminatory character of the ordinance, which it alleges amounts to an unwarranted and arbitrary interference with its constitutional rights."

It is alleged in the complaint in the present action:

> "That said zoning ordinance is not uniform in its operation, in this: That it prevents plaintiff from using her said real property for business and commercial purposes and prevents her from using it for any other purpose than limited residence purposes, while it permits other persons, firms, and corporations to use for business and commercial purposes property owned or rented by them in other districts more thickly populated and densely settled and exclusively devoted to residence purposes."

This allegation, plaintiff contends, contains a statement of sufficient facts which, if true, entitles her to the relief prayed for. Her contention, then, is that the complaint shows that the ordinance, while it prohibits her from using her property for business purposes, permits business to be carried on in residential sections of the city which are more densely populated than the district in which her property is located, and therefore the ordinance is not uniform in its operation, and accordingly is illegal. We think none of the three cases cited by plaintiff, and above referred to, support this contention of plaintiff. Each of these cases refers to some special and exceptional use to which property may be put, and they have but little application to the powers of municipal authorities to enact a general zoning ordinance. We do not understand that in dividing the territory of a city into industrial, business, and residential districts the authorities are controlled entirely by the density of population of these respective districts. There are other considerations which the city may well follow in determining whether certain territory within the city may be included in one or the other districts or zones. In one section of the city there may be railroad or water facilities which render such section naturally adapted to business purposes. Another section of the city, on account of its peculiar location, may be adapted to residential purposes. Can it be contended that, simply because the latter section of the city is less thickly populated than the other, the authorities are without power to set apart or zone the same for residential purposes? Yet this is at the most all the above-quoted allegation of the complaint shows in reference to plaintiff's property—that is, that it is located in a less populous district than other localities in said city where business is permitted.

In Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388, much the same question arose. In that case the ordinance involved purported, among other things, to zone property along Wilshire boulevard. By the ordinance, one block on either side of La Brae avenue, which intersected Wilshire boulevard at right angles, was zoned as business property. The remainder of the property in the immediate vicinity of the intersection of those streets and facing on Wilshire boulevard was zoned as residential property. This court sustained said ordinance, and, after referring to the fact that one portion of the property along Wilshire boulevard had been zoned as residential property while adjacent property at the intersection of La Brae avenue and Wilshire boulevard had been included in a business district, said (page 512 [234 P. 394]):

> "In this situation it may not be said that the ordinance is void for the reason that petitioners' property is zoned for residential uses, whereas business structures are permitted in other localities within the city similarly circumstanced as the property of the petitioners."

We are of the opinion, therefore, that the foregoing quoted allegation of the complaint fails to state any fact or facts which would tend to invalidate the ordinance.

[2] Under proper allegations, the complaint shows that plaintiff's property is situated directly across the street from business property, as zoned by said ordinance. Plaintiff contends that in this respect the ordinance is illegal, in that it favors those who own property on the north side of the street at the expense of those property owners whose property is located on the south side of said street. There is no merit in this contention. Zahn v. Board of Public Works, supra; Brown v. City of Los Angeles, 183 Cal. 783, 192 P. 716.

[3] The further allegation is found in the complaint:

> "That the property on the north side of J street between Thirty-Eighth and Thirty-Ninth streets, is, by the sole reason of its being classified as commercial property, greatly enhanced in value, and it exceeds in value the property on the south side of said street at least 100 per cent.; whereas, said property on the south side of J street, opposite said commercial property, is by reason of its being opposite said commercial property greatly reduced in value, and rendered practically undesirable as residence property."

Plaintiff contends that the facts set forth in this allegation are sufficient to warrant the granting of the relief demanded by her complaint. A similar claim was made as to the ordinance considered in the case of Zahn v. Board of Public Works, supra, 195 Cal. 512 (234 P. 394), but this court held the claim untenable in the following language:

> "The fact that the inclusion of the petitioners' property in zone B rather than in zone C depreciates its value is not of controlling significance. Every exercise of the police power is apt to affect adversely the property interest of somebody. Spector v. Building Inspector of Milton [250 Mass. 63] 145 N. E. 265, 267."

[4] Plaintiff makes further contentions as to the invalidity of the ordinance, all of which we may assume are based upon proper and sufficient allegations of fact in her complaint. These contentions will be considered in the order in which they are presented in her brief.

The first of these contentions is that the property of plaintiff is as a matter of fact commercial, notwithstanding the fiat of the city council. This is a matter largely in the discretion of the city council, and courts are loath to substitute their judgment for that of the municipal authorities. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479; Zahn v. Board of Public Works, supra. There are no special allegations in the complaint to support this contention, except that plaintiff's property is situate opposite and across the street from property within a business district.

The contention that residential uses are forced to abut on business areas is conclusively answered in the Zahn Case, as is also the further contention that a monopoly is created in favor of business establishments which are situated across the street from plaintiff's property.

The further contention is made that plaintiff is not "pioneering" a commercial district in an exclusive residential district, but is seeking a store in a proven commercial district. The allegations of the complaint upon which plaintiff relies to support this contention are that her property is located opposite and across the street from property which is zoned for business uses. This presents the same question as was presented in the Zahn Case, where the petitioner's property, which was included in a residential district, was situated opposite and across the street from property zoned for business uses. There is no merit in this contention.

There are further claims made by plaintiff of the invalidity of the ordinance which we think find no support in the allegations of the complaint. The first of these are "that the property of plaintiff is in effect confiscated to an ultra-æsthetic idea." We think from what we have already said that it plainly appears that there has been no confiscation of plaintiff's property. That being so, the contention that the municipal authorities were actuated by ultra-æsthetic ideas in the enactment of the ordinance becomes of no moment.

[5] Equally without merit is the contention "that said zoning ordinance is unequally administered to the practical financial ruin of appellant." The complaint shows no damage to plaintiff or to her property, but what might legitimately follow from the proper and legal inclusion of her property in a zone or district different from that in which adjacent property is included. Zahn v. Board of Public Works, supra, 195 Cal. 512, 234 P. 388; Spector v. Building Inspector of Milton, supra.

[6, 7] Finally, plaintiff contends "that the system in vogue in Sacramento is not a general, uniform, and comprehensive one." As already noted, the complaint shows that by the ordinance in question the city of Sacramento was divided into five zones or districts. The ordinance includes the whole of the territory within the municipality. The Sacramento river bounds the city on the west, and the Southern Pacific Railroad runs in a general easterly and westerly direction through the northern limits of the city. The Western Pacific Railroad runs parallel to, and some 15 or 16 blocks south of, the tracks of the Southern Pacific Company. The area along the river front and adjacent to the railroad tracks is included in industrial districts, both heavy and light. Between the lines of these two railroad companies, and extending from Second street on the west to Twenty-First street on the east, and from E street on the north to Q street on the south, the territory therein is largely zoned as business property. East of Twenty-First street to Thirty-First street is included in the second residential district, except the property along J street, which for a block on either side is zoned as business property, and except also a few small areas therein, which are also zoned as business districts. East of Thirty-First street to the city limits for about 30 blocks the territory of the city is mainly zoned for residential uses. There are a few small areas in this territory which are zoned as business property. Three of these face on J street, one of which is located opposite plaintiff's property, another is located on the south side of J street between Forty-Eighth and Fifty-First streets, and a third on the same side of the street between Fifty-Sixth and Fifty-Seventh streets. There are other remote sections of the city, but it is not necessary to go into details regarding the manner in which they are zoned. Since the adoption of the general ordinance, there have been a number of amendments thereto adopted by the city whereby property originally located in a residential district has been rezoned as business property. None of these amendments, however, has affected plaintiff's property; nor so far as is shown in the complaint have they related to any property fronting on J street or in the neighborhood of plaintiff's property. Plaintiff claims that by reason of these changes in the residential sections of the city, and the creating thereby of business districts therein, the residential sections of the city have become "spotted," and "that the system in vogue in said city is not a general, uniform, and comprehensive one, but is a haphazard one." We think the general plan adopted by said ordinance for the zoning of said city, as briefly set forth above, cannot be criticized as lacking in those essentials which go to make up a general, uniform, and comprehensive system for the zoning of a modern city. The adoption of a proper system of zoning is largely in the power and discretion of the municipal authorities, and courts are loath to substitute their judgment for that of the duly constituted authorities of the city. "It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals, or general welfare that it will be nullified by the courts." Miller v. Board of Public Works, supra, 195 Cal. 490, 234 P. 385, 38 A. L. R. 1479. The only particular in which the complaint charges that the present system of zoning is not general, uniform, and comprehensive is that, by the original ordinance and subsequent amendments thereto, the city has permitted small areas scattered throughout the residential sections to be zoned for business uses, and thereby permitted or caused the residential districts to become "spotted." This practice we think is in almost universal operation. It was followed in the ordinance considered in the Zahn Case, and was expressly approved and commended by this court, 195 Cal. 511, 234 P. 388.

We think we have considered and disposed of all the points made by the plaintiff in her assault upon the ordinance. In our opinion the complaint fails to state facts sufficient to entitle the plaintiff to a decree nullifying the ordinance. The general demurrer thereto was properly sustained.

The judgment is accordingly affirmed.

We concur: TYLER, Justice pro tem.; PRESTON, J.

204 Cal. 668

MOODY v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 12781.)★

Supreme Court of California. Aug. 4, 1928.

Petition for Rehearing and Modification Denied Aug. 30, 1928.

1. Master and servant ⚷367—One who renders services in course of independent occupation, following employer's desires only in result of work done, is "independent contractor" (Workmen's Compensation Act, § 8 [b]).

One who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work and not in the means whereby it is to be accomplished, is an independent contractor within meaning of Workmen's Compensation Act (St. 1917, p. 831) § 8 (b), excluding independent contractors from status of employees.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

2. Master and servant ⚷367—Employer's direction of work and control of place and manner of doing it determines whether workman is employee or independent contractor (Workmen's Compensation Act, § 8 [b]).

Decisive test in determining whether relationship is that of employee or independent contractor under Workmen's Compensation Act (St. 1917, p. 831) § 8 (b), involves consideration of who has right to direct the work and who has general and complete control in determining when and how it shall be done.

3. Master and servant ⚷367—Nurse summoned by hospital management to care for patient held not entitled to compensation for infection sustained, because "independent contractor" and not employee (Workmen's Compensation Act, § 8 [a, b]).

Graduate nurse summoned by hospital management to take charge of patient at hospital, whose hours of employment and wages were governed by the operating schedule maintained between hospital and nurses' association, *held* independent contractor and not employee of patient under Workmen's Compensation Act (St. 1917, p. 831) §§ 8 (a, b), 19 (d), as regards recovery of compensation for infection, incurred while on the case, since nurse was not subject to patient's orders with reference to methods of treating him.

In Bank.

Proceedings under the Workmen's Compensation Act by Ida M. Dracket against Fred S. Moody. From an award of the Industrial Accident Commission in claimant's favor, the employer brings certiorari. Award annulled, and opinion of District Court of Appeal (260 P. 967) superseded.

Lloyd Baldwin and R. P. Wisecarver, both of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

WASTE, C. J. Certiorari to review an award of the Industrial Accident Commission in favor of Ida M. Dracket and against Fred S. Moody. Briefly, the facts are that petitioner, Fred S. Moody, while suffering from an infection, which caused a high fever and delirium, was ordered sent to the hospital by his physician, who requested the hospital to assign petitioner a room, to prepare the operating room, and to call in a special nurse. In response to the doctor's request, the respondent Ida M. Dracket, a professional nurse, was summoned by the hospital management to take charge of the case, her name being taken from a waiting list of nurses kept by the hospital. There was no agreement or understanding as to the nature of her duties or the right to control her services. Her hours of employment and the wages she was to receive were covered by an operating schedule maintained between the hospital and the nurses' association. The operation was performed, and petitioner's delirium continued for a period of a week or ten days thereafter. After attending the patient for a week, the respondent complained of a soreness in her thumb, and was immediately retired from the case. The soreness developed into an infection, and she remained at the hospital as a patient for over two months. She filed a claim with the Industrial Accident Commission for compensation for injuries arising out of and in the course of her employment by petitioner, and was granted an award for a temporary total disability from November 8, 1926, and continuing indefinitely. Petitioner seeks to have the award annulled, contending that the relationship of master and servant does not exist in this case; that the disputable presumption of employment based on personal service, embodied in section 8(b) of the Workmen's Compensation Act (St. 1917, p. 831) has no application to the facts here; and that the status of the respondent nurse at the time she became inoculated with the infection was not that of an employee, but that of an independent contractor, exercising an independent calling, and retaining the entire control over the method and manner of doing her work, in accordance with her learning, skill, and training.

The sole question to be considered therefore in this proceeding is whether a graduate nurse, attending a patient in her professional capacity, becomes an "employee" of the patient, within the meaning of the Workmen's Compensation Act, or is to be considered an "independent contractor." The commission contends that, having found that the respondent was performing service for petitioner at the time she became infected, it was presumed that her status was that of an employee; that, under section 19(d) of the Workmen's Compensation Act, the burden of showing

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★Rehearing denied.

that she was an independent contractor was upon petitioner; and that that burden of proof was never discharged and therefore the presumption was never overcome.

[1, 2] Section 8 (b) of the Compensation Act, above referred to, provides that:

> "Any person rendering service for another, other than as an independent contractor, or as expressly excluded herein, is presumed to be an employee within the meaning of this act."

Many definitions of an "independent contractor" have been made, but they are not essentially different. Franklin Coal & Coke Co. v. Industrial Comm., 296 Ill. 329, 334, 129 N. E. 811. The following definition may be regarded as a correct statement of what constitutes an independent contractor: One who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work, and not the means whereby it is to be accomplished. Brown v. Ind. Acc. Comm., 174 Cal. 457, 460, 163 P. 664; Green v. Soule, 145 Cal. 96, 99, 78 P. 337; Barton v. Studebaker Corp., 46 Cal. App. 707, 189 P. 1025; North Bend Lumber Co. v. Chicago, etc., R. Co., 76 Wash. 232, 242, 135 P. 1017. "It is well settled that, where one person is performing work in which another is beneficially interested, the latter may exercise over the former a certain measure of control for a definite and restricted purpose, without incurring the responsibilites, or acquiring the immunities, of a master, with respect to the person controlled." Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 811, 159 P. 721, 723. The decisive test of the relationship is: Who has the right to direct what shall be done, and when and how it shall be done? Who has the right to general control? Lassen v. Stamford Transit Co., 102 Conn. 76, 128 A. 117, 118; see, also, Fidelity & Casualty Co. v. Ind. Acc. Comm., 191 Cal. 404, 407, 216 P. 578, 43 A. L. R. 1304. In other words, the test of what constitutes independent service lies in the control exercised. The test of control means complete control, and we must carefully distinguish between authoritative control and mere suggestion as to detail. Western Indemnity Co. v. Pillsbury, supra.

[3] We have found but one or two cases in the reports of the various states involving the status of a graduate nurse. "Ordinarily a trained nurse, performing her usual duties with the skill which is the result of training in that profession, does not come within the definition of a servant, but rather is one who renders personal services to an employer in pursuit of an independent calling." Parkes v. Seasongood (C. C.) 152 F. 583. The professions of doctor and nurse are so closely allied that decisions applicable to one would appear to apply equally well to the other. In the great majority of instances the inference, that it is the implied intention of the parties to contracts for the services of a medical practitioner that he is not to be under the employer's control with respect to the details of his work, is corroborated by the consideration that the employer is a person who does not possess the technical skill which would qualify him to exercise such control, and that it would for that reason, be highly inexpedient for him to attempt to exercise it. 19 A. L. R. 1186. "There is no more distinct calling than that of the doctor, and none in which the employee is more distinctly free from the control or direction of his employer." Pearl v. West End Street R. Co., 176 Mass. 177, 57 N. E. 339, 49 L. R. A. 830, 79 Am. St. Rep. 302. It is obvious that the judgment of the doctor, or nurse, must frequently be contrary to the wishes of the patient, and, in the exercise of their independent calling, it is their undisputed right to follow their own judgment without interference on the part of the patient. As was said in Quinn v. Kansas City, etc., R. Co., 94 Tenn. 713, 30 S. W. 1036, 28 L. R. A. 552, 45 Am. St. Rep. 767:

> "It was necessary that these surgeons should bring to their work, not only their best skill, but the right to exercise it in accordance with their soundest judgment and without interference. Not only was this the right of these surgeons, but it was as well a duty that the law imposes. If the railroad authorities had undertaken to direct them as to the method of treatment of the injured man, and this method was regarded by them as unwise, they would have been 'bound to exercise their own superior skill and better judgment, and to disobey their employers, if in their opinion the welfare of the patient required it.' Railway Co. v. Artist, 9 C. C. A. 14, 60 F. 365 [23 A. L. R. 581]."

It is admitted here that the respondent nurse would have refused to obey orders given her by the petitioner with reference to the methods of treating him even had his condition permitted him to give such directions. She would take orders from the patient with respect to minor services looking to his comfort, but that measure of control falls far short of that complete and authoritative control which is the decisive test of the relationship of master and servant. In accordance with that test it would appear that the right to control and direct the work of the respondent nurse was not reserved to the petitioner, and that she must be deemed to be an independent contractor within the meaning of the Workmen's Compensation Act.

The respondent contends that to hold contrary to its finding in this instance would be, in effect, to read into section 8 (a) of the Workmen's Compensation Act an exclusion of professional workmen, when such was not the intention of the Legislature. We cannot agree with this contention. The mere fact that the employee is one who carries on a separate and independent employment does not make him an independent contractor, although it is a circumstance to be taken into consideration as tending to show that he is an independent contractor. 39 C. J. 1319. When, in addition to this circumstance, there is lacking, as in the present instance, the essential element that the master or employer shall have control and direction, not only of the employment to which the contract relates, but of all its details (Pilger v. City of Paris Dry Goods Co. [Cal. App.] 261 P. 328), the relation of master and servant, or employer and employee, cannot exist, and the person performing the service must be deemed to be an independent contractor. Under the facts of this case, therefore, it follows that the respondent commission had no jurisdiction to make the award.

The award is annulled.

We concur: CURTIS, J.; SHENK, J; PRESTON, J.; SEAWELL, J.; RICHARDS, J.; LANGDON, J.

93 Cal. App. 358

CHAPLIN v. AMADOR et al. (Civ. 6322.)★

District Court of Appeal, First District, Division 2, California. July 30, 1928.

Hearing Denied by Supreme Court Sept. 27, 1928.

1. Appeal and error 🔑931(1), 1011(1)—Findings upon conflicting evidence are conclusive on appeal and all reasonable inferences are indulged to support them.

Findings of trial court upon conflicting evidence are conclusive on appeal, and all reasonable inferences are indulged in support of findings.

2. Trade-marks and trade-names and unfair competition 🔑70(1)—Motion picture actor held entitled to prevent another from adopting his rôle, garb, and mannerisms for purpose of deceiving public.

Motion picture actor *held* entitled to restrain another from imitating his rôle, garb, and mannerisms for purpose of fraud and deception of public; no question of monopoly or ownership of trade-name being involved.

3. Trade-marks and trade-names and unfair competition 🔑97—Injunction restraining defendant from dealing in motion pictures likely to deceive public, in which defendant appeared with rôle and costume similar to plaintiff's, held not too broad.

Injunction restraining defendant from dealing with motion pictures likely to deceive public, in which defendant counterfeited plaintiff's rôle, and enjoining use of similar name, style of dress, and mannerisms in imitation of plaintiff's motion pictures, *held* not erroneous as too broad, where motion picture complained of was planned and executed to secure patronage on basis of plaintiff's reputation.

4. Appeal and error 🔑110—Order denying new trial is not appealable.

Order denying motion for new trial is not an appealable order.

Appeal from Superior Court, Los Angeles County; John L. Hudner, Judge.

Action by Charles Chaplin against Charles Amador and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

Ben M. Goldman and J. J. Lieberman, both of Los Angeles, for appellant.

Loyd Wright and Charles E. Millikan, both of Los Angeles, for respondent.

PRESTON, Presiding Justice pro tem. This is an appeal by the defendant Charles Amador from a judgment entered against all of the defendants, perpetually enjoining and restraining them, their servants, agents, and employees, and all persons acting in privity with them from, (a) disposing of, advertising, or dealing in a motion picture called "The Race Track"; (b) from using the name "Charles Aplin" or "Charlie Aplin," or any other name similar to that of plaintiff in connection with said motion picture, or any motion picture, in imitation of the motion pictures of plaintiff, which will be likely to deceive the public in believing that plaintiff is acting the rôle therein hereafter referred to; (c) from advertising, selling, or dealing in any motion pictures which are an imitation of the motion pictures of plaintiff, or style of dress, costume, or mannerisms constituting an imitation of the plaintiff in his name or in his playing or acting the part or character or rôle of Charlie Chaplin, and which are so like the motion pictures acted in and produced by the plaintiff, and in which the plaintiff plays the principal or leading or any part in such rôle, as to be likely to deceive the public in believing that said motion pictures are the motion pictures produced and acted by plaintiff, or which would have the likely effect of so deceiving.

The complaint alleges the fame of plaintiff as a motion picture star in the rôle in question, a valuable subsisting good will in such characterization; that he originated, perfected, and featured said make-up, garb, and mannerisms; described the nature of the garb, make-up, and mannerisms of the character; that defendants have produced some films in imitation of plaintiff's said rôle, and have dubbed Amador therein as "Charlie Aplin"; that the same is a fraudulent scheme and conspiracy to damage plaintiff and the public, etc.

The answer, in effect, is a general denial, and also alleges that plaintiff himself appropriated said make-up, garb, etc., and is himself a direct imitator of others in connection with said rôle.

The case was tried by the court, and findings were made in accordance with the allegations of the complaint, and judgment entered accordingly.

The record reveals that Charles Chaplin,

★Hearing denied by Supreme Court.

commonly known to the public as "Charlie Chaplin," late in the year 1913 originated and perfected a particular type of character on the motion picture screen. In this character, Chaplin has generally worn a kind of attire peculiar and individual to himself, consisting of a particular kind or type of mustache, old and threadbare hat, clothes, and shoes, a decrepit derby, ill-fitting vest, tight-fitting coat, and trousers and shoes much too large for him, and with this attire, a flexible cane usually carried, swung, and bent as he performs his part. This character, and the manner of dress, has been used and portrayed by Charles Chaplin for so long, and with such artistry, that he has become well known all over the world in this character to such an extent that a display of his picture with the word "Charlie," or even with no name at all, has come to mean the plaintiff.

Late in the year 1920, or early in 1921, the defendants F. M. Sanford and G. B. Sanford, as producers, and the defendant Charles Amador, the appellant herein, as actor, entered into a plan or scheme, the purpose of which was that a series of twelve motion pictures would be produced in which the defendant Charles Amador, under the name of Charlie Aplin, would perform the leading rôle. In this scheme Amador was to be dressed in imitation of Chaplin and was to be featured in these pictures under the name of Charlie Aplin, which was an imitation of the name of Chaplin. One of the first steps in carrying out this scheme was the sending of letters by defendants to various states' rights distributors of motion pictures throughout the country. One of these letters contained the following announcement:

> "We announce the production of twelve two-reel record breaking comedies featuring Charlie Aplin in the well-known character, famous the world over."

This letter was sent over the name of Sanford Productions, F. M. Sanford, manager. Similar letters were sent throughout the country on the letterhead of Sanford Productions, one of them reading in part as follows:

> "Our comedian is a world beater in this famous character. There never was a better drawing card. A—Charlie Aplin—contract will soon be of big value in your territory, so wire us at once."

On the left-hand margin of this last letter were printed three views of "Charlie Aplin" in "this famous character."

Along with one of these letters there was sent a card having on one side of it a picture of Amador as "Charlie Aplin," and having on its reverse side printed matter taken from a San Diego paper, which in part is as follows:

> "Aplin, whose name is like that of Charlie Chaplin, who looks like him and acts like him, and who is a regular fellow with it all, came down here for the Sanford Productions. * * *"

One picture, called by the defendants "The Race Track," was completed and taken to New York by F. M. Sanford for the purpose of showing it to states' rights distributors. This film was shown to a distributor by the name of Ochs, who considered it so manifestly an imitation of Chaplin's character and Chaplin's name that he refused to negotiate for it. Learning of this, the plaintiff filed a suit for injunction, and obtained a preliminary injunction pending the trial of the suit, and defendants were restrained from exhibiting said picture.

At the very opening of the trial, counsel for the defendants made this statement:

> "The defendants are not contesting the rights of plaintiff in the exclusive use of his name or any other name similar to plaintiff's name. We have no desire to use the name of Charles Aplin or Charlie Aplin, or any other name similar in spelling or pronunciation or appearance to plaintiff's name. To that extent, without prejudice to the other issues in the case, the defendants are prepared to permit a decree in that respect, but, so far as the other issues in the case are concerned, we shall strenuously oppose them."

The court found, among other things, as follows:

> "* * * That the plaintiff is the first person to use the said clothes, as described herein and as described in the complaint, in his performing as an actor in motion pictures, and it is true that he originated, combined, and perfected the manner of acting and mannerisms mentioned herein as used in motion pictures, and it is also true that the plaintiff is the first person to originate, use, combine, and perfect in motion pictures that certain form of acting, those mannerisms, facial expressions, and movements of his body hereinabove mentioned and described."

[1] Appellant first contends that there is no evidence that plaintiff originated the rôle or its separate parts. The evidence upon this question is conflicting. It has been repeatedly held that the findings of the trial court upon conflicting evidence are conclusive and binding upon this court, and all reasonable inferences are to be indulged in support of the findings. The authorities supporting this rule are legion, among them being Gjurich v. Fieg, 164 Cal. 429, 129 P. 464, Ann. Cas. 1916B, 111; Wilbur v. Wilbur, 197 Cal. 1, 239 P. 332.

With this rule in mind, we have made a careful examination of the entire record, and we are fully convinced that there is abundant evidence to support all the findings of the trial court. We see no reason, however, to go into a detailed analysis of the large volume of evidence embodied in the record. The finding that plaintiff originated and combined the rôle is supported by evidence of managers of theaters, motion picture houses, actors, and motion picture producers.

No other finding is attacked by the appellant as being unsupported by the evidence.

Appellant's second contention is stated in his brief as follows:

> "Isn't the sole issue monopoly, on the one hand, or means to prevent confusion or deception, on the other hand? We respectfully submit that, even though the court accepted the findings, still the law is not and cannot be that the judgment and decree of the court, as framed, can stand."

[2] The question of monopoly is in no way involved in this action. Plaintiff is not seeking to prevent the appellant, Charles Amador, from appearing in motion pictures, but only seeks to prevent him from imitating the plaintiff in such a way as to deceive the public and work a fraud upon the public and plaintiff. The case of plaintiff does not depend on his right to the exclusive use of the rôle, garb, and mannerisms, etc.; it is based upon *fraud and deception*. The right of action in such a case arises from the *fraudulent purpose and conduct of appellant and injury caused to the plaintiff thereby, and the deception to the public*, and it exists independently of the law regulating trade-marks, or of the ownership of such trade-marks or trade-names by plaintiff. It is plaintiff's right to be protected against those who would injure him by fraudulent means—that is, by counterfeiting his rôle—or, in other words, plaintiff has the right to be protected against "unfair competition in business." We think the following authorities fully support our conclusion in this regard: Banzhaf v. Chase, 150 Cal. 180, 88 P. 704; Modesto Creamery v. Stanislaus Creamery Co., 168 Cal. 289, 142 P. 845; Bradford Baking Co. v. Weber Baking Co., 43 Cal. App. 570, 185 P. 417; Weinstock-Lubin Co. v. Marks, 109 Cal. 529, 42 P. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57; and International News Service v. Associated Press, 248 U. S. 215, at pages 234–236, 39 S. Ct. 68, 63 L. Ed. 211, 2 A. L. R. 293.

In the case of Weinstock-Lubin Co. v. Marks, supra, the court said:

> "Equity will not concern itself about the means by which fraud is done. It is the results arising from the means, it is the fraud itself, with which it deals. The foregoing principles of law do not apply alone to the protection of parties having trade-marks and trade-names. *They reach away beyond that, and apply to all cases where fraud is practiced by one in securing the trade of a rival dealer; and these ways are as many and as various as the ingenuity of the dishonest schemer can invent.*"

The same reasons apply with equal force to the case at bar, and demonstrate that the plaintiff is entitled to his injunction preventing defendant from imitating the rôle which plaintiff originated, and thereby injuring plaintiff and deceiving the public into the belief that appellant, Amador, under the name of Charlie Aplin, is really the plaintiff, Charlie Chaplin.

A careful review of the evidence, containing the various exhibits of plaintiff and defendant, convinces us that defendant's imitation of plaintiff would be likely to deceive the public, and that the whole plan and scheme of the defendants was undertaken with a view of deceiving the public and injuring plaintiff in his business, and, if permitted to be carried out, it would undoubtedly have that effect.

[3] Appellant further complains that the injunction is too broad. We think this contention is without merit. The injunction in its last analysis, as far as defendant, who is the only appealing defendant, is concerned, simply enjoins him from *imitating the plaintiff in such a way as will deceive and defraud the public*. We are in full accord with the view of the learned trial judge who, in denying a new trial, said:

> "Regarding 'The Race Track' picture, the court is convinced that defendants deliberately planned and executed an imitation of plaintiff, designed and calculated to deceive the public into believing that defendant Amador, posing as 'Aplin' was 'Chaplin,' and thereby did secure patronage that might not otherwise be obtained, and depriving plaintiff thereof, and that the imitation inheres in the entire picture so as to render it impossible of elimination. Regarding the other injunctive features, they amount to no more than restraint of imitation; and, to avoid their effect, defendants need do no more than avoid the imitation and deception."

We see no need of discussing this case further. We think, as above stated, that the evidence is ample to support all the conclusions reached by the trial court, and that its decision and judgment was right and proper, and should be affirmed.

[4] Appellant also appeals from the order denying a new trial. The order denying a new trial is not appealable, and for that reason the attempted appeal therefrom is dismissed. 2 Cal. Jur. 173, 174.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

93 Cal. App. 177

MERRITT v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 6043.)

District Court of Appeal, Second District, Division 2, California. July 16, 1928.

1. Contempt 🔑63(4)—Order of contempt must on its face recite facts showing contempt.

The order adjudging one guilty of contempt must on its face recite facts showing contempt.

2. Divorce 🔑269(11), 311—Evidence in contempt proceeding held insufficient to sustain finding divorced husband had ability to pay alimony and support child.

Evidence in contempt proceeding *held* insufficient to support finding that divorced husband had ability to comply with order of court requiring payment of alimony and money for support of child.

3. Divorce 🔑269(9)—Necessary expenses of divorced husband may be considered in determining net income as basis for determining ability to pay alimony.

Though a divorced husband cannot escape payment of alimony by living luxuriously and thus depreciating his ability to pay, he is entitled to live in such a manner as to be able to earn and draw his salary, and necessary expenses may be considered in arriving at net income as basis for determining ability to comply with order.

4. Prohibition 🔑10(2)—Writ of prohibition is available to prevent sentence for contempt, when manifest court will proceed notwithstanding lack of jurisdiction.

Writ of prohibition is available to prevent trial judge from sentencing petitioner for contempt of court for failure to pay alimony, in case it is manifest from previous orders or decisions of court that it will proceed notwithstanding a lack of jurisdiction.

Application by Hulett C. Merritt, Jr., for a writ of prohibition, prayed to be directed to the Superior Court in and for the County of Los Angeles and the Honorable Daniel Beecher, judge thereof. Writ granted.

Russell & Heid, of Tulare, and Theodore Hull, of Los Angeles, for petitioner.

Young & Young, of Los Angeles, for respondents.

THOMPSON, J. This is an application for the writ of prohibition to prevent the respondent judge from sentencing petitioner for contempt of court. In an action for divorce, wherein the petitioner was defendant, he was ordered, on December 1, 1926, to pay to the plaintiff in that action (he having stipulated that the order might be made) as permanent alimony the sum of $750 per month, and the further sum of $250 per month for the support and maintenance of a minor child. He was also ordered to carry a life insurance policy in the principal sum of $50,000, the annual premium on which was $616.60 for the year 1928, and to pay plaintiff the sum of $35,000 in cash. Petitioner has another daughter by a previous marriage for whose support he is also under order to pay the sum of $100 per month. Petitioner having failed to pay the $1,000 due on March 1, 1928, for the support of his wife, who is plaintiff in the divorce suit now pending and mother of the child of the marriage there sought to be terminated, the respondent court did on March 8, 1928, make its order requiring petitioner to appear and show cause why he should not be punished for contempt. After hearing the testimony of petitioner, the respondent judge made an order on March 16th finding him guilty of contempt, and continuing the matter for sentence to March 27, 1928. On the last-named date further testimony of the petitioner was taken, and the matter of imposing sentence was continued until March 30th. It is to prevent this sentence that the writ is sought.

The petitioner contends that the court is without jurisdiction to impose the sentence for two reasons: First, because there is no finding in the minute order to the effect that petitioner had the ability to pay; and, second, that the undisputed testimony shows that he did not have the ability to pay. The respondents deny both of these assertions, and take the position that petitioner cannot avail himself of the prohibitive writ, but must await the sentence and then seek his relief through either the writ of certiorari or habeas corpus.

The minute order makes no mention whether petitioner had the ability to make payment. It is said, however, in a bill of exceptions which it has been stipulated may be considered on this hearing as the record of testimony offered and received at the hearing and orders and findings of the court, that the respondent judge "made a finding that said Hulett C. Merritt, Jr., was able to comply with the orders of court theretofore made in the above-entitled matter with reference to the payments of alimony and moneys for the care, education, and maintenance of the minor child of the parties hereto, found the said defendant guilty of contempt and continued the hearing to March 30, 1928, for sentence."

[1] It is undeniable that the order adjudging one guilty of contempt must on its face recite facts showing the contempt. Bakeman v. Superior Court, 37 Cal. App. 785, 174 P. 911, and cases there cited; Overend v. Superior Court, 131 Cal. 280, 63 P. 372. The ruling necessary upon this precise question is so obvious, in view of the authorities, that it would require no further comment, were it not for the recital in the bill of ex-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ceptions that the trial court found that petitioner had the ability to pay. May we consider this statement in the bill?

It will be observed, first, that the stipulation by which we are authorized to consider the statement referred to recites that it "is the record of testimony introduced and orders and findings of the court on said contempt proceedings." There is no finding and nothing except the statement that a finding was made. There can be no doubt that the only thing which remains for the trial court to do is to fix the penalty and issue the commitment. If the court had taken these steps, it is apparent that the record would not support the judgment in the absence of a finding in the order adjudging petitioner guilty. Such is the effect of the authorities already cited, and such is the deduction of reason. Any other course would leave open to conjecture the question of jurisdiction, contrary to established procedure. From these observations it is apparent that the order adjudging petitioner guilty of contempt is in effect a judgment. It is said in 14 California Jurisprudence, at page 84, that—

> "Whether an order is in legal effect a judgment seems to depend upon whether it is a final determination of the rights of the parties as the result of adversary proceedings in which issues are framed and the parties are given an opportunity to present their contentions on the merits."

Accordingly, it has been held that orders in probate are in effect judgments when they meet the test thus stated. Estate of Harrington, 147 Cal. 124, 81 P. 546, 109 Am. St. Rep. 118. Also considerable light is shed upon the effect of this order by the case of People ex rel. Day v. Bergen, 6 Hun (N. Y.) 267, wherein it was held that, where the warrant of commitment contained words which were not contained in the order adjudging the contempt, the words so inserted were unauthorized, and the warrant was set aside, the court saying:

> "We are bound to suppose that the language of the order, convicting the defendant of the contempt, deliberately and accurately expresses the full intention of the court which made it."

And again:

> "An order of this character * * * must be strictly construed and is not to be extended by implications and intendments. * * *"

The only reasonable interpretation which we can ascribe to the statement in the bill of exceptions that the court found that petitioner had the ability to meet the payment required by the order is that it silently determined that to be the fact, without including it in the order. We are of the opinion that we can look to the face of the order only for the necessary support for the sentence which the respondent court threatens to impose.

[2, 3] But a finding that he was able to pay was impossible in view of the state of the testimony. The only witness to testify at the hearing was the petitioner. If, as is said in Myers v. Superior Court, 46 Cal. App. 206, 189 P. 109, his testimony was "false, then there is absolutely no evidence before the court," and the "court was without jurisdiction to make the order in question." Further, if his testimony is to be taken as true, he has no property other than his salary. On March 1st he received his salary of $1,250, out of which he paid $280 income tax, $500 to his former wife on account of the alimony, $100 under order of court to another daughter, approximately $204 for groceries, cleaning, and laundry bill, with $10.53 in the bank, and the remainder of $155.47 unaccounted for, except that he has two servants for whom he pays at the rate of $80 per month each, and by the explanatory statement that on account of his position as "manager of the Tajus ranch" he is compelled "to do quite a bit of entertaining for" his "father's guests, which costs $400 to $500 a month." While it is true that he has been remarried, he testified that his wife paid for her servants out of her own independent means. He also testified that his father has refused to pay his living expenses since February 1st. Manifestly this testimony fails to show that petitioner had the ability to pay the sum of $500, which was the amount unpaid when the order was made on March 16th, and also fails to show that he had the ability to pay $250, the balance remaining on March 27th; the petitioner having secured an advance on his salary payable April 1, 1928, between the 16th and the 27th, and applied it to the payment of alimony. It is quite true that he cannot live luxuriously and thus depreciate his ability to pay, and it is equally true that he must live in such a manner as to be able to earn and draw his salary. The courts have uniformly recognized necessary expenses as legitimate in order to arrive at the net income as a basis for determining one's ability to comply with the order. Snook v. Snook, 110 Wash. 310, 188 P. 502, 9 A. L. R. 262; Holcomb v. Holcomb, 53 Wash. 611, 102 P. 653. The testimony, being insufficient to support a finding that petitioner had the ability to comply with the order of the court, certainly cannot support a recital that such a finding was made, even if the recital were regarded as a finding.

[4] There remains for consideration the question raised by respondents, that prohibition will not lie, but that petitioner must wait until sentence has been pronounced and then seek the writ of review or habeas corpus. We think counsel's contention in this regard cannot be upheld. The prohibitive writ has been made use of in similar instances, as follows: People v. County Judge, 27 Cal. 151; Gordan v. Buckles, 92 Cal. 481, 28 P. 490; Knutte v. Superior Court, 134 Cal.

660, 66 P. 875; and Bakeman v. Superior Court, supra. The last-cited case is very similar to the one before us, and its authority, supported by reason, would be a sufficient answer to respondents' assertion. However, we find the rule succinctly stated in Commercial Bank v. Superior Court, 192 Cal. 395, 220 P. 422, as follows:

> "The trial of contempt proceedings has sometimes been stayed by a writ of prohibition where it is manifest from previous orders or decisions of the court that it will proceed notwithstanding a lack of jurisdiction."

The instant case is one of those thus described.

The peremptory writ will issue.

We concur: WORKS, P. J.; CRAIG, J.

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93 Cal. App. 448

PEOPLE v. VASQUEZ et al. (Cr. 1661.)*

District Court of Appeal, Second District, Division 1, California. Aug. 6, 1928.

As Modified Aug. 18, 1928. Hearing Denied by Supreme Court Oct. 4, 1928.

Criminal law ⟹829(18)—Refusal of instruction with reference to alibi held erroneous under circumstances, notwithstanding instruction was given on reasonable doubt.

In prosecution for robbery, wherein defense consisted of considerable evidence tending to establish an alibi, refusal of instruction relating to such defense and requiring acquittal in case defense on such point raised reasonable doubt in minds of jury as to presence of defendant at time and place of commission of crime *held* erroneous, in view of fact that evidence was not entirely satisfactory in its sufficiency to support conviction, notwithstanding instruction was given on reasonable doubt.

York, J., dissenting.

Appeal from Superior Court, Los Angeles County; Stanley Murray, Judge.

Louis Vasquez and others were convicted of robbery, and they appeal. Reversed.

Cassius D. Blair, of Los Angeles, for appellant Vasquez.

J. R. Wilder, of Los Angeles, for appellant Morales.

Theodore C. McKenna, of Los Angeles, for appellant Melendez.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Asa Keyes, Dist. Atty., and Hugh McIsaac, Deputy Dist. Atty., both of Los Angeles, for the People.

HOUSER, J. In the lower court each of the three defendants was charged in each of two counts in the information with the commission of the crime of robbery. On the trial each of the defendants was convicted on the first count; while, as to the second count, defendant Melendez only was convicted. The appeals herein are from the several judgments and orders denying the motions for a new trial.

The defense consisted of considerable evidence which tended to establish an alibi. Prejudicial error is predicated upon the refusal by the court to give to the jury the following instruction requested by each of the defendants:

> "When a person on trial for a crime shows that he was in another place at the time when the crime alleged was committed, he is said to prove an alibi. The defense interposed by the defendant in this case is what is known as an alibi; that is, that the defendant was in another place at the time of the commission of the crime. The court instructs the jury that such a defense is as proper and legitimate as any other, and all the evidence bearing on that point should be carefully considered by the jury. If, in view of all the evidence, the jury have a reasonable doubt as to whether the defendant was in some other place when the crime was committed, they should give him the benefit of that doubt and acquit him. As regards the defense of an alibi, the jury are instructed that the law does not require the defendant to prove that defense beyond a reasonable doubt to entitle him to an acquittal. It is sufficient if his defense upon that point raises a reasonable doubt in your minds of his presence at the time and place of the commission of the crime charged."

As calculating in some measure to offset the failure of the trial court to instruct the jury with reference to the law relating to the alibi of the defendants, attention is directed to an instruction given to the jury to the effect that the burden rested with the prosecution to prove the guilt of the defendant beyond a reasonable doubt.

In the case of People v. Fong Ah Sing, 64 Cal. 253, 28 P. 233, the propriety of the giving of an instruction in substance such as was requested by the defendants herein is clearly indicated. Likewise in the case of People v. Wong Loung, 159 Cal. 520, 534, 114 P. 829.

The case of People v. Visconti, 31 Cal. App. 169, 160 P. 410, 411, is nearly an exact parallel to that of the instant case, in that therein the trial court gave a general instruction to the effect that, before the defendant could be convicted, the jury must believe from the evidence, beyond a reasonable doubt, that the defendant committed the crime of which he was charged; but at the same time refused to give an instruction requested by defendant on the alibi presented by him, in substance as in the instant case, that he was not obliged to establish that defense by a preponderance of the evidence, or even beyond a reasonable doubt, but that it was sufficient to entitle him to a verdict of acquittal if the evidence raised in the minds of the members of the jury a reasonable doubt as to the presence of the defendant at the place where the crime was alleged to have been committed at the time referred to in the information. It was held that the action of the trial court in refusing the requested instruction constituted prejudicial error entitling the defendant to a reversal of the judgment. An application for hearing in the Supreme Court after decision by the District Court of Appeal was denied. However, the Supreme Court took occasion to state that, in view of the provision of section 4½ of article 6 of the Constitution, the refusal "in all cases" by the trial court to give such an instruction as was under consideration would not necessarily be deemed sufficient cause for reversal of the judgment; but that, as to the case before the court, it would be assumed that the District Court of Appeal "concluded, in view of the circumstances of this particular case, as shown by the record, that the refusal of the trial court to permit the requested instruction operated substantially to the prejudice of the defendant."

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*Hearing denied by Supreme Court.

The only discoverable authorities in this state which indicate a ruling which might be considered as contrary to, or which would cast a doubt upon, that so positively announced in People v. Visconti, 31 Cal. App. 169, 160 P. 410, 411, are People v. Winters, 125 Cal. 325, 57 P. 1067, and People v. Perrin, 67 Cal. App. 612, 227 P. 924.

In the former case, while an instruction similar in some respects to the instruction refused herein was criticized, no ruling was made to the effect that the trial court would be justified in refusing to give a proper instruction covering the legal principles relating to an alibi, even though, as here, an instruction were given to the effect that the burden of proving the guilt of the defendant beyond a reasonable doubt rested with the prosecution; but, in the latter case, it was held that, where the trial court instructed the jury that it was incumbent upon the prosecution to prove the allegations of the information beyond a reasonable doubt, and that, if the jury believed from the evidence beyond a reasonable doubt that at the time and place specified in the information defendant knowingly and designedly committed the acts of which he was charged, it was not prejudicial error on the part of the trial court to refuse to instruct the jury with reference to the alibi defense of the defendant. As authority for such ruling, the case of People v. Buck, 151 Cal. 667, 91 P. 529, is cited in the opinion of the court. An examination of that authority discloses the fact that the defendant therein was charged with the crime of murder, and that "his sole defense was insanity." One of the instructions requested by the defendant related to the credit which was properly attachable to the testimony of nonexperts as to the sanity of the defendant. The concluding clause of such requested instruction was as follows:

> "You are not to be bound by the statement or testimony of such witnesses, neither are you justified in disregarding them. It is your duty to give them such weight as they are entitled to."

The trial court refused to give to the jury that part of the instruction just quoted. In ruling that such refusal was not error, the Supreme Court used the language quoted in the case of People v. Perrin, as follows:

> "No reason occurs to us why so mere a commonplace should not have been allowed to stand, but there seems as little reason why it should have been requested. It must be presumed that a jury always understand that it is their duty to give to any evidence submitted to them the weight to which it seems entitled, and the refusal of the judge to make that comment on any particular item or line of evidence cannot be supposed to prejudice the party offering it."

In considering the force of such language as applied to facts like those in the instant case, it should be remembered that a considerable difference exists between the sufficiency of the evidence necessary to justify an acquittal in an insanity case and a case where the defense consists of evidence tending to establish an alibi. The authorities are agreed that, where the defense of insanity is interposed, it is incumbent upon the defendant to establish the fact by a preponderance of the evidence (8 Cal. Jur. 180, 368); but, when the evidence introduced by the defendant consists of an alibi, he is not required to prove it beyond a reasonable doubt, nor even by a preponderance of the evidence. It is necessary only that all the evidence in the case raise a reasonable doubt in the minds of the members of the jury as to the presence of the defendant at the time when and the place where the crime was committed. 8 Cal. Jur. 187. With so much in mind, the case of People v. Perrin, 67 Cal. App. 612, 227 P. 924, is somewhat weakened as an authority in the instant case to the effect that the refusal of the trial court to give the requested instruction relating to the law applicable to the alibi of defendants did not amount to prejudicial error. It is manifest that a marked difference exists between the rule which requires the prosecution to prove beyond a reasonable doubt each of the material facts going to establish the guilt of the defendant, and the rule which entitles the defendant to an acquittal if by the evidence he succeeds in producing a reasonable doubt as to an essential fact. The one is necessarily a positive psychological condition which in its effect approaches a practical demonstration of a truth; while the other, although it may be said to be established, nevertheless, as compared with the former, is immeasurably weaker, and may be dependent upon a lesser, if not an unsettled and negative condition. It results in the instant case that, because the jury was instructed that, "if upon consideration of the whole case you are satisfied beyond a reasonable doubt of the guilt of the defendants, * * * you should so find, * * *" was not the equivalent of instructing the jury, as requested by the defendants, that if it had "a reasonable doubt as to whether or not the defendants were in some other place when the crime was committed, they should give him the benefit of that doubt and acquit him."

Especially as against the two defendants herein, Vasquez and Morales, the case as presented was so weak that it somewhat strains good judgment to declare that it was satisfactory in its sufficiency. As to defendant Melendez, while the case was much stronger, nevertheless the evidence was not of a character greatly to be desired either in quantity or quality. In such circumstances, it is not at all improbable that, had the jury been fully and fairly instructed with reference to the law applicable to the alibi interposed by the defendants, a verdict of guilty might not have been returned against them. To quote substantially the language appended by the Supreme Court to the opinion in the case of People v. Visconti, 31 Cal. App. 169, 172, 160 P. 411, this court concludes:

> "In view of the circumstances of this particular case as shown by the record, that the refusal of the trial court to permit the requested instruction operated substantially to the prejudice of the defendants."

It becomes unnecessary to devote attention to other alleged errors occurring at the trial.

The judgment and the order denying the motion for a new trial as to each of the defendants are reversed.

I concur: CONREY, P. J.
I dissent: YORK, J.

BARRETT v. SOUTHERN PAC. CO.★
(Civ. 6298.)

District Court of Appeal, First District, Division 2, California. July 19, 1928.

Rehearing Denied Aug. 13, 1928. Hearing Granted by Supreme Court Sept. 17, 1928.

1. Appeal and error 🔑757(3)—For court to consider grounds for reversal, appellant must point out evidence and portion of record supporting its contention (Code Civ. Proc. § 953c).

To consider grounds urged for reversal of judgment, it is incumbent on appellant to point out to the appellate court the evidence and portion of the record supporting its contention, as required by Code Civ. Proc. § 953c.

2. Appeal and error 🔑757(1)—Appellant, not quoting testimony, printing instructions or showing that requested instructions were not covered by court's charge in brief, held not entitled to consideration of grounds for reversal (Code Civ. Proc. § 953c).

Appellant filing opening brief only, which contained no quotations from typewritten transcript of testimony, but merely general statements as to what witnesses were claimed to have testified, with scattering references to pages of transcript, and did not contain instructions complained of, nor show that substance of requested instructions or law applicable to subject thereof was not fully covered in court's charge, did not comply with requirements of Code Civ. Proc. § 953c, and hence was not entitled to consideration of grounds urged for reversal of judgment.

3. Appeal and error 🔑901—Judgment and proceedings on which based are presumed regular, and appellant must affirmatively show error.

All presumptions are in favor of the regularity of the judgment appealed from and proceedings on which it is based, and hence it devolves on appellant to show affirmatively existence of error for which he asks reversal.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Charles W. Barrett against the Southern Pacific Company. Judgment for plaintiff, and defendant appeals. On plaintiff's motion to dismiss the appeal or affirm the judgment. Motion to affirm granted, and judgment affirmed.

Ford, Johnson & Bourquin, of San Francisco, for appellant.

James F. Brennan, of San Francisco, John J. McMahon, of Los Angeles, and William F. Herron, of San Francisco, for respondent.

WARNE, Presiding Justice pro tem. Respondent made a motion herein to dismiss the appeal or affirm the judgment appealed from "upon the ground that appellant herein has not printed in its brief on file herein, or in any supplement appended thereto, or at all, any portions of the evidence or record herein, and that no evidence is set forth in said brief of appellant sufficient to advise respondent or the court concerning appellant's ground of appeal or sufficient to justify a reversal of said judgment, or to show any error in any ruling of the trial court, or to show error anywhere in the record and proceedings herein." Respondent contends that appellant has failed to comply with the requirements of section 953c of the Code of Civil Procedure, which contains the following provisions:

> "In filing briefs on said appeal, the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of

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★Superseded by opinion of Supreme Court, 277 P. 481.

the record as they desire to call to the attention of the court."

The suit was brought to recover damages against the appellant for injuries sustained when his automobile, in which he was riding in the nighttime within a thick gray fog, collided with a gray-colored stone pier in the middle of the state highway about four miles north of the city of Santa Barbara. The said pier is used to support an overhead bridge which the railroad of the appellant crosses. A jury returned a verdict in favor of respondent, awarding him damages. Judgment was entered accordingly and appellant appeals.

The grounds urged for a reversal of the judgment are as follows:

(1) Plaintiff was guilty of contributory negligence as a matter of law.

(2) That the construction and maintenance of the stone pier in the center of the state highway was duly authorized and did not constitute a public nuisance.

(3) Defendant was not guilty of negligence.

(4) The judgment is excessive.

(5) The court made numerous errors in excluding and admitting testimony and in giving instructions by plaintiff and in refusing practically all of the instructions requested by the defendant.

[1, 2] To properly consider these points on their merit, it was incumbent upon appellant to point out to this court the evidence and portion of the record supporting its contention. The typewritten transcript contains 308 pages of testimony. Appellant's brief does not contain a single quotation therefrom. Appellant rests content with the filing of an opening brief only, wherein it has stated the testimony favorable to its contention in the form of general statements as to what a witness is claimed to have testified to with scattering references to the pages of the transcript. No pretense is made of quoting the testimony. For instance, appellant says that the verdict was excessive, and in his brief all that is contained on the subject is as follows:

> "The verdict in this case is for $67,700. The injuries sustained by the plaintiff, aside from a paralysis of one of the nerves in his tongue, are not such as to warrant any very considerable amount of damage. Plaintiff testified that the trachea was cut, and that he was unable to swallow on account of scar tissue, and that the tongue was paralyzed. This, with the opening statement of counsel to the same effect, no doubt impressed the jury. It appears, however, from the testimony of Dr. L. W. Hotchkiss, the surgeon who attended him, that the injuries as testified to by plaintiff were seriously exaggerated. The trachea was not cut at all, and only the nerve on one side of the tongue was injured."

This is characteristic of the entire brief. Nor have the instructions complained of been printed in the brief. Nor is there any showing that the substance of the requested instructions or the law applicable to the subject upon which the request was made was not fully covered in the court's charge to the jury. Respondent contends "that the appellant's brief absolutely misconstrues the testimony"; in other words, that appellant has placed its own construction upon the evidence rather than quote the evidence as it actually stands to allow the court to place the proper construction upon it. An examination of the record would seem to bear respondent out in this respect. In so doing, appellant has not complied with the requirements of section 953c of the Code of Civil Procedure.

In the very recent case of Filmer v. Davis, 266 P. 985, this court said:

> "While the precise wording of the section requires the appellant to print such parts of the record as he desires to call attention to, the decisions above referred to, as well as the very nature of the matter, require that appellant print enough of the record to enable the appellate court to determine the merits of the appeal without examination of the typewritten transcript, except perhaps in case of a dispute developed in the briefs as to what the official record actually contains."

[3] From a reading of appellant's brief, we are unable to say that any error was committed in this case. As was said in the case of Scott v. Hollywood Park Co., 176 Cal. 680, 681, 169 P. 379:

> "All presumptions indulged in are in favor of the regularity of the judgment and proceedings upon which it is based, hence it devolves upon appellant to affirmatively show the existence of the error upon which he asks for a reversal."

See, also, Estate of McPhee, 156 Cal. 335, 104 P. 455, Ann. Cas. 1913E, 899; Marcucci v. Vowinckel, 164 Cal. 693, 130 P. 430; McKinnell v. Hansen, 34 Cal. App. 76, 167 P. 887; Miller v. Oliver, 174 Cal. 407, 163 P. 355; Estate of Berry, 195 Cal. 354, 233 P. 330.

In Estate of Berry, supra, at page 359 thereof (233 P. 332), the court said:

> "The result is not only that it was the plain duty of appellants to print in their brief or in the supplement thereto all portions of the record necessary to be considered by this court before arriving at a conclusion that the judgment should be reversed, but also that because of their failure so to do, this court would be fully justified in affirming the judgment appealed from without further consideration of the record. Appellants seem to believe that they have performed their duty fully in this respect when they have printed the portions of the evidence upon which they rely. They overlook the fact that in order to determine whether or not the evidence is sufficient to sustain a given finding, we must have before us not only the evidence but also the finding. If we had the finding before us and should conclude that the evidence was insufficient to support it, we still could not determine whether or not such finding was essential to support the judgment un-

less we had before us the pleadings or at least an accurate statement of the issues framed thereby."

In Jeffords v. Young, 197 Cal. 224, 229, 239 P. 1054, 1056, the court says:

> "It has been reiterated approximately one hundred times in the decisions of this court and of the District Courts of Appeal that it is incumbent upon an appellant who relies upon a typewritten transcript to print in his brief or in a printed supplement thereto sufficient of the record to justify a reversal of the judgment or order appealed from. 2 Cal. Jur. 643 et seq. Furthermore, as we pointed out some months ago (Estate of Berry, 195 Cal. 354, 233 P. 330), since the 1923 amendment [St. 1923, p. 748] to the section last cited, an appellant who fails to do this incurs thereby the risk that the order or judgment appealed from may be affirmed upon motion."

We have examined the entire record, and we find that no one of the points made by the appellant is well taken. If the motion to affirm had not been made, the court would have been constrained to have affirmed the judgment.

We are of the opinion that respondent's motion to have the judgment affirmed should be granted.

The judgment appealed from is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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93 Cal. App. 147

BUE v. SUPERIOR COURT IN AND FOR SHASTA COUNTY et al. (Civ. 3611.)★

District Court of Appeal, Third District, California. July 10, 1928.

Rehearing Denied Aug. 9, 1928. Hearing Denied by Supreme Court Sept. 6, 1928.

1. Certiorari 🔑28(2)—Costs 🔑32(1)—Successful defendant is entitled to costs as matter of course, and refusing costs under mandatory statute is jurisdictional and reviewable by writ of review (Code Civ. Proc. § 1024).

Successful defendant is entitled to his costs as a matter of course, under Code Civ. Proc. § 1024, and allowance of costs where statute makes it mandatory is jurisdictional question, and refusal to award costs required by statute may be corrected by writ of review.

2. Costs 🔑31—Where cross-complaint submitted as independent action was consolidated with main action, and recovery in both actions was denied, each party was entitled to costs (Code Civ. Proc. §§ 852, 1024).

Where in justice court action cross-complaint was under Code Civ. Proc. § 852, treated as complaint in separate action, and both actions were tried jointly without any attempt to present defendant's cause of action as counterclaim under section 855, and where recovery was denied in both actions, respective parties were each entitled to judgment for costs, under section 1024, in action wherein he was respectively a defendant.

3. Costs 🔑31—Where defendant in justice court sought recovery on cross-complaint as independent action, but cases were tried together and neither recovered, jury fees were divided (Code Civ. Proc. §§ 852, 1024).

Where case presented by cross-complaint in justice court was treated as separate action, but tried jointly with the main action on account of Code Civ. Proc. § 852, and recovery was denied moving party in both cases, plaintiff and defendant seeking independent recovery were each liable for one-half the jury fees, under section 1024.

4. Costs 🔑31—Where defendant converted cross-complaint in justice court into independent action and cases were tried together, neither party recovering, taxing of witness fees depended on which cause testimony related to (Code Civ. Proc. §§ 852, 1024).

Where defendant, who originally asserted cross-complaint in justice court, sought recovery as under independent action under Code Civ. Proc. § 852, but cases were tried together and neither was allowed affirmative recovery, taxing of witness fees would depend on whether the expenses were incurred in the prosecution or defense of cause of action asserted by plaintiff or in prosecution or defense of that asserted by defendant; each party being entitled to recovery of costs, in so far as he was a defendant, under section 1024.

Application by Salve Bue for a writ of certiorari to be directed to the Superior Court in and for Shasta County, and Walter E. Herzinger, Judge, to annul the portion of a judgment denying costs. Writ granted, and part of judgment annulled, with directions.

Carter & Smith, of Redding, for petitioner.

Baker & Ross, of Redding, for respondent.

PLUMMER, J. This matter is before us upon an application for a writ of review seeking an order of this court annulling and setting aside that portion of a judgment entered in respondent court on the 9th day of February, 1928, wherein it was adjudged that neither party to the action hereinafter named should recover costs.

The record shows that on or about the 4th day of March, 1927, one Harry W. Glover commenced an action in the justice's court of township No. 6, in the county of Shasta, against the petitioner herein, to recover the sum of $204.07 to cover damages alleged to have been sustained by the plaintiff in an automobile collision caused by the negligence of the petitioner therein named, Salve Bue, as defendant. Thereafter, and on August 26, 1927, the petitioner herein filed in said action an answer to the complaint filed by the said Harry W. Glover in said justice's court, and also a cross-complaint, in which the peti-

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★Rehearing denied. Hearing denied by Supreme Court.

tioner, Salve Bue, named the said Harry W. Glover and Oscar Hill, defendants. In his cross-complaint the petitioner alleged that he had been damaged in the sum of $200 by reason of the automobile collision which is described as the same collision as that set forth in the complaint filed by Harry W. Glover, wherein the said Salve Bue alleged and claimed that said collision was due to the careless and negligent manner in which an automobile owned by the said Harry W. Glover had been driven and managed by his agent, Oscar Hill, named as one of the cross-defendants.

Thereafter Harry W. Glover filed an answer to said cross-complaint and also a notice of motion to strike out said cross-complaint, on the ground that a cross-complaint is not permissible as a pleading in a justice's court. Following the proceedings herein stated, it was stipulated and agreed between the parties that the cross-complaint might be treated as a complaint in a separate action in the justice's court, and that both actions might be tried jointly. Thereupon the actions were so tried, and judgment was entered in the justice's court that neither party was entitled to recover from the other upon the alleged causes of action set forth in the complaints of the respective parties. Thereafter both parties appealed to the superior court of the county of Shasta, where the cause was then tried before a jury, and the jury returned a verdict that neither party was entitled to recover from the other, and judgment was thereupon entered, concluding with the following words:

> "It is therefore ordered, adjudged, and decreed that neither said Harry W. Glover nor Salve Bue, the parties in this action above named, shall recover anything from the other party, and that each of said parties shall pay his own costs of suit incurred herein."

The application of the petitioner seeks to have reviewed and stricken out that portion of the judgment referring to costs.

[1, 2] There seems to be no controversy between counsel that under the provisions of section 852 of the Code of Civil Procedure a cross-complaint is not permissible in an action begun and tried in a justice's court, nor does there appear to have been any attempt made on the part of the petitioner, either in the justice's court or in the superior court, to present his cause of action against the plaintiff as a counterclaim in defense of the plaintiff's cause of action, as provided for in section 855 of the Code of Civil Procedure. The parties, by stipulation and agreement, have proceeded upon the theory that the pleadings presented two separate and distinct actions, and that trial should be had upon the theory that two separate and distinct actions were being tried at the same time, upon the same testimony, and in this manner, submitted to the jury. Under the provisions of section 1024 of the Code of Civil Procedure there is no question but that a successful defendant is entitled to his costs as a matter of course. It is unnecessary to cite authorities to this effect, as both counsel are agreed as to the law, which we think is well settled.

Allowance of costs where the statute makes it mandatory is also a jurisdictional question, and a refusal to award costs where the statute awarded them may be corrected by a writ of review. This appears to be conceded by counsel for the respective parties. The difficulty arises in the application of what we have just stated to be the law. In the proceedings before us, both the petitioner, Salve Bue, and Harry W. Glover, appear to have been actors, and also to have been defendants. In so far as either party was an actor, he was not entitled to recover costs. In so far as either party was a defendant, he is entitled to recover costs. Under these circumstances, the respective parties were entitled to a judgment for costs in the action wherein he was, respectively, a defendant.

[3, 4] Following this reasoning, it is apparent from the record before us that the petitioner, Salve Bue, should not have been required to pay the entire expenses of the jury, as appears to be the case by his cost bill filed herein. The jury fees having been incurred in the trial of both actions, the apportionment thereof is a matter of simple division. As to the taxing of the costs of witness fees, some difficulty may be encountered, but trial courts as well as appellate courts exist for the purpose of solving difficulties and adjusting disputes, and therefore no reason is presented why such costs should not have been ascertained and taxed against the party liable to repay the same under the law. The taxing of the witness fees would seem to depend upon the mere matter of ascertaining whether such expenses were incurred in prosecution of the cause of action set forth by a respective party, or in defense of the cause of action set forth by the opposite party, and allowed and taxed accordingly, or disallowed and not taxed accordingly. As to the jury fees, as we have stated, it is apparent that the petitioner, under the law, should have been awarded judgment for at least one-half thereof. As to the witness fees, nothing is before us upon the record upon which we can express any opinion as to the amount that should be taxed against either party. That the court adopted the convenient method, as stated by counsel for respondent, is doubtless true, but we cannot accept mere convenience as a correct statement of the law or a correct method of procedure.

It is therefore ordered that the writ of review herein be granted as prayed for, and that portion of the judgment reading as follows: "And that each of said parties shall pay his own costs of suit incurred herein"—be annulled and set aside and the trial court directed to proceed to ascertain and adjust the costs between the respective parties, and enter judgment in favor of each party, in the amount to which it may be found that he is justly entitled.

We concur: FINCH, P. J.; HART, J.

93 Cal. App. 214

McKINNON v. FULLERTON et al.
(Civ. 6301.)

District Court of Appeal, First District, Division 2, California. July 19, 1928.

1. Cancellation of instruments 🔑53—Finding that gift deed was made in consideration of defendants furnishing plaintiff with home during lifetime and delivered in escrow held not finding of delivery of deed of gift vesting title in grantees.

Findings by trial court, in action to set aside deed, that parties entered into contract for making gift deed in consideration of defendants furnishing plaintiff with home during lifetime, and that deed was delivered in escrow to be held during life of plaintiff, did not constitute finding that deed of gift had been delivered to escrowee and title vested in grantee without being subject to further conditions, but merely that deed was deed of gift in form only.

2. Appeal and error 🔑1011(1)—Findings based on conflicting evidence will not be disturbed on appeal.

Findings based on conflicting evidence will not be disturbed on appeal.

3. Appeal and error 🔑1012(1)—Weight of evidence held for trial court in action to set aside deed.

In action to set aside deed, weight of evidence was for trial court.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by James H. McKinnon against Jessie B. Fullerton, substituted for Mary Ann Fullerton, deceased, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Henry C. Reynolds and Dunn, White & Aiken, all of Oakland, for appellants.

Asa V. Mendenhall, of Oakland, for respondent.

WARNE, Presiding Justice pro tem. This is an appeal from the judgment declaring a certain deed executed by respondent to his daughter, Mary Ann Fullerton, one of the defendants, to be null and void, and from the order denying defendants' motion for a new trial. The defendant Jesse B. Fullerton is the husband of the defendant Mary Ann Fullerton. Since the trial of this action the said Mary Ann Fullerton has died and this appeal is prosecuted by her husband Jesse B. Fullerton.

The court found the facts to be as follows:

"That on or about the 3d day of February, 1921, the plaintiff and the defendants Mary Ann Fullerton and Jesse B. Fullerton entered into a verbal contract with the said plaintiff, by which they agreed that, if the plaintiff would make a gift deed to the defendant Mary Ann Fullerton of all the real property hereinafter described, and deliver said deed to some one in escrow, with instructions to the escrow holder to deliver the said deed to said defendant Mary Ann Fullerton upon the death of said plaintiff, the defendants Mary Ann Fullerton and Jesse B. Fullerton, as consideration for said deed, would furnish and supply the plaintiff during his lifetime with a pleasant and peaceable home. * * *

"That, pursuant to the contract aforesaid, the plaintiff did, on or about the 3d day of February, 1921, prepare, subscribe, and acknowledge before a notary public in proper form a deed of gift of all the real property aforesaid to said defendant Mary Ann Fullerton, and thereupon the plaintiff delivered said deed to said defendant True Van Sickle, in escrow, and instructed him to hold said deed until the death of the plaintiff, and after said death to deliver said deed to the defendant Mary Ann Fullerton. That the said defendant True Van Sickle has ever since had and now has the possession of the said deed.

"That said plaintiff has complied with all the terms of the said verbal contract on his part to be performed.

"That the defendants Mary Ann Fullerton and Jesse B. Fullerton have each failed, neglected, and refused to comply with the terms of said contract, and still do fail, neglect, and refuse to comply with the terms thereof in this, to wit, that the defendants last above named have failed, neglected, and refused to furnish or supply the plaintiff with a pleasant and peaceable home, and that thereby the consideration for said deed has failed.

"That, since the said defendants Mary Ann Fullerton and Jesse B. Fullerton have failed, neglected, and refused to comply with the terms of said contract, the plaintiff has demanded of said defendant True Van Sickle that he redeliver the said deed to the plaintiff, and that he has refused and still does refuse to deliver to the plaintiff the said deed.

"That, when the defendants Mary Ann Fullerton and Jesse B. Fullerton agreed to furnish and supply the plaintiff, during his lifetime, with a pleasant and peaceable home, they, nor did either of them, intend to do as they had agreed.

"That, if said deed is left outstanding or in the possession of the said escrow holder, it will cause serious and irreparable injury to the plaintiff, and now does cast a cloud upon the plaintiff's title to said real property, and will continue to do so unless the same be delivered up and canceled."

Appellant contends that the trial court found the deed in question to be a deed of gift, and that, the deed having been delivered to the escrowee, title vested in the grantees, and therefore was not subject to any further conditions.

[1-3] We do not understand the findings to so hold. As we understand the findings, the deed was a deed of gift in form only; it having been executed in consideration of appellant's promise to provide respondent with a pleasant and peaceful home. It is also urged by appellant that the evidence is insufficient to sustain the verdict. We have examined the record in the case, and think it suffices to say that there is evidence to support the findings. Findings based upon conflicting evidence will not be disturbed upon appeal. It was for the trial court to weigh the evidence. This rule is so well settled that we do not consider it necessary to cite authorities.

It is our opinion that the order and judgment appealed from should be affirmed, and it is so ordered.

We concur: STURTEVANT, J.; NOURSE, J.

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93 Cal. App. 182

ANDREEN v. ESCONDIDO CITRUS UNION.
(Civ. 6318.)

District Court of Appeal, First District, Division 2, California. July 17, 1928.

1. Appeal and error 🔑989—Appellate court, in case verdict is attacked for insufficiency of evidence, can only determine whether conclusion is supported by substantial evidence.

When a verdict is attacked for insufficiency of evidence, power of appellate court begins and ends with inquiry whether conclusion reached by jury is supported by substantial evidence, and, in case testimony on material point is in conflict, it must be assumed jury resolved conflict in favor of prevailing party.

2. Negligence 🔑134(1)—Evidence held to sustain recovery for negligent fumigation of lemon orchard.

Evidence, in action for damages claimed to have resulted from fumigating lemon orchard in a careless and negligent manner and under unfavorable climatic conditions, *held* sufficient to sustain recovery.

3. Negligence 🔑124(2)—Evidence of failure to procure license held admissible, in action for damages for negligent fumigation of lemon orchard (Pol. Code, § 2322a[8], as amended by St. 1923, p. 1200).

In action for damages for negligent fumigation of lemon orchard, evidence that defendant and its employees had failed to procure license, as required by Pol. Code, § 2322a(8), as amended by St. 1923, p. 1200, *held* admissible as relevant and material to show negligence, though cause of action was not for violation of statute.

4. Pleading 🔑236(5)—Permitting amendment of complaint to conform to proof held not abuse of discretion.

Trial court *held* not to have abused discretion in permitting complaint to be amended to set forth a general allegation of negligence to conform to proof; such court having wide discretion in permitting pleadings to be amended in such manner, and discretion will not be disturbed unless abused.

5. Negligence 🔑136(25)—Causal connection between failure to procure license to fumigate orchard and injury from negligent fumigation held fact question for jury (Pol. Code, § 2322a[8], as amended by St. 1923, p. 1200).

Question as to whether there was causal connection between failure to procure license to fumigate orchard, as required by Pol. Code, § 2322a(8), as amended by St. 1923, p. 1200, and injury to lemon trees claimed to have been fumigated in careless and negligent manner, *held* question of fact for jury.

6. Negligence 🔑134(11)—Evidence held to show causal connection between failure to procure license to fumigate orchard and injury from negligent fumigation (Pol. Code, § 2322a[8], as amended by St. 1923, p. 1200).

Evidence in action for damages for negligent fumigation of lemon orchard *held* to show a clear causal connection between failure of defendant and employees to procure license, as required by Pol. Code, § 2322a(8), as amended by St. 1923, p. 1200, and resulting injury.

7. Appeal and error 🔑1032(1)—Merely showing error does not create presumption that error was prejudicial.

There is no presumption that error is prejudicial or that injury is done by merely showing error.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by Oscar E. Andreen against the Escondido Citrus Union. Judgment for plaintiff, and defendant appeals. Affirmed.

L. N. Turrentine, Wright & McKee, and C. M. Monroe, all of San Diego, for appellant.

Luce & Swing, of San Diego, and A. R. Honnold, of Escondido, for respondent.

PRESTON, Presiding Justice pro tem. This is an appeal by defendant Escondido Citrus Union, a corporation, from a judgment entered against it upon a verdict of a jury in the sum of $2,250.

Plaintiff brought this action for damages, charging that his lemon orchard was damaged by being fumigated by the agents of defendant in a careless and negligent manner and under unfavorable climatic conditions.

The defendant and appellant is a California corporation. The stock of the corporation is held by respondent and the various owners of citrus orchards in the vicinity of Escondido, San Diego county, Cal. Stock of the corporation is sold to citrus growers upon the basis of one share of stock for every 100 trees owned by them. The corporation operates a packing plant, and markets the crops of its members, charging for such services only the necessary expense of such operations. No dividends are paid; the corporation being operated for the benefit of its members. It maintains a "fumigation crew" and the necessary equipment and paraphernalia for fumigating orchards. The fumigation work is done only for the members of the corporation and at actual cost.

It is alleged in the complaint that plaintiff is the owner of 9 acres of citrus trees, upon which there are 605 lemon trees and 31 orange trees, and that on September 24, 1924, the defendant, through its agents and employees, caused the plaintiff's orchard to be fumigated with hydrocyanic gas. The complaint further alleges that this fumigation was done without the consent and against the will of plaintiff and in a negligent manner; the particular negligence being that the fumigation was done at a time when climatic conditions were not favorable to fumigation, there being a fog at the time of such fumigation, and that the fumigation was negligently and improperly applied, in that the mixture was too strong and was applied in excessive quantities and in an unskillful manner. It was further alleged on information and belief that the employees of defendant doing such work were boys and young men, unskilled in the work of fumigation, without supervision, and paid for the work by defendant at a certain price per tree. The complaint further alleged that plaintiff had suffered by reason of loss of his crop and in the further respect that his trees had become permanently damaged and set back and, as a consequence, the market value of his orchard had been lessened. A further claim was made for punitive damages, but this claim was abandoned and not submitted to the jury.

The answer of defendant denied specifically and in detail all of the material allegations of the complaint

The jury returned a general verdict in favor of plaintiff and assessed the damages at $2,250. The defendant made a motion for a new trial upon a number of grounds, among them being the insufficiency of the evidence to justify the verdict. This motion was denied by the trial court.

Many contentions are made for a reversal of the judgment. Appellant contends that the evidence is insufficient to support the verdict of the jury, for the reason that it fails to furnish sufficient data from which damages could be calculated.

[1] When a verdict is attacked for insufficiency of the evidence, our power begins and ends with the inquiry whether there is substantial evidence, contradicted or uncontradicted, which in and of itself will support the conclusion reached by the jury. If upon any material point the testimony is in conflict, it must be assumed that the jury resolved the conflict in favor of the prevailing party. The authorities supporting this rule are legion, among them being Gjurich v. Fieg, 164 Cal. 429, 129 P. 464, Ann. Cas. 1916B, 111; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Rocha v. Rocha, 197 Cal. 396, 240 P. 1010; and Union C. Co. v. Madera, etc., Irr. Co., 179 Cal. 774, 178 P. 957.

[2] With this rule in mind, we have made a careful examination of the entire record, and we are fully convinced that there is abundant evidence to support the verdict of the jury in its entirety. We see no reason, however, to go into a detailed analysis of the great volume of evidence embodied in the record, which contains 1,006 typewritten pages.

The testimony shows that appellant insisted on fumigating the orchard of respondent over his protests and against his wishes; that notice was served on respondent to fumigate or spray his orchards by the horticultural commissioner within 15 days from the receipt of the notice, in order to eradicate black scale; that within 8 days after the notice was received, and while respondent was trying to spray his orchard with an oil spray, appellant moved into the orchard during the temporary absence of respondent and began fumigating the trees with hydrocyanic acid gas. The fumigation was done negligently and unskillfully by appellant; appellant was particularly negligent in doing the work during a fog. A number of witnesses, including officers of the appellant corporation and county officers, who saw the orchard after it had been fumigated by appellant, testified that the orchard had been burned and damaged by the fumigation. All the witnesses for both the respondent and appellant stated that the fumigation was conducted during a fog, and all of the "fumigation crew" admitted that there was a fog and that it varied from light to heavy during the fumigation. Even the witnesses for appellant, who visited the orchard within 6 months after the fumigation, admitted that the orchard was damaged by the fumigation in a greater or less degree. There is evidence of loss of crop and evidence of damage to the trees amply sufficient to support the amount of damages awarded by the jury.

[3] Appellant also contends that the court erred in admitting evidence that appellant and its employees had failed to procure a license as required by section 2322a of the Political Code (St. 1923, p. 1200). The complaint, as originally filed, contained the following allegation:

> "That the said defendant corporation and its said employees doing said work of fumigation were engaged in doing the work of fumigation for hire, and that said defendant corporation, the defendants herein, and their said employees were not authorized and licensed to do such work of fumigation as is provided and required by section 2322a of the Political Code of the state of California as the same exists and is amended."

Before the case was tried, the appellant made a motion to strike the paragraph just quoted from the complaint upon the ground that the same was irrelevant and redundant. This motion was granted. The case came on for trial in another department of the superior court of San Diego county and before another judge, who permitted respondent to prove that neither the appellant nor its employees had procured a license authorizing them to engage in the business of fumigating orchards, as required by section 2322a(8) of the Political Code. The court also permitted the respondent to amend his complaint to set forth a general allegation of negligence to conform to the proof.

[4] Appellant argues that the court, having previously stricken out all reference to the failure of appellant and its employees to procure a license, no evidence on the subject should have been admitted. We need not pause here to consider the correctness of the first order striking the above-quoted paragraph from the complaint, for we are now only concerned with two questions: First, was the testimony complained of relevant and material? We think it was. The cause of action here alleged was not a violation of the statute, but *it was the negligence of appellant and its employees, and evidence that the statute had been violated was simply offered to show negligence.* Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 P. 1063, 16 Ann. Cas. 1061. Second, did the court abuse its discretion in permitting the complaint to be amended? We think not. The court has a wide discretion in permitting pleadings to be amended to conform to the proof, and its discretion in that matter will not be disturbed unless there is some abuse of discretion such as has prevented defendant from fairly and fully presenting its case. 21 Cal. Jur. p. 181, and cases there cited.

[5] Appellant further argues that there was no causal connection shown between the failure of defendant or its employees to procure a license and the injury complained of. This was a question of fact for the jury. 19 Cal. Jur. 734; Baillargeon v. Myers, 180 Cal. 507, 182 P. 37; Thomas v. German Gen., etc., Soc., 168 Cal. 183, 141 P. 1186. The trial court realized this was the rule when it gave the jury the following instruction:

> "It is a general rule of law that a violation of a statute is in itself negligence provided such violation contributed directly in causing the injury complained of. * * * Applying this rule to the present case, if you find from the preponderance of the evidence that the defendant, without first having secured a certificate as above provided, was, at the time it fumigated plaintiff's orchard, engaged for hire in the business thus prohibited, and that this violation of the statute contributed directly in causing the injury complained of, if any injury there was, such violation in itself constitutes negligence."

[6] We think, however, the facts in the instant case show a clear causal connection between the violation of the statute and the injury. The foreman in charge of the fumigation of respondent's orchard was not at all familiar with the "fumigation regulations" adopted by the horticultural commissioner of San Diego county; neither was he familiar with any of the documents or circulars on the subject issued by the Department of Agriculture of the United States, or those issued by the University of California. The evidence further shows that he did not follow any recognized practice of fumigation. Had he submitted himself to the examination provided by law, his lack of knowledge and skill would either have prevented him from procuring a license, or he would have been required to familiarize himself with the well-recognized methods of fumigation before he would have been licensed to do such work.

The facts bring this case within the rule laid down in Cragg v. Los Angeles Trust Co., supra. In that case, the defendant employed an elevator boy to operate the elevators in its building, who had not received a license as required by the ordinance of the city of Los Angeles, and the court held that the employment of this unlicensed operator by the defendant was negligence per se, and that, where an accident occurs through the carelessness of the operator, the defendant was liable, and that there was a causal connection between the violation of the statute requiring a license and the injury inflicted through the negligence of the unlicensed person.

[7] Appellant further contends that it was not in the business of fumigating for hire, because it only fumigated orchards owned by its members, and therefore not bound by the provisions of section 2322a of the Political Code, and also that this section is unconstitutional. We deem it wholly unnecessary to pass upon these questions in this case; for, if it be conceded, for the sake of argument, that all evidence relative to a violation of section 2322a of the Political Code was erroneously admitted, still there would be left abundant evidence to support the verdict and judgment, and show that the fumigation was negligently and unskillfully done. There is no presumption that error is prejudicial or that injury is done by merely showing error. Section 475, Code Civ. Proc.; Peavey v. Mutual Realty Corporation (Cal. App.) 255 P. 858; Gill v. Southern Pacific Co., 174 Cal. 84, 161 P. 1153. Therefore under no theory could appellant have been prejudiced by the admission of such evidence. The great preponderance of the evidence supports the verdict of the jury, and the record, considering the size thereof, is exceptionally free from error.

The judgment should be affirmed, and it is so ordered.

We concur: STURTEVANT, J.; NOURSE, J.

93 Cal. App. 221

BANDINI PETROLEUM CO. et al. v. HARTMAN et al. (Civ. 6076.)

District Court of Appeal, Second District, Division 2. California. July 19, 1928.

Appeal and error ⚷479(1)—Defendants, perfecting appeal and filing undertaking before issuance of order to show cause, held entitled to supersedeas to restrain enforcement of decree.

Where defendants, after decree requiring them to permit inspection of corporate books and records and before order to show cause as to why they should not comply with judgment or be adjudged in contempt, had perfected an appeal and filed an undertaking staying execution as ordered by trial court, they were entitled to a writ of supersedeas to restrain the court from enforcing the decree; the perfecting of such appeal completely answering the question presented in the order to show cause.

Application by the Bandini Petroleum Company and others for a writ of supersedeas against George O. Hartman and the Superior Court of the State of California within and for the County of Los Angeles. Writ granted.

Wm. L. Murphey, and Haas & Dunigan, all of Los Angeles, for petitioners.

Henry W. Mahan, of Los Angeles, for respondents.

CRAIG, J. The petitioners herein pray a writ of supersedeas to restrain the superior court of Los Angeles county from enforcing a decree directing the Bandini Petroleum Company to permit respondent Hartman to inspect and make notes from its corporate books and records, and from enforcing an order to show cause why petitioners should not be held in contempt of court for refusing to comply with such decree.

It is recited in the petition, and is not denied, that Hartman filed in said superior court an action wherein it appeared that he owned six shares of stock of the petitioning corporation which he had purchased for $6, and that, as such stockholder, he demanded, and after trial was granted, permission to inspect the corporate records. The trial was had on November 3, 1927, and on that date the trial court announced judgment for the plaintiff, at which time the petitioners' counsel stated that the defendants intended to appeal, and requested that the amount of undertaking on appeal and to stay execution be fixed. The court thereupon, without objection of the plaintiff's counsel, fixed the amount of undertaking in the sum of $1,000. On February 23, 1928, findings of fact, conclusions of law, and judgment were filed, and on April 10, 1928, the defendants (petitioners here) served and filed their notice of appeal, ordered the transcript, and also filed a written order of the court fixing the amount of bond to stay execution, together with an undertaking in the amount specified on the date of trial and in the order last mentioned. No notice of entry of judgment was ever served upon the petitioners, but on April 27, 1928, there was served upon them an order to appear and show cause, if any they had, why they should not be adjudged in contempt of court for having failed and refused to permit the plaintiff Hartman in said suit to inspect their books and records.

The respondents rely entirely upon the contention that a writ of supersedeas was not sought in this court until May 2, 1928, whereas judgment was entered on February 23, 1928, and that the petitioners had in fact been in contempt of the superior court for a period of more than two months prior to the time relief was sought in this court. Hence it is argued, the contempt having already been committed, the petitioners ought not to be heard upon their petition herein. The petitioners contend, however, that they promptly stated in open court their intention to appeal from said judgment, and that, although no notice of entry thereof was served, they did in fact perfect their appeal within a reasonable time thereafter, and that, having done so, they ought not to be held in contempt of court nor compelled to permit an inspection of their books pending such appeal.

In Sisson v. Guaranty Mortgage Co. (Cal. App.) 265 P. 1031, it was said that in such a case an appeal would not of itself stay execution of the judgment, but that, since the defendants might be damaged by its enforcement pending the appeal, a stay would not be improper if they should furnish good and sufficient undertaking to secure the plaintiff against loss in the event of an affirmance. The petitioners in the instant proceeding furnished bond as ordered by the court below, and have also furnished further undertaking in this court, to stay execution pending appeal and pending the determination of this proceeding.

As to the merits of the case, it is obvious that, while on April 27th petitioners were ordered to show cause before the superior court why they should not comply with said judgment or be adjudged in contempt for a failure to do so, they had previously and on the 10th day of the same month, by perfecting an appeal and filing an undertaking staying execution as ordered by the trial court, completely answered the question there presented, and had also challenged the validity of the judgment itself. If the judgment be held invalid, the defendants would not be in contempt of court for having denied the plaintiff an inspection of their books and records. If it be affirmed, the law provides ample remedy.

The respondents cite, in support of their defense to the application herein, Ex parte Cottrell, 59 Cal. 417. It there appeared, however, that the petitioner in a habeas corpus proceeding, who had been incarcerated for failure to obey an order increasing alimony, had not furnished any undertaking to stay execution of the order, although he appealed therefrom.

It is ordered that a writ of supersedeas issue, staying proceedings in the superior court until the disposition of the issues presented upon appeal.

We concur: WORKS, P. J.; THOMPSON, J.

93 Cal. App. 484

PEOPLE v. JOHNSTON. (Cr. 1682.)

District Court of Appeal, Second District, Division 2, California. Aug. 10, 1928.

1. **Automobiles 🔑355(13)—Evidence that defendant unlawfully operated automobile upon highway, causing pedestrian's death, held sufficient to support conviction for manslaughter.**

In action for manslaughter caused by the unlawful operation of an automobile upon a public highway resulting in collision with pedestrians thereby killing one of parties struck, evidence that defendant failed to stop after collision and that he was intoxicated *held* sufficient to support conviction.

2. **Automobiles 🔑357—Instruction that automobilist unlawfully and feloniously striking and leaving pedestrian without giving aid is liable for probable result held sufficient without words "knowingly" and "willfully."**

Instructing jury in effect that an automobile driver who by his unlawful and felonious conduct strikes and leaves a pedestrian without giving aid is liable for the natural and probable result of his unlawful act *held* sufficient without inclusion of the words "knowingly" and "willfully."

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

William Johnston was convicted of manslaughter, violating section 141, Motor Vehicle Act, and driving an automobile while intoxicated, and he appeals. Affirmed.

Benno M. Brink, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Waldamar Augustine, of San Francisco, for the People.

CRAIG, J. On the night of February 3, 1928, at about 9:30 o'clock, appellant, while driving an automobile in a southerly direction on Vermont avenue, near Forty-Eighth street, in the city of Los Angeles, struck Mrs. Florence Gillette and a lady companion and ran over them, as a result of which the former died almost instantly. He was charged by information, consisting of three counts, with (1) manslaughter; (2) violation of section 141 of the Motor Vehicle Act (St. 1923, p. 562) for failure to stop and furnish the information required by said section or to render aid; and (3) driving a vehicle upon a public street while under the influence of intoxicating liquor. He was found guilty upon all three counts, and was sentenced to serve in the penitentiary at San Quentin under the first two counts the time prescribed by law, and 90 days under the third count. This appeal is from the judgments rendered.

[1] The principal ground of appeal is an alleged insufficiency of the evidence to support the verdict and judgment upon either one of the counts. It is insisted that as to the verdict of manslaughter there is no evidence that the defendant was engaged in the commission of an unlawful act not amounting to a felony, or of an unlawful act which might produce death in an unlawful manner, or without care or circumspection, when the acts were committed which resulted in the death of Mrs. Gillette; that there was no evidence that defendant caused Mrs. Gillette's death, or that he was under the influence of intoxicating liquor at the time of the collision. It is asserted that "the only possible theory upon which the jury could have convicted on the charge of manslaughter is that the defendant was driving his machine while under the influence of intoxicating liquor at the time of the accident."

Two eyewitnesses testified that they saw a Ford automobile knock down two elderly women as they started to walk across Vermont avenue at Forty-Eighth street; that they were hit in the pedestrian zone; that it ran over them, turned westerly on Forty-Ninth or Fiftieth street, and made no effort to stop. The witness Morgan followed the machine in his car and obtained the license number; it was that driven by Johnston, and he was traced to his room, and was arrested at about 11:30 p. m. This witness also testified that Johnston increased his speed after striking the women, and continued to increase it up to about 40 miles an hour after turning westerly. A Mrs. Rose Ex stated that she was sitting in another car across the street from the accident, and that her attention was attracted by screams. It appears that another Ford car, which followed the defendant, ran over Mrs. Gillette's lower limbs below the knees. The autopsy surgeon testified that death was caused by crushing of the chest and abdomen.

One of the arresting officers swore that he found the defendant in bed, asleep, at about 11:30 p. m., and that it took some time to awaken him; that he then smelled of liquor, walked unsteadily; that his speech was more or less incoherent, and that "he was under the influence of intoxicating liquor"; that

Johnston admitted having been driving the Ford car, but said that he did not know where; that he had had a few drinks, and did not remember being farther south than Sixteenth street or Venice boulevard. The police surgeon testified that when the defendant arrived at the station house at 12:30 his breath was alcoholic, though he was not intoxicated, but that it would have been possible for him to have been intoxicated an hour before.

It remained for the jury to determine from the evidence, the salient portions of which are detailed above, and under the instructions of the trial court, as to whether or not the defendant was intoxicated when he knocked down and ran over the pedestrians, and we think the evidence was unquestionably sufficient to support their affirmative verdict in this respect. That he failed to stop, and that Mrs. Gillette came to her death as a result of the accident, are facts established by uncontradicted testimony of witnesses who were at the scene at the time. The question as to whether or not he struck the deceased was one as to which he claims there is a reasonable doubt raised by the evidence and circumstances. Granting that such a doubt might have been justified, we cannot say that the failure of the jury to so view the evidence was wholly unwarranted. Such a question is nearly always one as to which no direct evidence can be produced, and which must be determined through deduction and inference. It is idle to argue that there is an entire absence of facts established from which the jury could reasonably be convinced beyond a reasonable doubt that the defendant was cognizant of the fact that he had struck the deceased. The point does not warrant a restatement of the evidence in that behalf.

That the automobile which followed appellant's machine did not cause Mrs. Gillette's death seems obvious from the facts herein set forth. Manslaughter is the unlawful killing of a human being, without malice. Pen. Code, § 192. Since there is ample evidence tending to prove that Johnston drove on a public thoroughfare while intoxicated, the jury were justified in concluding that he committed a lawful act in an unlawful manner and was guilty of the offense charged in the first count.

[2] It is argued that the trial court erred, in instructing the jury that one who unlawfully strikes and leaves a pedestrian without stopping to render aid is liable for the natural and probable result of his unlawful act, by not including therein the words "knowingly" and willfully." The entire instruction reads as follows:

> "It is the law that if a person while driving an automobile on a public highway, by his unlawful and felonious conduct strikes another and causes him or her to be thrown to the pavement of a public highway and leaves the person so struck lying on the highway in a helpless condition, the person thus causing the condition of the injured person is liable for the natural and probable result of his unlawful acts, and, if, as a result thereof, the injured person is struck and killed by a vehicle driven by another person driving an automobile, the person who originally struck the injured person and left him upon the highway is as fully responsible under the law as if his own act had inflicted the fatal injuries."

The plain purport of this instruction was to inform the jury concerning the responsibility of the defendant, as involved in the charge of manslaughter, and that it had no direct application to the charge contained in the second count. Viewed in this light, we think it is not subject to criticism. Of course, the entire law pertaining to any charge is not expected, nor is it required, to be stated in one instruction. For the purposes of this instruction, the provision therein that the conduct in question should be unlawful and felonious is sufficient without defining these terms, and especially the word "felonious." No other point merits consideration.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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93 Cal. App. 465

STACY–JUDD v. STACY–JUDD.

(Civ. 3541.)

District Court of Appeal, Third District, California. Aug. 7, 1928.

1. Divorce 🔑133(1)—Decree granting husband divorce for desertion held supported by evidence.

In action for divorce by husband on ground of wife's failure and refusal to return after leaving on trip, evidence *held* sufficient to support decree granting husband divorce for desertion.

2. Divorce 🔑37(19)—Repentance of offending spouse does not destroy cause of action for desertion, where statutory period has elapsed, unless injured spouse voluntarily accepts offer of condonation (Civ. Code § 102).

Where statutory period for desertion has elapsed, repentance on part of offending spouse does not have effect of destroying other's cause of action for desertion, unless such other of his own free will accepts the offer of condonation, and desertion is cured, under Civ. Code, § 102, only where deserting spouse returns before the expiration of the period.

3. Divorce 🔑133(3)—Evidence in divorce action sustained finding that wife left husband with intent to permanently separate from him without husband's consent.

In husband's action for divorce on ground of wife's desertion, evidence *held* to sustain finding that wife left husband with deliberate intention of permanently separating and that such permanent separation was without husband's consent.

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action for divorce by Robert B. Stacy-Judd against Anna Veronica Stacy-Judd. Decree for plaintiff, and defendant appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.
Jerome H. Kann, of Los Angeles, for respondent.

HART, J. The plaintiff and the defendant are husband and wife. This is a suit by the plaintiff for a divorce from the defendant, on the ground of willful desertion. The complaint, which was filed on the 10th day of September, 1924, after alleging the fact of the intermarriage of the parties in January, 1917, and the fact of the plaintiff's residence in the state of California and of the county of Los Angeles for more than one year prior to the commencement of this action, proceeds:

> "The said plaintiff further alleges that on or about the 19th day of September, 1921, in the city of Calgary, in the province of Alberta, Canada, the said defendant, without cause or provocation on the part of this plaintiff and against his will and without his consent, willfully left and separated herself from said plaintiff with the intent to desert the said plaintiff, and that the said defendant ever since the said date has lived, and still continues to live, separate and apart from the said plaintiff against his wish and without his consent."

The complaint further states that "there is no issue of the said plaintiff and said defendant," nor (it is likewise further stated) are there "any community or other property rights between the said plaintiff and the said defendant."

A general demurrer to the complaint was overruled, and the defendant thereupon answered, denying the essential allegations of the complaint and then declaring:

> "That it is true that plaintiff and defendant have been living separate and apart for some time, but defendant alleges that such separation was not caused by any act or wish of the defendant herein and that such separation was contrary to and against the will and consent and wish of this defendant and the same has been caused and continued on account of the conduct of the plaintiff towards the defendant, and not otherwise. This defendant further alleges that she never at any time deserted or abandoned the said plaintiff or separated herself from him, either without his consent, or otherwise, or at all, and that she has only lived separate and apart from the said plaintiff because of his refusal to live with or support this defendant."

The statement in the complaint that there is no issue of said marriage and the further statement that there are no community or other property rights of the parties are not denied, and the truth of those allegations of the complaint, therefore, stand admitted by the pleadings. And there is no evidence in the record of children born to them or of any community rights between the parties.

The court made findings, upon which it predicated its interlocutory decree, declaring that the plaintiff is entitled to a divorce from the defendant. The latter appeals from said decree.

The points urged here are that the findings and the interlocutory decree are without sufficient evidentiary support, but that, if there was a voluntary separation by the defendant from the plaintiff with intent to desert the latter, the evidence shows that the former, before the expiration of the statutory period (one year) required to constitute a cause of action for desertion, offered in good faith to fulfill the marriage contract, and solicited condonation, which was refused by the plaintiff. Civ. Code, § 102.

The findings and the decree are afforded sufficient evidentiary support. It may be conceded for the purposes of this decision that upon the ultimate questions of fact there is a substantial conflict.

The plaintiff is an architect by profession and the defendant a school teacher. They intermarried on the 10th day of January, 1917, at the city of Minneapolis, in the state of Minnesota. At that time plaintiff resided at Minot, N. D. Plaintiff testified that after his marriage with defendant he made up his mind to leave Minot and seek a location elsewhere; that, carrying out this determination, he went to Calgary, Canada, in January, 1920, and, after being there "a week or two," decided to locate at that place, and did take up his residence there. He continued:

> "I decided to stay in Canada, and I established a home there, and later went back to Minot, packed up various goods, and we drove back to Calgary June, 1920. About three weeks after she arrived she told me she had made a contract with the school board in Minot, N. D., to return there for the winter season and I objected to that, but I allowed her to go, and she went for the September opening of school and left me for 3½ or 4 months. Then I wrote her urging her to return, which I think she did, just before Christmas. When Mrs. Judd came in June, I had been living in a flat. I did not have my own home and had not established a home there because my furniture was still in Minot and my home was really in Minot, N. D. I bought a house in Canada in April, 1921, after Mrs. Judd returned from North Dakota from her school. We lived together until the 19th of September, 1921, about a year, I think. She and her mother left for Minnesota the 19th of September, 1921, and I consented for her to go; no question about that. I took them to the train. I gave her $100 for her expenses. * * * The train left at 11:15. I drove them down to the station in my automobile. I left Calgary, Canada, I think, in September, 1922, a little over a year after she left. I came down

to this coast and drove back again and decided Los Angeles was the best place and I just got out of Canada in September, 1922. After September 19, 1921, I wrote to my wife many times. I received other letters which I have not produced in court. I could not state how many. I received the fourteen written and printed cards and the letters evidenced by the registered receipt. The next time I saw my wife after September, 1921, I think was the fall of 1923, probably it was 1924. In the meantime I sued for divorce in North Dakota on the ground of desertion, based on the separation of September 19, 1921. I went to my lawyer in Calgary and he advised me to bring the action in North Dakota, which I did. He said that the action would be better there because at the time I had no intention of leaving Calgary and it would have done my business no good anyhow, and when I journeyed down to Fargo, N. D., I was notified by my attorneys that Mrs. Stacy-Judd, my wife, had decided to put in an answer and my attorneys advised me to take the case out of the court there and wait until I came to California and stay there a year and start over again."

Plaintiff further testified that he did not know that his wife was going to Minneapolis with her mother on the 19th of September, 1921, until within a few hours of the time they departed. Defendant then stated to the plaintiff:

That she intended to take her mother home and would remain at Minneapolis for two or three weeks and then return to Calgary. "After that time elapsed," continued plaintiff, "I began to wonder whether she was coming back or not, because on her departure I noticed a great many items taken out of the house"—that is, as he explained, "all the silverware, a lot of china, glass, bed linen; in fact, there was practically nothing left but the furniture itself—no other items. But, as she had left the previous year for a period of four months, I thought probably I might induce her to come back, so I wrote at various times to Mrs. Stacy-Judd, urging her to return.

"Q. What did she reply? A. I don't remember having a reply at all. And then about a month or five weeks before Christmas I thought I would make a final effort, and I redecorated the house, spent quite a lot of time there, and got together a lot of items, and at that time I also had my mother, and I sent her a long telegram urging her to return; that was just prior to Christmas; and I did not get an answer at all until, I think the letter was dated the 10th of January, 1922, wherein she said she had no intention—

"Q. Just a minute. Was there any particular argument prior to the time she left as you stated? A. No, sir; none at all.

"Q. I show you a letter purporting to be dated January 10, 1922, signed, 'Anna,' and ask you to look at the signature and letter and state in whose handwriting both are? A. Mrs. Stacy-Judd's.

"Q. Is this the letter you received by ordinary course of mail? A. Yes, sir."

The letter referred to, with a few statements contained therein, as given here, deleted because not being of importance, reads:

"Minneapolis, Minn., 3701 Park Ave., Jan. 10—22.

"Dear Robin: Your letter and telegram rec'd and it is hard to answer them. In the first place let me state that I too am troubled with my heart caused from worry and trouble during my married life and trying to summon up the courage and strength to return to my unhappy married life.

"When I left Calgary for my visit here, I felt crushed and heart-broken, but thought that time and a complete change would give me enough strength to make one more trial, but I find that I have not the vitality to face it all again. I'm trying not to hold it against you, Robin, for it may be natural for you to be selfish and to possess an ungovernable temper along with other faults. You have made many promises, but am sorry to say you have failed to keep them. You may think you care for me, but back of it all is self. No, Robin, you ceased to care for me shortly after our marriage. Even on our honeymoon you didn't consider my wishes. I can never remember your doing one thing just to please me alone; there was always a selfish motive lurking near. * * *

"You often threw it up to me that I didn't have the nerve to leave you, and I said unless you changed your ways I would be obliged to prove to you that I had. You told me last winter that you lost 'all interest' in me, and you certainly proved it many times. Right up to the last minute we were in Calgary you were so unkind and selfish. You didn't get on the train or even wait until it pulled out. I'm trying hard to forgive all this, but I can never forget!!

"I won't go into the details any longer, but let it suffice to say that it is all for the best that we should part. Life is short the longest. So you have my permission to get a divorce, marry again, and start life anew. As for me, I have no intention to even marry again for it is indeed far too risky. All I want is peace and contentment. No one to bawl me out publicly—swear at me—keep me up all hours and bore me all evening, etc.

"I have taken a long time in which to make my decision and this is final. My folks refuse to have anything to say on the subject.

"Robin, please do not try to see me as it will do no good, for you have killed all my love for you. You can get your divorce on desertion if you wish one.

"When you stop to think it over you are better off than I am to begin life over again. You never worry for any length of time and then you have our little home—the furniture and the car, while I have gone out into the world as any servant would, with just my few belongings. * * *"

On February 19, 1923, the defendant wrote and addressed the following letter to plaintiff:

"Minneapolis, 625 E. 32d St., Feb. 19, '23.

"Dear Robin: I rece'd a letter from Mr. Shure telling me that the case was dismissed in N. D. Will you please tell me if you intend starting one again in Cal. as soon as your domicile is established there. Also tell me if you paid the taxes on that piece of land up to date.

"Sincerely, Anna."

The "piece of land" spoken of in said letter consisted of about an acre of land in

North Dakota which plaintiff, before the separation of the couple, had conveyed to defendant by a deed of gift. The defendant, not having received an answer to the above letter, addressed the following letter (undated but registered at Minneapolis) to plaintiff:

> "Minneapolis, 625 E. 32d St.
>
> "Dear Robin: Two weeks ago I wrote asking you two questions, and as you haven't answered them I thought perhaps either you were ill or it never reached you, as I put no return on it. I would not be able to tell if you rec'd it. So I thought it best to write again and this time register it.
>
> "I asked you if you had paid the taxes on that small piece of land for this year, and if not I'll pay it. I didn't want to ask them at Minot about it. Then the other question was if you are going to start another case in Cal. as soon as it is possible. This last I want to know very much, Robin, so please be rather nice to me and answer my questions, and I may help you to obtain what you wish so much for.
>
> "I hope your health is alright now.
>
> "Sincerely, Anna."

Again the defendant addressed a letter to plaintiff, at Minneapolis, under date of August 29, 1923, which is as follows:

> "Minneapolis, Minn., 625 E. 32d St.,
> "Aug. 29, 23.
>
> "Dear Robin: You said in your letter that you held no rancour nor bitterness toward me and yet when I was kind enough to inquire if you or your mother were injured in that earthquake shock you never answered nor allowed your mother to do so. For I'm sure she would have been polite enough to have written at least one line.
>
> "Robin, please play the game like a good sportsman and tell me if you have started the case there in Los Angeles, and if so about what time I'll be served.
>
> "Come on, Robin, just for old time's sake answer this.
>
> "Sincerely, Anna."

The above letters, it will be noted, were written subsequent to the expiration of the one-year period during which willful desertion must exist before it becomes a legal ground for divorce. The plaintiff testified that in no letter received by him from the defendant was there any proposal or suggestion of reconciliation or an offer to return. It appears that the defendant went to Los Angeles in October, 1923, "to see," so she testified, "if I could make up with him," but found that he would not talk to her on the subject of reconciliation. This, it will be observed, was two years after the date (September 19, 1921) she left Calgary for Minneapolis with her mother, and, obviously, only a few months short of two years after defendant's letter to plaintiff under date of January 10, 1922, was written, in which she positively declared that she had decided not to return to and live with the plaintiff, and that such decision was final. The plaintiff testified, however, that, after her arrival in Los Angeles, the defendant had a number of conversations with him, either in person or over the telephone, and that in none did she express a desire for a reconciliation, but on every such occasion discussed the matter of a money settlement only.

Richard Roberts testified:

> "I met the defendant at the Hollywood Branch of the Pacific Southwest Bank, where I was manager at the time. Mrs. Judd came to the office and stated she had left Mr. Judd in North Dakota on account of his inability to support her and she was down trying to arrange a monetary settlement with him. She said she had not been happy with him. This was in the spring of 1925."

Mrs. Hallie Hayward, residing in Los Angeles, and an acquaintance of the defendant, testified that the latter was at the witness' home a short time after the complaint herein was filed (September 10, 1924); that during the course of the conversation the defendant stated she "had come out to California, I think it was in the summer previous"; that some friends had written her before she went to Los Angeles and "told her that her husband was doing a very good business, and she said that she had given the better part of her life to him, and she felt that some recompense was owing to her, and she had made up her mind that if he was getting along he ought to support her"; that she further said:

> That "she had been unable to live with him because she had come from a home where she had everything, every luxury, and when she married Judd she was under the impression that he was a wealthy young bachelor, and after she married him she found out that he hadn't any money; that she had not been accustomed to do housework, and she did not like it, and she said that in order not to go around in rags she had to teach school."

The witness continuing, stated that defendant further said:

> That "she preferred teaching school to keeping house, and disliked living with him so much that she would rather be occupied."

She (defendant) in that conversation also declared that her family disliked Judd.

Mrs. Ann Stevens, who was present at the conversation between the defendant and Hayward, upon being asked by counsel for the plaintiff as to the purport of said conversation, testified:

> "Well she (defendant) merely said that she heard Mr. Judd was doing well out here, and she came out here to get a money judgment, but she would not live with him, and when she went back with her mother she went with the expectation of never returning; she always lived in luxury, and she thought when she married him he was a man of wealth, and after she married him she found out he was poor, and he could not give her the things she wanted, and so she went out to teaching school, which

she preferred to housekeeping, and her mother was well to do, and she knew she had a good home to go to."

Herman Vanderhoogan, a building contractor, was acquainted with the plaintiff in Calgary, Canada, and had met the defendant there in her husband's office. The witness had done some work on plaintiff's house in Calgary. He (the witness) went to Los Angeles in 1922, arriving there on November 10th of that year. He testified:

That in the year 1924 he met the defendant in the plaintiff's office in Hollywood. In 1925 he met her in the Pacific Southwest Bank in Hollywood; that he was in the lobby of the bank waiting for a party with whom he had an engagement, and the defendant, being also in the lobby of the bank at that time, "noticed me, and walked up to me, and started talking about what she had previously told me in the (plaintiff's) office. She said she was absolutely dissatisfied with Mr. Stacy-Judd and she could not get what she wanted; she wanted a settlement in good, real hard cash, and she could not get any money out of him, could not get any care, and he had never kept her; it was absolutely—he was absolutely no good, and she could not live with him."

Vanderhoogan also corroborated the testimony of the plaintiff to the effect that, prior to the latter's receipt of defendant's letter of the 10th day of January, 1922, he was having his house in Calgary remodeled and repaired so that it would be in good condition on the return of the defendant to Calgary.

[1] The foregoing statement of the evidence presented by the plaintiff is sufficient to confirm the statement above made that the findings and the decree are amply supported.

The defendant testified that she endeavored in every way to effect a reconciliation between her husband and herself, but that he refused to entertain any proposition looking to that result. She said that the letter written by her to the plaintiff under date of January 10, 1922, was intended as a "bluff"; her motive being the hope that thus she would bring him to his "senses" and cause him to resume their marital relations and live happily together. She then, rather inconsistently with that statement, testified that she did not intend to mail the letter, but that, while she was temporarily absent from home or the room in which she had left the letter, her sister mailed it with other letters. But there was introduced in evidence no letter written and sent by the defendant to the plaintiff in which she expressed a willingness to return, or a desire or wish that their differences be forgotten and thus their reconciliation effected. There were, it is true, several post office receipts of registered letters sent by the defendant to plaintiff, but the letters themselves were not produced. Besides, with the exception of one or two of these, said letters were sent to and received by the plaintiff after the expiration of one year from the time that the defendant deserted the plaintiff. The defendant testified that the registered letters contained, substantially, an acknowledgment by her of her error in leaving the plaintiff and a direct offer on her part to return to and live with him. But, as seen, the defendant contradicted her testimony as to that matter, hence, as to any of the registered letters sent by defendant to the plaintiff prior to the expiration of the statutory period for desertion which defendant claims contained an offer by her to return to and resume marital relations with the plaintiff, there is a substantial conflict in the evidence, which it was the sole function of the trial court to settle. Section 102 of the Civil Code reads as follows:

"If one party deserts the other, and before the expiration of the statutory period required to make the desertion a cause of divorce, returns and offers in good faith to fulfill the marriage contract, and solicits condonation, the desertion is cured. If the other party refuse such offer and condonation, the refusal shall be deemed and treated as desertion by such party from the time of refusal."

As the counsel for the plaintiff well says in his brief:

"In order that a desertion may be cured it is essential under said section, first, that the return of the guilty spouse be made prior to the expiration of the statutory period of one year; second, that the offending party return; third, that the guilty party offer in good faith to fulfill the marriage contract; and, fourth, that the guilty party solicit condonation."

[2] It is settled law that repentance on the part of the offending party cannot have the effect of destroying a cause of action for desertion already accrued, unless the injured party of his own free will accept such offer of condonation. Of course, this means that the injured spouse is not compelled to accept an offer to return made after the expiration of the statutory period in such cases.

In Walker v. Walker, 14 Cal. App. 487, 112 P. 479, it is said:

"In Benkert v. Benkert, 32 Cal. 468, the wife had manifested no intention to return to her husband until after the statutory period constituting desertion had elapsed. The court said: 'Her repentance did not obliterate the offense. If it had been accepted and acted on by the plaintiff, by receiving her and renewing the cohabitation, it would be regarded as a condonation. But he may, after the lapse of the statutory period, refuse to accept the offer. Bishop (section 530), in speaking of the offer to return, says that if it is made in good faith within the period prescribed by the statute to complete the offense, it will bar the suit. "But after the time has expired and the right of action has fully accrued, the injured party is not obliged to accept such an offer; it comes too late." ' "

See, also, Kenniston v. Kenniston, 6 Cal. App. 657, 92 P. 1037.

Respecting the element of good faith as one of the essentials of an offer of the guilty party to return, it is said in Peretti v. Peretti, 165 Cal. 717, 719, 134 P. 322, 323:

> "But while the law, where one spouse deserts the other permits the delinquent spouse to repent and seek reconciliation and restoration and if refused makes it thereafter desertion on the part of the otherwise innocent spouse, the offer of the spouse originally at fault to resume conjugal relations must be made in good faith. *Whether good faith exists in making such an offer is a question of fact, and the determination of that question by the trial court will not be disturbed if there is any ground for supporting it.*"

In Kusel v. Kusel, 147 Cal. 52, 54, 81 P. 297, it is said that, under the terms of section 102 of the Civil Code, to cure desertion, it is necessary that, with the offer to fulfill the marriage contract, condonation must be asked for or solicited.

The plaintiff, it appears, upon receiving from defendant the letter of January 10, 1922, delivered it into the hands of an attorney, with directions to the lawyer to prepare and file a complaint in a suit for divorce against the defendant. It is here contended by the defendant that those acts on the part of the plaintiff constituted a refusal by the latter to accept the defendant's offer for reconciliation. But this contention is inconsistent with the trial court's sufficiently supported findings. In other words, the contention proceeds upon the assumption of a return and offer by the defendant to renew marital relations, which elements, according to the findings, supported as we have said by the evidence, are absent from this case.

[3] Another contention by the defendant is that the evidence shows that the separation was by or upon mutual agreement of the parties. Of course, the findings are also inconsistent with that contention. While it is true that the plaintiff, after learning (only a few hours before the hour of their departure) that the defendant and her mother intended to leave Calgary for Minneapolis acquiesced in the defendant's plan to make that journey, still it is clear that the evidence, viewed as a whole and upon a rational consideration thereof, warranted the court in findng, as in legal effect it did find, that the defendant, when she left Calgary for Minneapolis, did so with the deliberate intention or purpose to separate permanently from the plaintiff and so desert him. Plaintiff's approval of her act in departing from Calgary at the time mentioned was, according to his testimony, which the trial court had the legal right to accept, upon her representation to him that she merely desired to accompany her mother to her (the mother's) home in the American city named, and that she (defendant) would return to the plaintiff at their Calgary home in two or three weeks. Moreover, as seen, the plaintiff testified that, unbeknown to him, the defendant (who had undoubtedly been contemplating that journey to Minneapolis for some time prior to her departure therefor) had gathered together and packed in a form convenient for shipment, or carriage in some manner, nearly, if not quite, all the household equipments contained in the Calgary house of the parties, and shipped or carried them with her to her mother's Minneapolis home. These circumstances, together with the fact that she did not return to plaintiff, but instead of so doing wrote and sent him her letter of January 10, 1922, in which she declared that her decision not to return to or live with the plaintiff was final and that (in effect) any appeal he might make to her for a resumption of the marital relation between them would be futile, constitute a singularly strong showing of her intention to desert the plaintiff, an intention of which the latter, so he testified, had no knowledge or suspicion until it was revealed to him by the defendant's said letter to him. Thus it was further shown to the evident satisfaction of the trial court that the plaintiff did not acquiesce in or agree to or approve the act of the defendant in separating from him in the sense of a separation which, if existing for the period of one year, would give to the innocent spouse a cause of action for divorce on the ground of willful desertion.

There are no further points requiring consideration. There is no substantial merit in the appeal. The decree appealed from is accordingly affirmed.

I concur: FINCH, P. J.

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93 Cal. App. 228

BANK OF ITALY v. MacGILL et al.
(Civ. 3544.)

District Court of Appeal, Third District,
California. July 23, 1928.

1. Mechanics' liens 🔑281(3)—Evidence held to sustain finding that mortgagee at time of execution of mortgage had knowledge of work being done and materials furnished on lots (Code Civ. Proc. § 1186).

Evidence *held* to sustain finding that mortgagee at time of execution of mortgage had knowledge of work being done and materials furnished on lots covered by mortgage, notwithstanding that materials were not actually placed or delivered upon lots on which buildings were erected, but were piled or placed upon an adjoining lot; Code Civ. Proc. § 1186, authorizing mechanics' liens, not requiring that lumber company should pile lumber actually delivered for building on lot where it was to be erected.

2. Mortgages 🔑151(3)—Mechanics' liens held prior to mortgage executed after beginning of work and commencement of delivery of materials (Code Civ. Proc. § 1186).

Under Code Civ. Proc. § 1186, authorizing mechanics' liens, when building improvement or construction is commenced, mechanics' liens pursuant to work and delivery of materials commenced before execution of mortgage on premises are prior to such mortgage.

3. Mechanics' liens 🔑213—Mechanics' liens held not waived by reason of execution of trust deed as additional security for materialmen and person performing work on premises (Const. art. 20, § 15).

Mechanic's lien under Const. art. 20, § 15, being a matter of constitutional right, the execution of a trust deed as additional security for person performing work on lots and materialmen *held* not to constitute a waiver of mechanics' liens, in absence of showing consent to be bound by or to limit any rights by reason of declaration of trust or express waiver of rights as lienholders.

Appeals from Superior Court, Los Angeles County; Edward I. Butler, Judge.

Separate actions by the Bank of Italy, administrator with the will annexed of the estate of Sarah Ann Flint, deceased, against B. D. MacGill, the Hammond Lumber Company, A. E. Harshman, and others, wherein defendant Hammond Lumber Company filed a cross-complaint. From the judgment, plaintiff and defendant Harshman appeal. Affirmed.

Wood, Janeway & Pratt, S. T. Hankey, and Homer C. Mills, all of Los Angeles, for appellants.

R. L. Horton, of Los Angeles, and C. Newell Carns, of Lankershim, for respondent.

PLUMMER, J. This appeal involved three actions brought by the plaintiff to foreclose three separate mortgages and actions by the defendant Hammond Lumber Company, a corporation, and C. B. Kahl, to foreclose certain liens. Judgment was entered covering the respective cases establishing the priority of the mechanic's lien. From this judgment the plaintiff Bank of Italy, as administrator, and Harshman appeal. All the actions were tried as one and are presented upon one transcript. The appeals are taken upon the judgment rolls alone.

The transcript shows that the defendant B. D. MacGill was, on and prior to the 10th day of February, 1923, and also on and prior to the 24th day of February, 1923, the record owner of the title to the lots involved in this action. On the 10th day of February, 1923, the said B. D. MacGill executed three separate mortgages on three separate lots, each being for the sum of $3,000, in favor of the Scarborough Company, which mortgages were thereafter recorded on the 24th day of February, 1923, and some time prior to the beginning of this action assigned to the plaintiff herein. While the title to the lots in question stood in the name of B. D. MacGill, one A. E. Harshman was the real owner of all of said lots. At a date not stated, but prior to the 24th day of February, 1923, the said A. E. Harshman entered into a contract with the defendants Hammond Lumber Company and C. B. Kahl for the furnishing of certain labor and materials for the erection of a building upon each of the three lots involved in this action. At a date not stated, but prior to the 24th day of February, 1923, the defendant C. B. Kahl commenced work under his contract upon each one of the three lots included in the mortgages assigned to the plaintiff in this action. Likewise prior to the 24th day of February, 1923, the defendant Hammond Lumber Company began delivering building materials for the erection upon each of said lots of buildings, which material was thereafter used in the erection of buildings upon each of said three lots. The building material, however, was not placed upon the lots on which the buildings were actually erected, but was placed upon adjoining lots.

On or about the 12th day of February, 1924, the defendant A. E. Harshman, by an arrangement with the defendants Hammond Lumber Company and C. B. Kahl, and apparently for the purpose of obtaining sufficient material and the performance of labor to complete said buildings, transferred all his interest in and to the lots involved in this action to one W. T. McAllister; said conveyance being made subject to all the liens and incumbrances upon said property. The conveyance also covered a large number of lots other than the three lots involved herein. Thereupon the said W. T. McAllister executed a trust declaration in the following words and figures:

"This trust agreement, dated this 12th day of January, 1924, is to certify that the undersigned, W. T. McAllister, has taken title to the following described real estate in Los Angeles county, California, to wit:

"Lots 63, 65, 66, 67, 68, 70, 72, 123, 124, and 125 of tract 5906, as per map recorded in Book 62, pages 13, 14 and 15, of Maps, in the office of the county recorder of said county.

"Lots 52, 53 and 54, block A, of tract 5006, and 126, 128, and 130 of tract 5906, subject to possession until sold; lots 2 and 4, block 3, in Emery Park tract, and lot 1, block 4, in Emery Park tract; also contract of sale with Meyering Land Company for purchase of lots 5 and 7, block 11, Emery Park tract, and lot 27, block 12, Emery Park tract; also order for deed on Hellman Commercial Trust & Savings Bank, whereby the trustee is about to take title to lot 127 of said tract 5906; also notes and trust deeds as follows:

"Emma Fay, lot 129 in said tract 5906, for $1,750.00; Annie Richardson, lot 131 in said tract 5906, for $1,750.00; Walter and Pansy Williamson, lot 132 in said tract 5906, for $1,650.00;

"And that he will hold, dispose of and convey the same, together with any other property received hereunder and any and all securities and moneys or other property received or derived in any way, therefrom in trust for the use and benefit of the following named beneficiaries according to their respective interests as follows, to wit:

"First. First, and in priority over any other interests hereunder, Hammond Lumber Company and others furnishing materials and labor to the extent of actual cost of labor and materials used to complete houses, garages, and improvements on above lots and other accounts, including interest at seven (7%) per cent. per annum, from their due dates, all such bills and accounts to be first approved by C. S. Anderson. For checking said construction work and accounts during the progress of the work, the Hammond Lumber Company may employ a suitable person to be on the job at a salary not exceeding that usually paid a carpenter foreman, upon advising the trustee in writing that this course appears to be required to safeguard their interests, and thereupon the trustee shall out of the trust funds reimburse the said company the cost of such employment as a part of his current expenses hereunder. The accounts payable to the Hammond Lumber Company hereunder include three thousand three hundred ($3,300.00) dollars, which covers amount of accepted orders on mortgagee, and accepted by said mortgagee, on the following completed jobs now due: Lots 52, 53, and 54, block A, tract 5006; lots 29 and 30, block E, and lots 11 and 12, block F, all in tract 4689—which shall be the first item paid said company, and for the purpose of conserving the cash available for construction work, and agreeable to said company, such accounts may be deferred in favor of other accounts payable under this paragraph until after May 1, 1924.

"Second. Thereupon, and subject to the above, this trust is to cover each of the miscellaneous accounts of A. E. Harshman in favor of said Hammond Lumber Company and others furnishing material for said job, and interest thereon at seven (7%) per cent. per annum from January 2, 1924, as per statements hereto attached and approved by said Harshman subject to credit of three thousand three hundred ($3,300.00) dollars, when paid under preceding paragraph and any collections from collateral held by said company, the release of which collateral shall be made upon full payment hereunder.

"The present amount of money held by the Scarborough Company is thirteen thousand five hundred sixty-four and 12/100 ($13,564.12) dollars, as verified by W. T. McAllister, and the trustee is to expend this amount for the completion of the buildings and payment of accounts approved by said C. S. Anderson, covering the lots mentioned in this agreement. Should there be any surplus remaining in this fund after the buildings have been completed, it is agreed that the trustee shall cause such surplus to be paid to Hammond Lumber Company, who are then to credit the same to the general account of Harshman as reported by statement of Hammond Lumber Company attached hereto.

"Third. Thereupon, and subject to the above, A. E. Harshman, the balance and remainder of the trust property and income therefrom. All compensation of the trustee and his attorney, as such shall be chargeable to and deducted solely from the amount payable under this item third. In the event there is no surplus to be distributed to said A. E. Harshman hereunder, then the said expense shall be paid by the said A. E. Harshman. Distribution shall be made from time to time as funds are received from sales or otherwise, and at the same time, and whenever it shall be required by the trustee to convey title to any lot or lots held hereunder, any lien or claim held by or under the beneficiaries hereunder, in respect to labor or materials furnished for any building or improvement on any of the trust property required to be conveyed free therefrom, shall be duly released and waived in consideration of the beneficial rights hereunder.

"The trustee shall have full power to manage and control the trust property and to deal fully and expeditiously therewith, the purpose hereof and powers respecting real estate being subject to the provisions of the Civil Code of California; to sell, transfer, and convey any of the real estate at any time held by him hereunder, at such price, not less than the scheduled price approved by said C. S. Anderson, hereto attached, and upon such terms and conditions as the trustee may determine, and to take in part payment therefor the note or notes of the purchaser, secured by first or second mortgage or deed of trust upon the property sold and conveyed by him and/or other property, and to take in part payment therefor, to an extent not exceeding one-third of the sale price in any case, any other real estate of the purchaser, at such valuation as he shall determine, and to exercise all the rights of owner and holder of such notes, securities, or other property, and to sell, assign, pledge, transfer, or otherwise dispose of and turn to account any notes, securities, or other property, at any time held by him hereunder; to cause any real estate to be transferred to a third person for the purpose of providing for the refunding of any loan secured thereby; to pay all taxes, liens, or charges of whatever nature at any time existing against any of the trust property; and to pay or satisfy any debts or claims on such terms and upon such evidence as the trustee may determine. It shall not be the duty of the purchaser of any part of said property to see to the application of the purchase money paid therefor; nor shall any one other than C. S. Anderson who may deal with said trustee be privileged or required to inquire into the necessity or expediency of any act of said trustee, or of the provisions of this instrument.

"The trustee shall be entitled to deduct from the income or proceeds of sale arising hereunder, any commissions at the board rate, costs or expenses incurred by him incidental to the execution of the trust hereunder, and likewise to be reimbursed therefrom all sums of money to the payment of which he, by reason of being trustee, may be held liable or subjected by way of damages, penalty, or fine.

"The trustee may resign his trust at any time by written instrument executed by him and delivered to any one or more of the beneficiaries, and, in the event of vacancy in the office of trustee, however, caused while this trust shall subsist, and so often as the same shall occur, Hammond Lumber Company, W. B. Scarborough Company, and A. E. Harshman, of Los Angeles, Cal., or any two of them are hereby authorized and empowered by any writing executed and acknowledged by them in the manner provided for the execution of deeds to real estate in the state of California, to nominate and appoint any person to be trustee thereof, in the place of the trustee previously acting hereunder, and thereupon, and so often as a new trustee shall be so appointed, the trust property and all powers, authorities, and discretions herein given to the trustee shall immediately vest in the new trustee so appointed as fully and effectually as if he had been the original trustee hereunder.

"This trust agreement shall not be placed on record in recorder's office of said Los Angeles county, and the recording of the same shall not be considered as notice of the rights of any person hereunder, derogatory to the title of said trustee or his successor in trust. Three years from date, if any property remains in this trust, the trustee shall convert the same into cash by selling such property at public auction, upon notice of sale, published at least once a week for three successive weeks in a newspaper of general circulation, published in the city of Los Angeles, Cal., and distribute the proceeds to the beneficiaries hereunder, after deducting the expenses incidental thereto.

"In witness whereof, said W. T. McAllister has hereunder affixed his signature and seal the day and date above written.

"W. T. McAllister. [Seal.]

"In the presence of Alva E. Harshman.

"Accepted: C. S. Anderson for Hammond Lumber Co."

Only two questions are involved, which are: First, whether or not the Hammond Lumber Company furnished materials previously to the recording of the plaintiff's mortgages; second, whether or not the defendants Hammond Lumber Company and C. B. Kahl waived their right to mechanics' liens.

[1] The findings of the court are to the effect that the defendant C. B. Kahl had begun work upon the lots in question, and that there were visible evidences upon the lots in question of the work being performed by C. B. Kahl prior to the time when the mortgages in question were recorded by the plaintiff's assignor. The court also found that the Hammond Lumber Company had begun the delivery of building materials for the erection of buildings upon the lots in question prior to the date of the recording of the mortgages now held by the plaintiff. The point made by the appellant as to the delivery of materials is that materials delivered by the Hammond Lumber Company were not actually placed or delivered upon the lots on which the buildings were erected, but that the lumber and other building material was piled or placed upon an adjoining lot, and therefore that the plaintiff's mortgages should be given priority. Appellant's argument in this behalf is interesting but not very convincing. Section 1186 of the Code of Civil Procedure, which gives a materialman a mechanic's lien, does not provide that a lumber company shall pile the lumber actually delivered for the building upon the lot where the building is to be erected. That section reads:

> "The liens provided for in this chapter are preferred to any lien, mortgage, or other incumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished; also, to any lien, mortgage, or other incumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement, or structure was commenced, work done, or the materials were commenced to be furnished."

By this section, the lien attaches as soon as the work is begun or as soon as materials are commenced to be furnished. In the case at bar, the findings show that work had been begun upon the premises on which the buildings were to be erected. It is true that the work begun upon the lots in question was work being done by the defendant C. B. Kahl, but the work, as found by the court, being upon the lots adjoining, on which the lumber was piled, gave visible evidence and information to anyone as to the lots upon which the buildings were to be erected, and for which buildings the materials were being delivered. We cannot shut our eyes to what is common knowledge to every one who lives in a city, that building materials are not piled upon the lot where the building is to be erected or is being erected, but is ordinarily and commonly delivered upon and piled upon the streets. We can see no logical distinction between delivering materials upon the streets and upon adjoining lots. If work is being done upon the lots, indicating, as found in this case, where the buildings are to be erected, all persons having to do with the lots are immediately placed upon notice.

[2] The court having found that labor was being performed by the defendant C. B. Kahl and materials also being furnished by him, and also that materials were being furnished by the defendant Hammond Lumber Company prior to and at the time of the recording of the mortgages upon which plaintiff bases its actions, it becomes wholly unnecessary for us to review the argument based upon the case of McClain v. Hutton, 131 Cal. 132, 61 P. 273, 63 P. 182, 622, and sections 1186 and 1183 of the Code of Civil Procedure as they read at the time of the decision of the case of McClain v. Hutton and the subsequent amendments thereto, for the simple reason that whether there was or was not any contract between the owner of the lots and the contractor is wholly immaterial. The court has found that the priority of the mechanic's liens asserted by the lumber company and by

C. B. Kahl rests upon the fact of the priority of the beginning of their work and the commencement of the delivery of materials. Under section 1186, Code of Civil Procedure, that is all that is necessary to give priority.

[3] This brings us to the only question having any merit presented by these appeals, to wit: Have the defendants Hammond Lumber Company and C. B. Kahl waived their mechanic's liens? The title to the lots involved, and which were apparently placed under the control of the said W. T. McAllister, was not vested in either one of the defendants. The fact must also be taken into consideration that a large number of lots were included in the trust declaration, and therefore we conclude were covered by the deed of conveyance made to McAllister. The deed referred to is not set out in the findings, and, as these appeals are based upon the judgment roll alone, we cannot assume anything as to the contents of the deed which would be detrimental to the interests of the respondents upon these appeals. It cannot be assumed that this deed was made conditional upon the waiver of any mechanic's lien to which the defendants then had a right or might subsequently acquire by reason of their performance of labor and the furnishing of building material. There is nothing in the record which would place the defendants Hammond Lumber Company and C. B. Kahl in the position of mortgagees having only one right of action, to wit, to foreclose a mortgage under section 726, Code of Civil Procedure. This is not a case where the mechanic's lienholder has taken a mortgage upon the identical lot upon which he asserts a mechanic's lien. It appears to be held under such circumstances that, limited by section 726, Code of Civil Procedure, to one form of action for the foreclosure of a mortgage, the acceptance of a mortgage by the mechanic's lienholder waives his mechanic's lien by reason of the fact that his remedy, being limited to one form of action under the section referred to, is inconsistent with the further assertion of a mechanic's lien. In the case at bar, the testimony not being before us, we must conclude that there was nothing in the deed of conveyance made by Harshman to McAllister which limited the right of action then possessed or subsequently acquired by either one of the materialmen. The declaration of trust, as we have stated, shows that W. T. McAllister had taken title to a large number of lots for the purpose of paying off all of the mortgages and liens that might be upon the three lots in question. The liens were to be discharged and paid off according to their priority. The record does not show that C. B. Kahl ever agreed to the declaration of trust, and, while it does show that one C. S. Anderson apparently signed for the Hammond Lumber Company, we do not find anything that indicates the existence of an intention on the part of either one of the materialmen to surrender their liens until they had been paid in full for the amount of their claims. While the declaration of trust purported to limit the action of the trustee to a period of three years, there is not a word which indicates that the materialmen agreed to any postponement of the assertion of their right to mechanic's liens. No question is made as to the validity of the liens, as to their having been filed within the time allowed by law or of the commencement of foreclosure proceedings thereon. The one point only is urged—that of waiver. Before considering this question, it is proper to state that the decisions are not at all harmonious upon just what act amounted to a waiver, nor are the decisions of those states where a mechanic's lien rests upon the common law alone of much assistance in determining whether there has or has not been a waiver. In the state of California a mechanic's lien is a matter of constitutional right (section 15, art. XX, State Constitution), and by the Code provisions becomes a matter of record. Thus all of the decisions of other states which have to do with secret liens or of which the public can have no notice until an action to foreclose the same has been brought are not of any weight in this state other than in so far as most of them hold that, in determining whether a lien has or has not been waived, the question of intention enters largely into the consideration. In this state the rule that prevails is well stated in 17 California Jurisprudence, p. 161, § 107, to wit:

> "Grave reasons must be shown in every case to justify a holding that a mechanic's lien has been lost or destroyed. The mere circumstance that a claimant has taken additional security does not preclude the enforcement of the lien, nor may the conclusion that the additional security was meant as a substitute for the right of the lien, be reached, unless the fact plainly appears from the nature of the contract between the parties."

Following this statement a number of illustrations are given as to when materialmen have not lost their liens. In states having no constitutional provision such as ours, there is a diversity of opinion as stated, and this diversity is shown by the text in 40 Corpus Juris, p. 322, as follows:

> "In some states the rule is that a mechanic's lien is waived by taking any other security for the debt, while in other states the taking of other security is not a waiver of the mechanic's lien, unless there is an express agreement to that effect, or such was the intention of the parties, or the security is inconsistent with the existence or enforcement of the lien."

And, further, the same text-writer, on page 323 of the same volume, lays down the rule:

> "It has been held that the lien is waived by taking a mortgage on the property subject to the lien, but a considerable number of authorities take the position that a waiver does not

result where the parties do not so intend, and the rights of third parties are not infringed," etc.

It may be here stated that there was absolutely nothing in the so-called declaration of trust, assuming that it is binding upon the parties, that limits or infringes upon any of the rights of the plaintiff in the actions under review. As we have stated and as shown by the decision in the case of Simons Brick Co. v. Hetzel, 72 Cal. App. 1, 236 P. 357, the rights of the materialmen related back to the date when they began doing work and furnishing material, which was prior to the accrual of the rights under which the plaintiff claims, and therefore the taking of additional security by the materialmen would not infringe upon the rights of the plaintiff, but would rather tend to safeguard those rights and leave to the holder of the mortgages a more valuable security than otherwise would exist. It may be here stated that the record does not show that anything was ever done by the trustee or any other person in and by virtue of the declaration of trust, and apparently it was abandoned by all parties.

The cases cited by the appellant to the effect that the taking of additional security is a waiver of a lien are all reviewed by the Supreme Court in the case of Martin v. Becker, 169 Cal. 301, 146 P. 665, Ann. Cas. 1916D, 171, and are held to be inapplicable by reason of the constitutional provision to which we have referred. The Martin Case makes plain that the reason which applies to a waiver of a secret or common-law lien has no application when applied to a lien that must necessarily, for both its creation and enforcement, be made a matter of public record. The opinion in the Martin Case, in referring to the taking of additional security, uses the following language:

> "Grave reasons indeed must be shown in every case to justify a holding that such a lien is lost or destroyed. Certainly the mere circumstance that the prudent mechanic or materialman has taken additional security for his debt should not be held so to operate. Nor should any conclusion that such additional security was meant to be a substituted security for the right to the lien be found except in the clearest case. Before such a conclusion is reached, it should plainly appear from the nature of the contract between the parties that the security was in fact substituted and not cumulative. And, finally, no argument for the destruction of such a lien can be based upon the theory of its secrecy, when in this state no secrecy at all exists."

The determination of the case of Martin v. Becker, as we read it, turned upon the question whether the taking of a mortgage by Hubbard from the contractor Becker operated as a waiver of the lien asserted by Hubbard by reason of the provisions of section 726 of the Code of Civil Procedure, limiting the form of action for recovery of a debt secured by mortgage. It was there held that Hubbard's right of action to obtain payment was not limited, and therefore that he had a right to enforce his lien. In the case at bar, as we have stated, the conveyance was not made to the materialmen. If they acquired any additional security, it was based entirely upon the declaration of W. T. McAllister. The record is silent as to whether the Hammond Lumber Company ever consented to or ratified or agreed to be bound by, or to limit any of its rights by reason of such declaration, nor does the declaration bear the signature of the defendant C. B. Kahl. But, assuming that both of the materialmen were agreeable to the taking of the additional security, we do not find any language therein from which it necessarily must be concluded that the materialmen intended to waive any rights as lienholders or intended to limit any right of action which they might have to enforce liens upon the three lots in controversy. If the transaction as disclosed by the record constituted any security whatever, it simply gave to all parties additional property from which the amount of their claims might be realized. This is not sufficient to justify the conclusion that any existing rights were intended to be waived. The right to enforce the mechanic's liens against the three lots upon which the buildings were erected would not be inconsistent with the right of all parties to have additional property sold by the trustee and the proceeds applied to the payment of the indebtedness of A. E. Harshman.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

93 Cal. App. 317

FRANCIS v. FIDELITY & DEPOSIT CO. OF MARYLAND. (Civ. 6367.)★

District Court of Appeal, First District, Division 2, California. July 27, 1928.

Hearing Denied by Supreme Court Sept. 24, 1928.

1. Injunction 🔑251—Evidence sustained finding that plaintiff, suing for damages on bond given for restraining order, employed attorneys who defended former suit.

In action to recover damages on bond given for restraining order, evidence *held* to sustain finding that plaintiff employed attorneys defending former suit, whose fees were sought to be recovered, though the attorneys gratuitously represented other parties who were defendants in the former suit.

2. Injunction 🔑251—Evidence sustained finding of plaintiff's payment of attorneys, in suit to recover attorneys' fees as damages under bond for temporary restraining order.

In action to recover attorneys' fees as damages under bond given to secure temporary restraining order, evidence *held* to sustain finding

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★Hearing denied by Supreme Court.

that attorneys were paid by plaintiff, though check used for payment was drawn by club of which plaintiff was president.

3. Gifts 🔑47(1)—Transaction by which president of club paid attorney with club's check did not raise presumption that club made gift to president of proceeds.

Where president of club hired attorney to defend suit and paid him with check executed by the club, it was not presumed that the club acted as a volunteer or was making a gift to its president.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Leon C. Francis against the Fidelity & Deposit Company of Maryland. Judgment for plaintiff, and defendant appeals. Affirmed.

James H. Boyer, of Oakland, for appellant.
John L. McVey, of Oakland, for respondent.

STURTEVANT, J. An action in equity was commenced entitled Knights of the Ku Klux Klan, a Corporation, v. Leon C. Francis et al. A temporary restraining order was taken out. To obtain the restraining order, the plaintiff gave an undertaking in the sum of $500, which was executed and delivered by this defendant. Later the action was dismissed, and one of the defendants in that action commenced this action to recover $500 alleged to be his damages. The action last mentioned was tried before the court sitting without a jury. The court made findings in favor of the plaintiff, and, from a judgment entered thereon, the defendant has appealed and has brought up a bill of exceptions.

It is conceded that, in the injunction action, attorneys appeared for the defendants and obtained the above-mentioned judgment of dismissal, that they were paid $500, and that the payment was a reasonable sum for the services so performed. While the foregoing facts are admitted, some others are attacked under the claim that the findings are not supported by the evidence. The findings were general. It is necessary, therefore, to set forth at least parts of the pleadings. The plaintiff alleged, among other things:

> "That the plaintiff herein, upon being served with the said temporary restraining order and order to show cause aforesaid, was compelled to employ, and did employ, Frank W. Hooper and John L. McVey, attorneys at law, duly licensed and entitled to practice as such in all the courts of the state of California, to appear for and represent him upon the hearing of said temporary restraining order and order to show cause, and said attorneys did appear for and represent the said plaintiff herein in the matter of said temporary restraining order and order to show cause at the time and place set forth in said temporary restraining order and order to show cause. * * * That the plaintiff herein was compelled to, and did, pay to said Frank W. Hooper for his services aforesaid the sum of $250, and was compelled to, and did, pay to said John L. McVey for his services aforesaid the sum of $250, and the said sum of $500 was and is the reasonable value of the services of said attorneys as aforesaid."

[1] The defendant contends that the allegation as to who employed the attorneys is not sustained by the evidence. We think the contention is not well founded. The plaintiff testified that he employed the attorneys, and Mr. Hooper, who was one of the attorneys, testified that they were employed by the plaintiff. No other witnesses were called. The mere fact that the attorneys gratuitously represented all of the other defendants does not rebut the direct evidence which we have cited.

[2, 3] The defendant makes the additional point that the plaintiff did not pay the attorneys. That contention rests on the following facts: The attorneys were paid by being handed a check. It was delivered into the hands of Mr. Hooper, one of the attorneys, by the plaintiff. It was a check drawn by "East Bay Club of Alameda County," and was countersigned by "Leon C. Francis, President, and J. J. Coons, Secretary." The check was made payable to Frank W. Hooper. The witness Leon C. Francis testified that the check was loaned to him. The defendant asserts that was the conclusion of the witness. However, he did not make that objection during the trial, but cross-examined the witness on the subject. It is certain the money represented by the check was the property of the East Bay Club. The record is wholly silent as to that body making any gift of the money to any one. We may not indulge in any presumption to that effect. When thereafter the trial court made a finding that all of the allegations of the complaint were true, that finding was in effect a finding "that *the plaintiff* herein was compelled to and did pay to said Frank W. Hooper for his services aforesaid," etc. The finding so made is supported by the evidence. As we understand the defendant, it contends that the East Bay Club of Alameda was voluntarily standing back of the defendants in the injunction case without any agreement to be reimbursed for moneys advanced. But, if such was the fact, the record before the trial court, and which has been brought up, does not show any such donative agreement on the part of the East Bay Club. We may not presume that the club acted as a volunteer or was making a gift. Provident, etc., Ass'n v. Davis, 143 Cal. 253, 256, 76 P. 1034.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

93 Cal. App. 224

KRAMER v. REYNOLDS et al. (Civ. 3548.)

District Court of Appeal, Third District, California. July 19, 1928.

1. Statutes 🔑93(8)—Statute authorizing holding of court in cities of over 50,000 located more than 15 miles from courthouse held valid (Code Civ. Proc. § 142, as amended by St. 1925, p. 218, § 2).

Code Civ. Proc. § 142, as amended by St. 1925, p. 218, § 2, authorizing superior court to sit in cities of over 50,000 located more than 15 miles from county courthouse, *held* valid, legislative classification not being disturbed unless palpably arbitrary or unreasonable.

2. Chattel mortgages 🔑157(2)—Evidence held to sustain finding that one purchasing property from mortgagor, who held under undated bill of sale, had knowledge of outstanding chattel mortgage.

Evidence *held* to sustain finding that purchaser of personal property from mortgagor had knowledge of existing unpaid chattel mortgage thereon, in mortgagee's foreclosure suit, though date of bill of sale of property given in connection with mortgage did not definitely appear.

3. Appeal and error 🔑1010(1)—Appellate Court may not interfere where evidence in record sustains trial court's finding.

Where there is evidence in record to sustain trial court's finding, Appellate Court is not at liberty to interfere.

Appeal from Superior Court, Los Angeles County; C. W. Miller, Judge.

Action by Rose Kramer against Sadie Reynolds and E. C. Redman. Judgment for plaintiff, and, from the judgment and an order denying a new trial, defendant last named appeals. Affirmed.

Frank H. Snyder, of Glendale, for appellant.

Adolph B. Rosenfield, of Long Beach, for respondent.

Ralph H. Clock and Geo. A. Hart, both of Long Beach, amici curiæ.

WEYAND, Justice pro tem. [1] The trial of this cause was had by a department of the superior court of Los Angeles county, sitting at Long Beach, a city within Los Angeles county. The appellant E. C. Redman objected to a trial by the said court, sitting at Long Beach, contending that section 142 of the Code of Civil Procedure, as that section was amended in the year 1925 (St. 1925, p. 218, § 2), is unconstitutional and void in so far as it attempts to give legal authority to hold a session of the superior court of Los Angeles county in the city of Long Beach. This objection should be considered before proceeding to a consideration of the merits of the case.

Section 142, Code of Civil Procedure, was amended in the year 1923 (St. 1923, p. 78, § 2), and as it was thus amended it provided that in counties of the first class (the class to which Los Angeles county belongs), a session of the superior court could be held in a city such as Long Beach. This section of the Code, as it then stood, was considered in the case of In re Brady, 65 Cal. App. 345, 224 P. 252, and was held to be unconstitutional, in so far as it attempted to authorize a session of the superior court in the city of Long Beach. In this decision it was pointed out that if the section had been so worded as to apply to all the counties of the state of California, it would not be subject to attack on that ground.

The amendment of 1925 changed the said section in that very particular, making it general, and applying its provisions to all the counties of the state of California. The Brady Case, above cited, cannot now be considered as interpreting the present law.

The city of Long Beach, as ascertained by the last United States census, had a population of over 50,000 therein, and its city hall was more than 15 miles from the Los Angeles county courthouse. These conditions, in any county of the state, warrant the superior court of such county in holding a session of said court in any city in such county where these conditions are present.

In Anastasion v. Superior Court of Sacramento County et al., 194 Cal. 93, 227 P. 762, the whole matter of classification was considered in a lengthy opinion by the late Justice Lennon. It is there said:

> "Every presumption is in favor of the validity of the legislative act and the legislative classification will not therefore be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason."

The present section is founded upon reason, as it attempts to provide for a session of the superior court within a populous city which is situated a distance from the county courthouse. We can see nothing in the section, as it is now worded, that makes it void.

[2, 3] Passing then to the merits of the case, we find it to be an action for the foreclosure of a chattel mortgage upon some apartment house furniture and furnishings situated in Long Beach, Los Angeles county. In the early part of September, 1923, the plaintiff, Rose Kramer, owned this property. She gave a bill of sale of this property to the defendant Sadie Reynolds and received from said Sadie Reynolds a chattel mortgage thereon for the sum of $2,500. This is the chattel mortgage attempted to be foreclosed herein. The evidence clearly discloses that prior to the actual passing of the instruments, negotiations had been pending between the two parties last above named. The bill of sale and the mortgage were each made out by the

proper party and placed in escrow with a banking institution in said city. The bill of sale was undated, as to the day of the month of September, 1923. An exchange of the instruments was effected with the bill of sale thus undated. The mortgage given by defendant Reynolds was dated September 11, 1923.

The original complaint herein was filed November 29, 1924. Appellant E. C. Redman was not named as a party defendant therein. By an amended complaint filed March 25, 1925, it was alleged that the appellant Redman claimed an interest in the said furniture, but that the said Redman acquired such interest well knowing that the said property was subject to the lien of the mortgage above referred to.

The defendant Sadie Reynolds was served with summons and complaint on December 1, 1924, and she failed to appear in the action. It might here be noted that she did not appear as a witness in the trial of the cause. An answer in behalf of the defendant Redman was filed April 24, 1925. There it was alleged that Redman acquired the title to said personal property by bill of sale from the defendant Sadie Reynolds on January 15, 1925, for a valuable consideration, and "as being clear of and unincumbered by said chattel mortgage." He further claims by said answer that on the date of his alleged purchase he relied upon a bill of sale dated after the execution of the mortgage and executed by Rose Kramer to Sadie Reynolds. Judgment was for plaintiff, and defendant Redman appeals from such judgment and the order denying his motion for a new trial.

In the brief of appellant Redman it is well said "the vital issue of fact upon the trial concerned the bona fides of appellant, in his purchase." Redman was an attorney at law, and at times immediately preceding the alleged purchase of the property from Sadie Reynolds represented said Sadie Reynolds. In the month of December, 1924, it is admitted, he received letters from the attorneys of Rose Kramer, relating to a proposed settlement of the matters involved in the foreclosure suit then pending. In some unexplained manner this bill of sale had thereon, when produced in court at the trial, the date of execution as being September 15, 1923. This bill of sale also had indorsed thereon a statement as follows:

> "I paid Rose Kramer on September 15, 1923, $2,500 cash for the articles herein inventoried, at which time I was given and received this bill of sale. [Signed] Sadie Reynolds."

As before stated, defendant Sadie Reynolds did not appear as a witness, and no testimony from her was before the trial court.

As to the bona fides of appellant in his alleged purchase of the furniture, the court found that on January 15, 1925, when defendant Sadie Reynolds transferred the property to defendant E. C. Redman, said Redman had full knowledge of the note and mortgage sued on and that the same was a valid and subsisting lien on the said property. This finding of the trial court had the effect of branding the entire transactions whereby Redman became the apparent owner of this property free from the lien of the chattel mortgage as a fraudulent transaction. This fraud, if such it was, in the nature of things, could have been committed only by Sadie Reynolds, or by defendant Redman, or by both defendants conniving together.

We believe there is ample evidence in the record to sustain the trial court. Where there is such evidence, an appellate court is not at liberty to interfere.

Many cases are cited by appellant as to purchases of property from one holding a release of a prior incumbrance, and the kindred subjects, but all such law and citations are to no purpose, when underlying the whole matter is the finding of the trial court that good faith was wanting.

We do not feel it necessary to quote from decisions in support of the conclusions above reached, as to the merits of this matter.

The judgment herein is affirmed.

We concur: FINCH, P. J.; HART, J.

205 Cal. 1

HOGAN FINANCE & MORTGAGE CO. v. MEAD. (L. A. 9495.)

Supreme Court of California. Aug. 8, 1928.

1. Replevin 🔑72—Evidence in claim and delivery held to sustain finding that defendant had placed automobiles involved in hands of third person on consignment.

In action in claim and delivery for the recovery of certain automobiles, evidence *held* to sustain finding that defendant had placed automobiles in the hands of a third person on consignment with authority to sell the same in the usual course of business and account to consignor in case of disposition of any of such cars.

2. Fraudulent conveyances 🔑137(1)—Purported sale of automobile held ineffective against creditor attaching car while owner retained possession (Civ. Code, § 3440).

Purported sale of automobile *held*, under Civ. Code, § 3440, ineffective as against creditor of owner attaching car at time that owner had possession thereof.

3. Sales 🔑219(2)—Consignee of automobiles for sale could not by assignment of purported conditional sale contracts transfer title.

Consignee of automobiles for sale in the usual course of business, having no title thereto, could not, by assigning purported conditional contracts of sale, transfer title thereto.

4. Estoppel 🔑96—Purchaser of conditional contracts of sale of automobiles without check on cars held wanting in due care necessary to protect itself against fraud (Civ. Code, § 3543).

Purchaser of conditional contracts of sale for automobiles without any check of what cars seller was handling *held* wanting in due care within Civ. Code, § 3543, necessary to protect itself against fraud in forgery of purported conditional contracts of sale, as against consignor of cars for purpose of sale in usual course of business.

Department 2.

Appeal from Superior Court, Los Angeles County; Ernest Weyand, Judge.

Action by the Hogan Finance & Mortgage Company against C. S. Mead, wherein defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals. Affirmed.

Greenberg, D'Orr & Beilenson, Gilligan & Cobb, Greenberg & Beilenson, and Lawrence Cobb, all of Los Angeles, for appellant.

Morin, Newell & Brown, Stanley K. Brown, and J. W. Morin, all of Pasadena, for respondent.

SHENK, J. This is an appeal by the plaintiff from a judgment in favor of the defendant, C. S. Mead, on his cross-complaint in an action in claim and delivery.

The defendant and cross-complainant was a distributor of Chevrolet automobiles in Pasadena. One I. H. Weaver was a retail automobile dealer located at San Gabriel. The plaintiff was engaged, among other activities, in purchasing and financing contracts for the purchase of automobiles, dealing directly with automobile dealers. Weaver entered into an agreement with Mead to handle Chevrolet cars at San Gabriel. Under this agreement Weaver received numerous cars from Mead and sold them to customers in the San Gabriel territory. Whether Weaver purchased the cars, taking title in himself, or received them on consignment, is the crucial point in the case. There was no agreement in writing between these two contracting parties as to whether the transaction between them should constitute a sale or a consignment other than as might be inferred from the documentary evidence as to what took place between them. This documentary evidence is found in a promissory note payable on demand in the principal sum of the price to Mead for each car. A note was executed by Weaver to Mead on each car at the time the car was delivered to Weaver, and the note had appended to it beneath the signature of the maker the words, "secured by," followed by the description of the car by model, motor number, and serial number.

In December, 1924, Weaver became involved financially and had disappeared. At that time Mead had in his possession five of said notes on which no payments had been made. He went to the Weaver Garage at San Gabriel, found therein the motorcars described in said five notes, and removed them to his place of business in Pasadena. He also commenced an action against Weaver on the sixth demand note different in form but authorizing suit thereon in the event of nonpayment. The car described in this note was not found by Mead, but in said action he attached a sixth car, the possession of which was then in Weaver. After judgment in said action Mead purchased said car at execution sale.

On December 15, 1924, the plaintiff commenced the present action, describing in the complaint the six cars hereinbefore mentioned and a seventh car which is not now involved herein. At the commencement of this action the plaintiff, by furnishing the necessary bond, required the sheriff to take possession of all of said cars. The defendant did not file a repossession bond, and upon the expiration of the statutory period said cars were delivered to the plaintiff, who subsequently sold them to third parties.

The trial court found that at the time of the commencement of this action Mead was the owner of the automobiles in question; that Mead had placed said automobiles in the hands of Weaver on consignment with authority in Weaver to sell the same in the usual course of business and to account to Mead in case of the disposition of any of said cars. Whether this finding is supported by the evidence is the important question.

[1] It must be conceded that the notes themselves, unaided by other evidence, might support the inference that the parties intended that the transaction should be a sale and not a consignment. On the other hand, it must also be conceded that this inference is not controlling or conclusive if the agreement of the parties evidenced an intention that Weaver was to be a sales agent or consignee and that the promissory notes were to be the evidence of the amounts for which the consignee should be bound to account to the owner or consignor. The original agreement was an oral agreement between Mead and Weaver. Weaver was arrested on December 9, 1924, and was thereafter sentenced to state's prison. He was not a witness at the trial of this action. Mead testified: That Weaver came to him and wanted to know if there were not some way whereby Weaver could handle Chevrolet cars at San Gabriel. That he was agreeable, but that he soon found out that Weaver did not have sufficient money to buy the cars. That Weaver said, "Isn't there any way that I could make arrangements about the cars?" And that Mead said, "Yes, I will consign you cars; take cars on consignment, and I will hold a note against those cars." That when Weaver took a car he signed a note, and when he made a sale he would report it and take up the note. The evidence of the circumstances attending the making of the original oral contract followed by the execution of the notes would, it may be assumed, support a finding to the effect that the transactions were purchases and that title passed to Weaver, but the opposing inferences in favor of the finding that was made by the court are also deducible from the evidence. Under this state of the record it cannot be held that there was no substantial evidence to support the finding complained of.

[2] The evidence is undisputed that the defendant was the purchaser of the sixth car at the execution sale. It is admitted that title to this car had passed to Weaver. There is no dispute that Weaver purported to convey his title thereto to the plaintiff, but he retained and had possession of the same at the time of the commencement of the attachment suit. Mead was a creditor of Weaver under the note sued on in that action. The purported sale of this car to the plaintiff was therefore ineffective as against Mead under the provisions of section 3440 of the Civil Code.

[3] After Weaver had received the other five cars involved in this controversy he drew up purported conditional contracts of sale thereof and forged the signatures of the purchasers. He thereupon sold for cash this forged paper and assigned his right, title, and interest thereunder and in and to the cars themselves to the plaintiff. In the assignment he guaranteed to the plaintiff the full payment of the contract price at which the cars were supposed to have been sold and represented title in the cars to be in himself. It is under these forged instruments that the plaintiff claims title. It is obvious that if Weaver had no title to these cars, as the court found, he could not transfer title to the plaintiff, unless he was authorized to do so, which the evidence shows was not the case.

[4] Furthermore, the court found in favor of Mead on every element of estoppel advanced by the plaintiff. From the evidence it appears that Mead was diligent at all times in his transactions with Weaver, by often and periodically checking the cars on Weaver's showroom floor and by keeping close account of all of his dealings with Weaver. On the other hand, the evidence discloses that the plaintiff purchased said conditional contracts of sale without any check of what cars Weaver was handling. It even appears that in one instance Weaver sold to the plaintiff three different contracts of sale covering the same car. In this respect it would appear that the plaintiff was wanting in the due care necessary to protect itself against the fraudulent transactions of Weaver. Section 3543 of the Civil Code is applicable in favor of Mead and against the plaintiff on this phase of the case.

It is unnecessary to discuss the many authorities cited by the respective parties, as the supported findings of the court in connection with the foregoing observations are deemed determinative.

The judgment is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

205 Cal. 11

MEISNER v. McINTOSH. (S. F. 12347.)

Supreme Court of California. Aug. 10, 1928.

1. Judgment 🔑253(1)—Recovery, in action for damages for fraud, in excess of amount demanded in complaint, held unauthorized, though answer was filed (Code Civ. Proc. § 580).

Where plaintiff in action to recover damages for fraud claimed damages only in amount of $1,000, entry of judgment in excess of amount claimed was error, though answer was filed, and judgment was required to be reduced to sum demanded in complaint, notwithstanding Code Civ. Proc. § 580, which permits court to grant plaintiff any relief consistent with case made by complaint and embraced within issue where answer is filed.

2. Deeds 🔑59(3)—Grantor's execution and recording of deed, without grantee's knowledge or consent, held not to constitute delivery.

Grantor's execution of deed to property located near property previously sold grantee, together with recording of deed, all without knowledge, acquiescence, or consent of grantee, did not constitute delivery either express or implied.

3. Fraud 🔑34—Plaintiff's reconveyance of other property, to which defendants executed and recorded deed in plaintiff's name, without his consent, held not condition precedent to plaintiff's recovery for fraud.

In action for damages for defendants' fraud in purporting to convey property to which they had no title, plaintiff's reconveyance of other property, to which defendants executed and recorded deed in plaintiff's name, without plaintiff's consent, *held* not condition precedent to recovery.

4. Appeal and error 🔑989—Affidavits filed on motion for new trial are not considered in determining whether evidence supported findings.

Substance of affidavits filed on motion for new trial, which tended to contradict plaintiff's testimony, cannot be considered in connection with contention that evidence did not support findings for plaintiff.

5. New trial 🔑106—Refusal of defendants' motion for new trial held not abuse of discretion, notwithstanding accompanying affidavits which tended to contradict plaintiff's testimony at trial.

Refusal of defendants' motion for new trial *held* not abuse of discretion, though affidavits were filed with the motion, which tended to contradict plaintiff's testimony at trial, since such evidence should have been offered at the trial.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Lloyd A. Meisner against Margaret McIntosh, individually and as administratrix of the estate of John McIntosh, deceased. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Superseding former opinion in 267 P. 102.

Wm. F. Rose, of San Francisco, for appellant.

James H. Boyer, of Oakland, for respondent.

PER CURIAM. [1] This appeal was decided in department, and thereafter a motion to hear the same in bank was granted. At the time of the granting of said motion we were in doubt as to the correctness of that portion of the department opinion which held that the judgment was valid, notwithstanding it exceeded the amount alleged in the complaint to be due from the defendants. By the complaint the plaintiff sought to recover damages for fraudulent representations made by the defendants whereby he was induced to convey certain real property of the fair market value of $1,000. There was evidence produced at the trial to the effect that said real property was of the fair market value of $1,525. The trial court found in accordance with this evidence and rendered judgment in favor of plaintiff for this amount together with other amounts hereinafter referred to. No amendment to the complaint to conform to this evidence was made or filed. Appellants contend that as the plaintiff alleged that he was damaged only in an amount of $1,000, it was error for the court to find, and upon such finding to award a judgment, in the sum of $1,525, or in any amount exceeding the sum of $1,000. In this we think appellants are right. The authorities overwhelmingly support appellants' contention. "The rule is firmly established that irrespective of what may be proved a court cannot decree to any plaintiff more than he claims in his bill or other pleadings." 15 R. C. L. 604. "A judgment cannot be properly rendered for a greater sum, whether by way of debt or damages, than is claimed or demanded by plaintiff in his declaration or complaint." 33 Cor. Jur. 1164. "The judgment is for $7,470 and costs. The plaintiff prayed for the sum of $6,000, the value of the property, and $500 damages, and the prayer follows the ad damnum clause of the complaint, which alleges that plaintiff has been damaged in the sum of $500 by reason of the detention. In the absence of an amendment to the complaint, therefore, the court could not allow any damages beyond the amount prayed for." Burke v. Koch, 75 Cal. 356, 360, 17 P. 228, 229. The judgment was accordingly modified by striking out the amount thereof and inserting the sum of $6,500. The judgment was not by default, but was rendered after a trial of the action upon its merits. "The finding of damage is for an amount greater than the complaint avers. Still, the finding necessarily establishes that plaintiff was damaged to the amount which he claims. The judgment may, therefore, be modified, and it will still be supported by the finding in question." Kerry v. Pacific Marine Co., 121 Cal. 564, 573, 54 P. 89, 92 (66 Am. St. Rep. 65).

The only decision of our courts which is in apparent conflict with the foregoing authorities is that found in the case of Kimball v. Swenson, 51 Cal. App. 361, 196 P. 781, where the court held that under section 580 of the Code of Civil Procedure, which provides that in any case, where an answer is filed, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue that, "the relief 'embraced within the issue' was the damage for appellants' conversion. The answer having joined issue on this point, the judgment properly followed the measure of damages prescribed by the Code for such cases." The following authorities are relied upon in the opinion as supporting the doctrine therein announced: O'Donnell v. Kramer, 65 Cal. 353, 4 P. 204; Johnson v. Polhemus, 99 Cal. 240, 244, 33 P. 908; Title Insurance & Trust Co. v. Ingersoll, 158 Cal. 474, 480, 111 P. 360. None of these cases is directly in point, as in none of them was the direct question involved which is presented for determination in the present action. In Kimball v. Swenson, supra, the court said:

> "They (the parties thereto) thus put in issue the question of damages, not merely as alleged in the complaint, but according to the measure specified in the Code."

From this it appears that the case was tried upon the theory that the pleadings were sufficient to raise the question as to whether or not the plaintiff therein was entitled to recover the full amount of damages measured by the provisions of the Code applicable thereto. This is further apparent from a later statement in the opinion as follows:

> "The case was tried upon the theory that respondent was entitled to recover upon whichever basis the jury should determine, and at one stage of the proceedings counsel agreed that the measure fixed by the Code applied to the case at issue."

Where a case is tried upon the theory that the pleadings are sufficient to raise certain issues included in the findings, the parties thereto are estopped from thereafter raising the objection that the pleadings do not support the findings. Silvers v. Grossman, 183 Cal. 696, 192 P. 534; Cross v. Bouck, 175 Cal. 253, 165 P. 702. There is no showing that the present action was tried upon any such theory.

The authorities first cited, in our opinion, sustain the contention that the judgment in so far as it exceeds in amount that averred in the complaint is erroneous, and should be modified accordingly.

In all other respects, we think that the department opinion has correctly determined the questions considered, and we hereby adopt the same as the opinion of this court:

> "This is an appeal by the defendant from a judgment against her for $2,361.56 in an action for damages for fraud. The facts as found by the trial court are: That on the 27th day of March, 1924, and at the time of the transfer thereof to defendant Margaret McIntosh, plaintiff was the owner and in the possession of a certain described parcel of real property in Berkeley, Cal., then having a fair market value over and above all liens and incumbrances of the sum of $1,525, which facts were then known to John McIntosh and Margaret McIntosh. That in the months of March and April, 1924, and many times prior thereto, at said county of Alameda, state of California, for the purpose and with the intent of cheating and defrauding plaintiff, defendants represented to said plaintiff that said John McIntosh and Margaret McIntosh were the owners of a certain described piece or parcel of real property in the county of Calaveras, state of California, consisting of 160 acres, and in the month of April, 1924, and prior to the sale of said property to plaintiff, said John McIntosh, acting for himself and as the agent of said Margaret McIntosh, pointed out to this plaintiff a spring of water, and stated to this plaintiff that said spring of water was located on said 160 acres of land then claimed to have been owned by said John McIntosh and Margaret McIntosh. That many times prior to the 1st day of April, 1926, said Margaret McIntosh and John McIntosh offered to trade said land in Calaveras county, Cal., to plaintiff, subject to the incumbrances thereon, for said property in the city of Berkeley owned by plaintiff, together with the promissory note of plaintiff, payable to said John McIntosh and Margaret McIntosh, in the sum of $580. That, relying upon said representations of said John McIntosh and Margaret McIntosh, and because thereof, said plaintiff accepted said proposal of exchange. That plaintiff believed in and relied upon said representations, offers, and promises made to him by said Margaret McIntosh and John McIntosh, and because thereof, thereafter, subsequent to the 27th day of March, 1924, executed a grant deed granting and conveying to said Margaret McIntosh said real property owned by plaintiff in said city of Berkeley, and on said last named date plaintiff also executed to said Margaret McIntosh and John McIntosh, his said promissory note in the sum of $580. That plaintiff received no other consideration, and neither said John McIntosh nor Margaret McIntosh parted with anything for the transfer and conveyance by plaintiff of said Berkeley property to Margaret McIntosh and the execution and delivery of said note for $580 except the said deed purporting to convey to plaintiff said land in Calaveras county, California. That neither said John McIntosh nor said Margaret McIntosh on the 27th day of March, 1924, or at any time thereafter, owned any right, title, or interest in or to said land in Calaveras county, and said spring of water was not on said land, but was situate on other and adjoining land, which latter property was at no time owned by John McIntosh and Margaret McIntosh, or either of them; all of which facts were at all times herein mentioned well known to said John McIntosh and Margaret McIntosh and unknown to plaintiff for more than one year subsequent to the execution of said deeds. That prior to

discovering that said John McIntosh and Margaret McIntosh were not the owners of said real property in Calaveras county, or any part thereof, and that said spring of water was not on said or any land owned by said defendants, and without knowledge of the falsity of said representations made to him as aforesaid, and within six months after the execution by him of said note, said plaintiff paid to said John McIntosh and Margaret McIntosh said sum of $580, named as the principal sum in said promissory note, together with the interest accrued thereon, and said note was thereupon returned to plaintiff. That no part of said sums has been repaid to plaintiff. That on or about August 15, 1924, said Margaret McIntosh and John McIntosh sold, transferred, and conveyed said real property situate in Berkeley, previously granted to them by plaintiff, to Earl W. and Virginia E. Weber, who ever since have been and now are the owners thereof.

"An examination of the record discloses that the contention of appellant that the evidence does not support the findings is without merit. The testimony of the plaintiff supports the findings made by the trial court.

[2, 3] "It appears that after plaintiff discovered the fraud which had been practiced upon him and threatened to commence criminal proceedings, defendants executed a deed purporting to convey to plaintiff a 200-acre tract of land, located about a mile from the quarter section which they had sold to him; that John McIntosh caused said deed to be recorded and gave instructions to the recorder to mail said deed to plaintiff. It also appears that the preparation and recording of this deed was all without the knowledge, acquiescence, or consent of plaintiff. Under the circumstances, there was no delivery of this deed to plaintiff. Delivery cannot be made without the consent, express or implied, of the grantee. There is, therefore, no merit to appellant's contention that a reconveyance should have been made by plaintiff as a condition precedent to his recovery in this action. * * *

[4, 5] "Certain allegations were made in affidavits filed by defendant upon her motion for a new trial, which allegations either directly or indirectly tended to contradict the testimony of plaintiff in certain particulars. Of course, the substance of these affidavits cannot be considered in connection with the contention of the appellant that the evidence does not support the findings. At the most the allegations in the affidavits would but create a conflict in the testimony and such allegations were not before the court at the time of making its findings. As to the refusal of the trial court to grant the motion for a new trial, we are of the opinion that its discretion was properly exercised in this matter, as the defendant should have produced at the trial any testimony available to contradict that offered by the plaintiff."

The judgment is modified by reducing the same is the sum of $525, together with interest on said sum at the rate of 7 per cent. per annum from March 27, 1924, to date of judgment. As so modified the judgment is affirmed.

It is further ordered that appellants recover their costs on this appeal.

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204 Cal. 570

WITTER et ux. v. BANK OF MILPITAS et al.★

(S. F. 11707.)

Supreme Court of California. July 18, 1928.

Rehearing Denied Aug. 16, 1928.

1. Mortgages ⟹355—Mortgagor, knowing that debt was due, but permitted to make payments, was not lulled into security requiring personal notice of sale under trust deed.

Where attempt was made to set aside sale under trust deed, and it appeared that trustee bank, in order not to cause mortgagors to be unduly inconvenienced, had permitted them to make tardy and inadequate payments, always cautioning them that time of loan would not be extended, and repeatedly informing them that whole amount of debt with interest had been declared due and payable and would be called in, *held* that mortgagors had not been lulled into security requiring personal notice of sale.

2. Mortgages ⟹354—Notice to mortgagor provided in trust deed is sufficient to authorize sale under deed.

In making sale under trust deed, it is sufficient to authorize sale if such notice be given mortgagor as is required by the trust deed.

3. Mortgages ⟹369(7)—Evidence held to sustain finding beneficiary of trust deed had not waived provision authorizing it on interest default to consider whole debt due, and require trustee to sell.

Finding that trust deed provision, on default of payment of interest on secured debt, beneficiary could consider whole debt due and payable, and, on written application, require trustee to sell, had not been waived, *held* warranted by the evidence.

4. Appeal and error ⟹1011(1)—Sale under trust deed will not be disturbed, where findings against contention of unfairness were supported by conflicting evidence.

Findings against plaintiffs' contention that unfair advantage was taken of them in sale under trust deed will not be disturbed, where record showed that as to some of the findings there was no evidence contradicting them, and, as to others, evidence was conflicting.

5. Mortgages ⟹341—Sale under trust deed is not void merely because trustee was officer in beneficiary corporation.

Sale made under trust deed by trustee who is also officer in beneficiary corporation is not void merely because of trustee's relation to beneficiary.

6. Mortgages ⟹369(7)—Evidence held to show that trustee did not wrongfully withhold portion of proceeds of sale paid for necessary work on premises authorized by trust deed.

Where plaintiffs, in attack on sale made under trust deed empowering trustee to care for property, claimed that portion of proceeds from sale was wrongfully withheld, evidence *held* sufficient to show trustee had not wrongfully withheld portion of proceeds paid for such care.

★Rehearing denied.

7. Mortgages 🔑342—Where beneficiary under trust deed was empowered to appoint new trustee, and it did so, sale by new trustee carried title.

In attack on trustee's sale under trust deed, which provided that beneficiary could at any time appoint successors of trustees named in instrument who should have same power as original trustee, and beneficiary appointed such other trustee who conducted sale, *held* such sale was good, since, on appointment, new trustee became vested with title to trust premises.

8. Mortgages 🔑369(1)—Statutes authorizing court to appoint expert to investigate and testify, and statutes as to mode of transfer, held inapplicable to action to set aside foreclosure of trust deed (Civ. Code, §§ 1091–1135; Code Civ. Proc. § 1871 as added by St. 1925, p. 305).

In attack on sale made by trustee under trust deed, where plaintiff invoked Civ. Code, §§ 1091–1135, providing mode for transfer of real property, and Code Civ. Proc. § 1871, as added by St. 1925, p. 305, empowering court to appoint expert to conduct investigation and report to court, *held* statutes were inapplicable.

9. Mortgages 🔑354—Notice of sale under trust deed that should have read "front door of county courthouse," but omitted word "house," held cured by reference to recorded deed containing correct information.

In attack on trust deed providing that, in making sale, trustee should publish time and place of such sale at "front door of county courthouse," and notice, as published, omitted word "house," and was worded "front door of county court," but contained exact reference to book and page where deed was recorded, which contained correct information, *held* that reference in deed cured slight defect in published notice.

10. Appeal and error 🔑662(1)—Where record contained no evidence contrary to finding of court, contention that finding was not sustained by evidence held unavailing.

Where sale under trust deed was attacked on ground that notice was not published in newspaper of general circulation, and notice was published in paper decreed by superior court to be newspaper of general circulation two years prior to date of sale, but record contained nothing to show that finding was not sustained by evidence, it cannot be so argued.

11. Mortgages 🔑357—Where there was no request to adjourn sale under trust deed, plaintiffs cannot complain because there was but one bidder.

In attack on sale made under trust deed, where only one bid was made, and no request was made that sale should be adjourned, plaintiff may not complain, in absence of other facts supporting claim, that sale should have been adjourned.

12. Mortgages 🔑363—Sale under trust deed was not nullity because representative of beneficiary made bid without written instructions; writings subsequently made being sufficient.

In attack on sale made under trust deed, where plaintiffs contended that attorney for beneficiary appeared at sale, and made bid, which was nullity because he had no written instructions at time, and no writing was issued or money passed, *held*, it was not necessary to have written instructions, or that contract be executed on doorsill of courthouse at time of sale, but writings subsequently made were sufficient.

13. Mortgages 🔑349—Sale made by trustee under trust deed, not conducted by licensed auctioneer, held at "public auction" within meaning of deed.

In attack on sale made under trust deed on ground that sale was not made at public auction, and was therefore void because not conducted by licensed auctioneer licensed by city of San Jose, under Charter art. 1, div. 2 (St. 1915, p. 1874), where no ordinance was introduced to show that auctioneers were licensed or regulated, words "public auction" must be taken in ordinary sense, and in that sense sale complied with terms of deed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Auction.]

14. Mortgages 🔑360—Trust deed, authorizing two trustees to make sale, neither directed nor required that two attend sale, and sale by one was good.

In attack on sale made under trust deed by one trustee on ground that it was void, where trust deed authorized two trustees to make sale, *held*, that sale was good, since trust deed neither directed nor required two should attend sale, nor that both as in a duet conduct the auction.

15. Mortgages 🔑360—Notes need not be taken up by trustees selling under trust deed, where deed does not so provide.

Attack on sale made under trust deed on ground it was without consideration, since notes were not taken up by trustees, was not good, since, if makers wanted notes surrendered to them, it was their duty to apply therefor.

16. Mortgages 🔑364—Requirement for payment of price in cash at sale under trust deed did not require beneficiary purchasing to actually transfer cash to trustee and receive it back in payment of debt (Civ. Code, § 3532).

Beneficiary purchasing at trust deed sale *held* not required to actually pay cash to trustee and receive it back in payment of debt, notwithstanding cash provision of trust deed; Civ. Code, § 3532, not requiring idle acts.

17. Appeal and error 🔑762—Errors of law first raised in closing brief will not be considered.

Errors of law, first discussed in closing brief, will not be considered, since they should have been presented in opening brief.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by George F. Witter and wife against Bank of Milpitas and others to set aside a sale under deed of trust. Judgment for defendants, and plaintiffs moved for new trial, which was denied. From a judgment for defendants, and denial of new trial, plaintiffs appeal. Affirmed.

Superseding opinion 262 P. 808.

George F. Witter, of Oakland, for appellants.

C. L. Witten and William H. Johnson, both of San Jose, for respondent Bank of Milpitas.

L. D. Bohnett, of San Jose, for respondents Ramstad.

PER CURIAM. [1, 2] This action to quiet title and to set aside a trustees' sale and deed covering certain real property was instituted in March, 1924, approximately five years subsequent to such sale. The trial court found all material issues in favor of the defendants, and judgment was accordingly entered. Upon appeal, the judgment was affirmed by the District Court of Appeal, First Appellate District, Division 2. 262 P. 808. The appellants' petition for hearing herein was granted in order that this court might more fully consider the contention that appellants were, under the circumstances disclosed by the record, entitled to the relief sought because of the failure of the respondent bank to give them personal notice of the contemplated sale of the property under the power contained in the trust deed. Incidentally there is no provision or requirement in the trust instrument for the giving of such personal notice. It appears that the respondent bank did not immediately, upon breach, exercise its right to direct a sale of the premises involved, but, on the contrary, gave the appellants every opportunity over an extended period of time to meet their obligation. Having heretofore accepted whatever benefit may have accrued to them as a result of the respondent bank's delay in asserting its right to direct a sale, the appellants now state that such conduct served to lull them into inactivity, and caused them to rest secure in the belief that no sale would be made until they had been personally notified thereof. We have examined the record, and conclude that this contention cannot be sustained. The trial court found, and the finding is amply supported by the evidence, that the respondent bank did not by its conduct lull the appellants into inactivity or a sense of security. The only notice specified in the trust instrument called for publication of notice of sale "at least once a week for three weeks" in a newspaper having a general circulation in the county wherein the property is situate. That the sale was in strict accordance with the terms of said instrument was found by the trial court. The authorities indicate that it is sufficient if such notice be given as is required by the trust deed. Kennedy v. Dunn, 58 Cal. 339, 340; Balfour-Guthrie Co. v. Woodworth, 124 Cal. 169, 171, 173, 56 P. 891; Sargent v. Shumaker, 193 Cal. 122, 130, 223 P. 464; Baldwin v. Brown, 193 Cal. 345, 351, 352, 224 P. 462; 25 Cal. Jur. 81, § 65. We are of the opinion that this rule is applicable to the present case. As intimated, our examination of the record has disclosed nothing that would justify the application to this case of the equitable principle relied upon by the appellants, requiring personal notice of sale when the trustor has been lulled into security by the conduct of the beneficiary. The appellants, over a period of three years, permitted the payments upon the principal and interest of their debt to fall in arrears without any apparent exertion to liquidate said obligation. The respondent bank, in order not to cause them any undue inconvenience, permitted the appellants to make tardy and inadequate payments, always cautioning them, however, that the time of the loan would not be extended, and repeatedly informing them that the whole amount of the debt and interest had been declared due and payable and would be "called in." As pointed out above, this action was commenced approximately five years after sale under the power and subsequent to an agreement upon the part of the respondent bank to sell the property to third parties, the respondents Ramstad. There would therefore appear to be little, if any, equity in the appellants' favor.

With this prefatory statement, we adopt as the decision of this court the opinion of the District Court of Appeal, above referred to, written by Mr. Justice Sturtevant, and concurred in by Mr. Justice Nourse and Mr. Presiding Justice Koford. It reads:

The plaintiffs commenced an action against the defendant bank and its grantee to set aside a sale made by the trustees under a deed of trust. The defendants appeared and answered, and a trial was had in the trial court before the court sitting without a jury. The court made findings in favor of the defendants, and a judgment was entered thereon. The plaintiffs made a motion for a new trial, the motion was denied, and the plaintiffs have appealed, bringing up a bill of exceptions. The portions of the record necessary to the consideration of any given point will be stated in connection with the discussion of the point.

[3] 1. The plaintiffs complain because they were not given actual notice of the intended sale. The trust deed did not contain a provision requiring actual notice. On the contrary, the sixth paragraph provided that, if the debtor failed to pay his interest at the time provided, in that event the beneficiary might consider the debt as immediately due and payable, and that the trustees on the written application of the beneficiary might proceed to sell the property. The plaintiffs contend that the defendant bank waived the provision just referred to by its conduct. They call to our attention that, from the time the loan was negotiated, they were frequently in arrears in the payment of interest, etc.,

and, notwithstanding that fact, their payments were accepted when tendered, and they cite and rely on the rule stated in Boone v. Templeman, 158 Cal. 290, 295, 110 P. 947, 139 Am. St. Rep. 126. The defendants do not question the doctrine of that case, but contend that the facts of the case at bar do not bring it within the rule. They call to our attention the conversations and correspondence set forth in the bill of exceptions. Turning to the bill of exceptions, it will be noted at once that the plaintiffs received their loan from the bank on the 19th day of January, 1915. It will also be noted that, by reason of the nonpayment of interest, the bank wrote to the plaintiffs on June 9, 1916, exercising its option to declare the principal due and payable. That act was never canceled. Thereafter numerous letters were sent to the plaintiffs by the defendant bank asking for its money. Excepting only the last payment, from the day the notes were signed until the very last payment, the payments made were made when the plaintiffs were in default, and no single payment paid all interest then due. The last payment paid the interest five days in advance. During the same time the plaintiffs were promising to pay, asking for extensions, and representing that they were negotiating a sale of the property so that they could take up the loan. On July 29, 1918, the bank wrote the plaintiffs that they could have an extension of time providing they paid up the interest due July 19, 1918, back taxes, and kept the interest paid up promptly, and kept some one on the place to take proper care of it. The letter closed with the statement: "You have ten days from date in which to make the payment as above provided." The interest mentioned was not paid until December 14, 1918. The discussions continued as above stated, and in October, 1918, Mr. Witter had a conversation with Mr. Reed, the vice president of the bank, regarding the possible foreclosure. Referring to that conversation, the plaintiff testified that Mr. Reed said no foreclosure would be undertaken without notice to the plaintiffs. Mr. Reed testified that he never made the statement. In December, 1918, the bank again threatened foreclosure in a letter addressed to Mr. Gehring, attorney for Mrs. Blais, who held a second trust deed. Mr. Gehring informed the plaintiffs. They handed to him a check for the interest. He delivered the check to the bank, and, at the time of the trial, he testified that on accepting the check "they said the loan was satisfactory." There was no evidence that Mr. Gehring was acting for the plaintiffs, nor that he repeated to them "that they (the bank officials) said the loan was satisfactory." The court found against the plaintiffs on the issue of lulling them into inactivity. The finding is sustained. Sargent v. Shumaker, 193 Cal. 122, 134, 223 P. 464. The payment last mentioned paid the interest to December 19, 1918. No further payments were made, and, on February 4, 1919, the board of directors of the defendant bank ordered its agents to cause a sale of the premises.

[4] 2. The plaintiffs contend that an unfair advantage was taken of them. They assert that they learned the foreclosure had taken place on March 24, 1919, and that on March 28, 1919, Mr. Gehring and Mr. Blais called at the bank and offered to pay plaintiffs' indebtedness, and the bank refused the offer. They call to our attention that on March 27, 1919, the defendant bank adopted a resolution to sell the property to A. G. Ramstad for $8,500, whereas the bank had foreclosed on it for $6,425.05. The plaintiffs cite and rely on Winbigler v. Sherman, 175 Cal. 270, 165 P. 943. In that case, at page 275 (165 P. 946), the court quotes with approval as follows:

> "Where the inadequacy is palpable and great very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought."

In their brief the plaintiffs cite many probative facts. Before we proceed to consider those probative matters, it is necessary to consider the state of the record. Those probative facts were introduced in response to the allegations of the complaint of the plaintiffs, wherein the plaintiffs had alleged separately: (1) Numerous irregularities on the part of the trustees; and (2) numerous fraudulent acts on the part of the trustees and the defendant bank. The trial court made findings in response to each of said allegations. Each and all of those findings are against the plaintiffs. The plaintiffs contend that such findings are not supported by the evidence. As to some of the findings, there was no evidence contradicting them, and as to some of the other findings the evidence was conflicting. This court may not disturb them.

[5] In connection with this point we understand the plaintiffs to contend that Mr. Giacomazzi could not act as trustee because he was an officer of the defendant bank. They cite and rely on Wickersham v. Crittenden, 93 Cal. 17, 28 P. 788. The case cited is not helpful. It was on an altogether different set of facts. The rule applicable is stated in Copsey v. Sacramento Bank, 133 Cal. 659, 66 P. 7, 204, 85 Am. St. Rep. 238; and Herbert Kraft Co. v. Bryan, 140 Cal. 73, 79, 73 P. 745.

[6] The plaintiffs say that the claim of the bank, "including costs and expenses of sale, was $6,425.05"; that the property was sold for $6,525.05; and they assert that the trustees have wrongfully failed to pay them the balance claimed to be $100. Between the date of the execution of the notes and the date of the sale the property was vacant at times and in need of care. The trust deed authorized the bank or the trustees, "4.

* * * to enter, hold, protect, repair, and care for said property, including improvements, trees, vines and crops thereon, as they or either of them see fit * * * all at the trust and charge of said trustors. * * *" It also authorized the trustees, after sale made, out of the proceeds to pay "6. * * * first the expenses of sale and these trusts including reasonable compensation for their services, counsel fees of $200, and cost of certificate or abstract of title to time of sale, all to accrue on any default of said trustors hereunder, next all amounts with interest due from said trustors pursuant to paragraph fourth of this instrument. * * *" The attorney for the bank, Mr. Witten, made the bid. He testified:

> "The amount of the bid made by me was $6,525.25, and was made up of principal and interest, $6,300.05, advertisement, $25.00, attorneys' fees, $200.00. One hundred of my fee went to pay a party who had done work on the orchard."

There was no cross-examination and no contradictory evidence. It is clear that the trustees do not wrongfully withhold $100 or any other sum.

[7] 3. The third point made by the plaintiffs is that there was no devolution of title. The point involves a consideration of the following fact: The deed of trust, as originally executed, conveyed the property to M. Lynn and A. L. Crabb as trustees. It also provided that, in the event of a default, the trustees could sell the property. Furthermore, it provided (omitting irrelevant parts):

> "Said beneficiary may, at any time by instrument in writing appoint a successor, * * * or discharge and appoint a new trustee in the place of any trustee named herein or acting hereunder, * * * who shall have all the estate, powers, and duties of said trustee predecessor."

By an instrument in writing dated March 6, 1917, the bank appointed E. P. Giacomazzi in the place and stead of M. Lynn. Thereafter Giacomazzi and Crabb conducted the trustee sale and conveyed the property. Lynn did not join nor did he execute a deed. Under the facts it was not necessary. Wood v. Gridley, 217 Ill. App. 579. At page 585 the court said:

> "Upon the appointment being made under the power, the new trustee becomes vested, ipso facto, with the title to the trust premises and is clothed with the same power as if he had been originally named in the will. No conveyance need be made to him by the former trustee, or by the former trustee's heirs or representatives, if he be dead. Craft v. Indiana, D. & W. Ry. Co., 166 Ill. 580 [46 N. E. 1132]; Reichert v. Missouri & I. Coal Co., 231 Ill. 238 [83 N. E. 166, 121 Am. St. Rep. 307]; Edwards v. Edwards, 22 Ill. 121; 39 Cyc. 312, and cases cited."

[8] The plaintiffs invoke sections 1091–1135 of the Civil Code and section 1871 of the Code of Civil Procedure, as added by St. 1925, p. 305. Those sections have no application to the facts.

[9] 4. The trust deed provided that in making a sale the trustees should "publish the time and place of such sale * * * at public auction at the front door of the county courthouse in the county of Santa Clara. * * *" The notice as published omitted the word "house," and was worded "front door of the county court in San Jose." There is no claim that the sale as made was not made at the front door of the county courthouse at San Jose in the county of Santa Clara. The notice as published contained an exact reference to the date, parties, and the book and page of the recordation of the trust deed. That deed contained the correct information. That reference cured the slight defect of which the plaintiffs complain. Lau v. Scribner, 197 Mich. 414, 163 N. W. 914, and cases there cited. See, also, Hinds v. Clark, 173 Cal. 49, 54–55, 159 P. 153.

[10] 5. In this same connection it is contended that the notice was not published in a newspaper of general circulation. The notice was published in the Daily Record. A decree of the superior court adjudging the Daily Record to be "a newspaper of general circulation" was introduced in evidence. The trial court made findings on the issue against the plaintiffs. As we understand, the plaintiffs contend that the adjudication was made two years prior to the date of the sale, and that the adjudication is no evidence that the Daily Record was, at the time of the sale, a newspaper of general circulation. There was no evidence that the judgment determining the status of the Daily Record had been vacated. There is nothing in the record, therefore, from which it can be argued that the findings made by the trial court on this branch of the case are not sustained by the evidence. In re Simpson, 62 Cal. App. 549, 217 P. 789.

[11] 6. In making their sixth point, the plaintiffs state that the trustees did not do their duty, and continue the sale for want of bidders. They point out that there was only one bidder, the officer of the bank; they call attention to the fact that it is their claim that the property was sold for a little over $6,000 when it was of a value of nearly $25,000; and they argue that to uphold the sale would be to uphold a set of facts that was tantamount to a fraud. The argument would be impressive, if it were sustained by the record. But the record discloses that, at the time of the sale, there was only one bid. There was no request made by any one that the sale should be adjourned to a day certain. The court found that the property was not of a value of $25,000, and that it could not have been sold for more than $8,500. That finding is supported by the evidence. In the absence of any other facts

supporting the claim that the sale should have been adjourned, the plaintiffs may not complain. Freeman on Void Judicial Sales, § 32.

[12] 7. It is next contended that there was no sale. That fact was alleged in the plaintiffs' complaint, and the trial court made findings against the plaintiffs. In presenting the point to this court, we understand the plaintiffs to contend that, when Mr. Witten, the attorney for the bank, appeared at the sale and made a bid, his act was a nullity because he held no written instructions at the time, no writing was issued at the time, and no money was passed at the time. It was not necessary that he hold written instructions, nor that a contract be executed on the doorsill of the courthouse at the time of the sale, nor that money should pass at that same time and place, nor that the notes be surrendered. The writings subsequently made were sufficient. Bank of Orland v. Finnell, 133 Cal. 475, 478, 65 P. 976.

[13] 8. The eighth point made by the plaintiffs is that the sale was not made at public auction, and was therefore void. In other words, they contend that, because the auction was not conducted by a licensed auctioneer, then it was not a public auction. The power to license is vested in the city of San Jose by virtue of the terms of its charter, article 1, division 2. See Stats. 1915, p. 1874. No ordinance was introduced which shows that auctioneers are licensed at that place or which purports to regulate auctions or define what is a public auction. The words "public auction" are not defined by statute, and therefore they must be taken in their ordinary sense. Estate of Gird, 157 Cal. 534, 542, 108 P. 499, 137 Am. St. Rep. 131. Construed in that sense, the trustees fully complied with the terms of the deed.

[14] 9. The plaintiffs contend that the sale was made by one only of two trustees, and therefore void. They note the fact that the sale was actually conducted by Giacomazzi. The rest of their argument is the same as made under division 3, supra. For the reasons there stated, it is clear that the argument is without merit. Moreover, the deed of trust authorized the two trustees to make the sale. It neither directed nor required that the two should attend the sale, nor that both as in a duet conduct the auction.

[15, 16] 10. It is next contended that the sale was made without consideration. In this connection the plaintiffs make two complaints—they object because the trustees did not take up the notes and return the notes to the makers, and they object because the trustees did not require the bank to pay cash. As to the first complaint, it does not come within the terms of the trust deed. It is wholly silent on the subject. If the makers wanted the notes surrendered to them, it was their duty to apply to the bank therefor. As to the second complaint, it is quite clear that the deed provided that the sale would be for cash; however, if the beneficiaries bid at the sale, the deed contained no language that commanded the trustees to require that the bank carry to the sale a sack of cash, make its bid, obtain its deed, pay in cash, and then demand back the cash and credit it as a payment on the notes. Having determined their duty to make a sale, the trustees had the right to conduct it as they did. The idle act of carrying around the sack of cash is not mentioned in the contract, and "the law neither does nor requires idle acts." Civ. Code, § 3532. In Voorhies v. Voorhies, 66 Misc. Rep. 78, 82, 120 N. Y. S. 677, at page 681, the court said:

> "1. As the deed gave to the trustee a power in trust to sell and turn over the proceeds as he chose, to the extent of all the proceeds, equity will deem it a valid exercise of his powers to turn over the real property instead. * * * The same reasoning, applied in all the cases giving the beneficiary the right of election to take the property instead of the money, applies equally to these assumed facts, if the trustee were willing to convey the property directly, instead of selling and turning over the proceeds. While the beneficiaries could not elect or compel the trustee to convey the property and thus terminate the trust, yet, when the trustee had himself determined, in the exercise of his discretion, that he would thus terminate the trust by selling and turning over the proceeds, there is no reason why he could not instead convey the property directly. This he did, by his deed of January 25, 1875, giving good title to John James Voorhies and his wife."

11. The plaintiffs contend that plaintiffs have been deprived of their property without due process of law. That point is but another method of arguing the contentions presented in the preceding divisions. For the reasons stated above, the point must be ruled against the plaintiffs.

[17] We have taken up and discussed each point made in the opening brief. In their closing brief the plaintiffs, for the first time, set forth certain errors of law. There are two reasons why we do not take up each one and discuss it. If the plaintiffs relied on said errors or any one of them, the plaintiffs, in fairness to the defendants and to the court, should have presented such points in their opening brief. 2 Cal. Jur. p. 734, § 424. In the second place, it is clear, if we make a detailed comparison, that the points stated in the opening brief were but another method of stating the errors of law which plaintiffs enumerate in their closing brief.

We find no error in the record.

The judgment appealed from is affirmed.

204 Cal. 673

WESTLAKE MERCANTILE FINANCE CORPORATION v. MERRITT et al.

(S. F. 12855.)

Supreme Court of California. Aug. 6, 1928.

1. Bills and notes 🔑149—Question of negotiability of draft must be determined from face of instrument.

Question of negotiability or nonnegotiability of a draft must be determined from face of instrument itself.

2. Bills and notes 🔑165—Drafts drawn by seller on buyer of goods, reciting that obligation arose out of purchase, "maturity being in conformity with original terms of purchase," held nonnegotiable (Negotiable Instruments Act, Civ. Code, §§ 3084, 3085, 3133).

Drafts drawn by seller on buyer of goods, reciting that "the obligation of the acceptor hereof arises out of the purchase of goods from the drawer, maturity being in conformity with original terms of purchase, *held* nonnegotiable trade acceptances, in view of Negotiable Instruments Act (Civ. Code, §§ 3084, 3085), making instruments payable upon a contingency nonnegotiable, since underlying contract was made a part of instruments for the purpose of determining the maturity date, and holder was therefore not entitled to recover thereon as holder in due course under section 3133.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by the Westlake Mercantile Finance Corporation against Charles A. Merritt and Charles A. Parlier, individually and as copartners, doing business under the firm name and style of Merritt & Parlier. Judgment for defendant, and plaintiff appeals. Affirmed.

Superseding opinion of District Court of Appeal, 262 P. 815.

George H. Woodruff and Woodruff, Musick, Pinney & Hartke, all of Los Angeles, for appellant.

Elmer D. Jensen, of San Jose (H. A. Blanchard, of San Jose, of counsel), for respondents.

PRESTON, J. On April 30, 1925, under the trade-name of Aristocrat Distributing Company, one J. B. Vallen entered into a contract in writing with Chas. A. Merritt and Chas. A. Parlier, a copartnership doing business under the name of Merritt & Parlier, with reference to the sale and delivery by the former to the latter of a certain number of dishwashing machines. The contract need not here be set out other than to state that it was never fulfilled on the part of the Aristocrat Distributing Company, and there is no pretense that its covenants were observed. At the time of the making of the contract, and as a part of the transaction, Merritt & Parlier accepted two drafts or trade acceptances drawn by the Aristocrat Distributing Company, payable to themselves, alike except as to date of maturity, for $420 each, and payable 60 and 90 days after date, respectively. The material part of the earliest of these acceptances is here set forth:

> "No. ——. Los Angeles, Calif., 4/30, 1925, date of sale. $420 to Merritt & Parlier, San Jose, Calif., on June 30th, 1925. Pay to the order of ourselves at Los Angeles, Calif., the sum of four hundred twenty and 00/100 dollars. The obligation of the acceptor hereof arises out of the purchase of goods from the drawer, maturity being in conformity with original terms of purchase. Accepted at San Jose, Cal., dealer's town, on 4/30, 1925, date of order. Payable through Security State Bank, San Jose, Cal., dealer's bank. Merritt & Parlier, Trade-Name of Acceptor. By Chas. A. Merritt, Authorized Acceptor. Aristocrat Distributing Co., J. B. Vallen."

[1, 2] Plaintiff, alleging itself to be a holder in due course (Civ. Code, § 3133) of these instruments, sued the defendants as acceptors thereof for the amounts specified therein. Defendant copartnership, pleading the nonnegotiability of said instruments, introduced and proved an uncontradicted defense to said obligations unless plaintiff can be said to be an innocent purchaser thereof for value. Plaintiff showed a payment of $786.90 for said instruments and that it was ignorant of all infirmity in them. The whole question turns upon the negotiability or nonnegotiability of said drafts, and this question must be determined from the face of the instruments themselves. International Finance Co. v. Northwestern Drug Co. (D. C.) 282 F. 920. The question is further refined by the construction to be placed upon the above clause, reading:

> "The obligation of the acceptor hereof arises out of the purchase of goods from the drawer, maturity being in conformity with original terms of purchase."

In other words, is said clause the expression of a contingency as to the maturity of the acceptances, or does it merely refer to the consideration for which they were given? Particularly, does the expression, "maturity being in conformity with original terms of purchase," refer to the date set up in the body of the trade acceptances, or does it refer to the underlying contract between the parties? It will be observed that these acceptances were made payable to the drawers themselves. The question further arises: For what reason were these paragraphs inserted? Without them the instruments are perfect trade acceptances, negotiable in form in every respect. If these paragraphs were not intended to make the collateral agreement a part of the instruments, then they are a fraud upon the acceptors, who had a right to believe that they would mature only as in said contract provided.

We are fortunately not without assistance in the proper construction of these instruments, for the identical question was presented to the highest courts in both the states of Minnesota and Texas. It seems that the representatives of this patented article, the Aristo dishwashing machine, have in other states been long on promises, short on performances, and quick on negotiations of the obligations executed by the credulous and unwary merchants. In Minnesota, in the case of Heller v. Cuddy, 172 Minn. 126, 214 N. W. 924, the court held the above paragraph to be "a statement of the transaction which gives rise to the instrument" (Civ. Code, § 3084), saying:

> "So there is no ground for the contention that this statement in the acceptances put the plaintiffs upon inquiry concerning the terms of the underlying contract of purchase or its status at the time being with respect to performance or breach by the parties thereto. The situation is very different from that presented by an instrument which by reference makes another and underlying contract a part of itself and so becomes subject to its terms. That was the case in King Cattle Co. v. Joseph, 158 Minn. 481, 198 N. W. 798, 199 N. W. 437."

It will be seen from the above quotation that if the instruments here under consideration make the underlying contract a part of themselves, their negotiability is thereby destroyed. As above intimated, we are of the opinion that the said paragraph does make the underlying contract a part of said instruments for the purpose of determining the maturity date thereof, which may be different from that set forth in said instruments themselves. In this connection we are constrained to disagree with the opinion announced in the above-quoted case. We are in accord, however, with the reasoning set forth in Lane Co. v. Crum (Tex. Com. App.) 291 S. W. 1084, which is also a case involving the identical language here under consideration. In that case there was in the Court of Civil Appeals (284 S. W. 980), a majority opinion in accord with the Minnesota holding, to which there was a dissenting opinion by Mr. Justice Stanford. The Supreme Court, however, adopted the reasoning of Mr. Justice Stanford, in the following language:

> "We agree with the conclusion reached by Associate Justice Stanford in his dissenting opinion as to the legal effect of the clause just quoted. In our opinion the clause has effect to render the trade acceptances nonnegotiable under the law merchant as well as under the Negotiable Instruments Act (Vernon's Ann. Civ. St. 1925, arts. 5932–5946). The obligation of the acceptor, according to the terms of said clause, arises, not from the instruments themselves, but from a collateral transaction. For an instrument to be negotiable, the obligation of the maker must arise exclusively from the instrument. No obligation arising from a collateral transaction can be imported into the terms of the instrument without destroying the negotiability of the instrument. 8 Corpus Juris, pp. 113, 114. A negotiable instrument has been termed 'a courier without luggage,' whose countenance is its passport. This apt metaphor does not fit these trade acceptances, for the reason they are laden with the equipment of a wayfarer who does not travel under safe conduct. By their express terms, these instruments bear burdens whose nature must be sought for beyond the four corners of the instruments themselves. The clause in question is more than a mere 'statement of the transaction which gives rise to the instrument,' as permitted by paragraph 2, § 3, of article 5932 of the Revised Statutes. So far from being a mere descriptive reference to the transaction, which gave rise to the instrument, the clause, in definite terms, points to that transaction as the source of the acceptor's obligation to pay the amount named in the instrument. The legal effect of the clause is to render the paper subject to all the rights and equities of the parties to the collateral transaction from which the obligation of the acceptor arises. Parker v. American Exchange Bank (Tex. Civ. App.) 27 S. W. 1072; 8 C. J. 124."

A similar case and a similar holding is Continental Bank & Trust Co. v. Times Pub. Co., 142 La. 209, 76 So. 612, L. R. A. 1918B, 632, where the words, "as per contract," appearing in an otherwise negotiable promissory note, were held to qualify the unconditional promise to pay previously expressed therein. Similar words, however, were held not to destroy the negotiability of an instrument in National Bank v. Wentworth, 218 Mass. 30, 105 N. E. 626. The courts do not differ as to the legal principle involved, but differ as to the meaning to be assigned to the language then under review. The question has been stated as follows:

> "Whenever a bill of exchange or a promissory note contains a reference to some extrinsic contract in such a way as to make the bill or note subject to the terms of that contract, as distinguished from a reference importing merely that the extrinsic agreement was the origin of the transaction or constitutes the consideration of the bill or note, the negotiability of the instrument is destroyed."

See, to this effect, Northwestern Nat. Ins. Co. v. Southern States, etc., Co., 20 Ga. App. 506, 93 S. E. 157.

The principle has again been stated that by the law merchant one of the principal elements of negotiability is certainty of payment, and any words of the instrument rendering payment conditional or uncertain destroy it as a negotiable instrument. Greenbrier Valley Bank v. Bair, 71 W. Va. 684, 77 S. E. 274. In our own Code (section 3085, Civil Code) it is provided:

> "An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

Somewhat in line with this reasoning is the case of Glendora Bank v. Davis et al. (Cal.

Sup). 267 P. 311, where the court held the following language to destroy the negotiability of the instrument:

> "This note is given in payment of merchandise and is to be liquidated by payments received on account of sale of such merchandise."

The doctrine of such cases as Flood v. Petry, 165 Cal. 309, 132 P. 256, 46 L. R. A. (N. S.) 861, and Pratt v. Dittmer, 51 Cal. App. 512, 197 P. 365, which relates to cases of transfer prior to failure of consideration in executory contracts, is, in view of the construction above announced, not here involved. This conclusion renders also unnecessary a discussion of the question of the sufficiency of the evidence to support the finding of the court that plaintiff had actual knowledge of the infirmity of these instruments.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

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204 Cal. 609

PARKER v. SOUTHERN PAC. CO. et al.
(S. F. 12340.)

Supreme Court of California. July 30, 1928.

1. Railroads 🔑348(4)—Failure to comply with law relative to signals on approaching highway crossing is prima facie negligence of railroad company (Civ. Code, § 486).

Failure to comply with Civ. Code, § 486, prescribing duties of operators of train in ringing bell and blowing whistle on approaching a highway crossing, is prima facie negligence on the part of the railroad company.

2. New trial 🔑103—Granting new trial for newly discovered evidence not relating to issue of contributory negligence held error, in case evidence on such issue supported general verdict.

Where special findings and general verdict in action for injury to automobile passenger in collision with train were such that it could not be said that jury did not pass on issue of contributory negligence, the granting of a motion for new trial on ground of newly discovered evidence having no bearing on such issue *held* error, in case evidence on issue of contributory negligence was sufficient to support general verdict.

3. Railroads 🔑324(1)—Approach to railroad crossing is warning of danger which traveler must notice.

An approach to a railroad crossing is in itself a warning of danger of which traveler is bound to take notice.

4. Railroads 🔑327(1)—Motorist on parallel highway, in view of railroad track, has duty of making observation before approaching crossing.

Where view of railroad track from parallel highway is unobstructed, it is duty of motorist to see what can be seen before approaching crossing, and it is not due care to assume that trains are operated on track only in one direction.

5. Railroads 🔑350(21)—Determination of automobile passenger's duty in approaching railroad crossing is generally for jury.

Duty of passenger in automobile when approaching railroad crossing must rest upon its own facts, and determination of those facts as a general rule is one for jury.

6. Railroads 🔑350(21)—Contributory negligence of automobile passenger in collision with train at crossing held for jury.

Contributory negligence of passenger in automobile in relation to collision with train at railroad crossing *held* for jury.

7. New trial 🔑102(3)—Diligence in procuring alleged newly discovered evidence held insufficient to warrant new trial.

Diligence in procuring alleged newly discovered evidence *held* insufficient to authorize granting of new trial on such ground.

8. New trial 🔑6—Discretion of trial court in granting new trial is legal one.

Discretion of trial court in granting a new trial is a legal one, and the proper exercise thereof presents a question of law.

Department 2.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by Marie N. Parker against the Southern Pacific Company and another. From an order granting a motion for a new trial, defendants appeal. Reversed.

L. L. Cory, of Fresno, for appellants.

Fenston, Williams & Hansen and Christian Hoeppner, all of Fresno, for respondent.

SHENK, J. This is an appeal by the defendants from an order granting the plaintiff's motion for a new trial. The motion was made on the usual statutory grounds, and was based on affidavits purporting to set forth newly discovered evidence. The order did not specify that the motion was granted on the ground of the insufficiency of the evidence to support the verdict.

The action was brought to recover damages for personal injuries sustained by the plaintiff as the result of a collision between the automobile in which she was riding as a guest and south-bound passenger train No. 84 of the defendant, known as the "Fresno Flyer," at the Ashland avenue crossing near Muscatel, which is about 5½ miles north of Fresno, in unincorporated territory. The Ashland avenue crossing is a meeting point for the north-bound and south-bound trains, and at that point comprises a double track, consisting of a main line track (the easterly track) and a passing or switch track. The track beds are about 5 feet higher than the highway level. The accident occurred on a bright and clear Sunday, October 4, 1925, at about 2:30 o'clock in the afternoon, which was the scheduled meeting time of the two trains at or near Muscatel. The driver of the car was Mrs. Maud Merrill Miller, at whose right the plaintiff was sitting. In the rear seat were Mrs. Miller's husband and Mrs. Johanna C. Merrill, her mother. The motorcar was proceeding from the north along the state highway on the westerly side of and parallel with the railroad right of way. The driver's intention was to cross into Ashland avenue at the point mentioned. The plaintiff testifies that they proceeded southerly toward the Ashland avenue crossing. She saw the north-bound passenger train No. 67 approaching the crossing from the south. By the time they had reached the crossing, the rear end of the north-bound train had passed over the crossing, moving slowly. Mrs. Miller turned to the left off the highway and approached the railroad tracks. The plaintiff testified that she listened and looked in both directions to hear or see if a train was approaching on either track, heard nothing and saw nothing except the departing north-bound train. Mrs. Miller proceeded to cross the tracks, and almost as soon as the front wheels were over the first rail of the main line track the automobile was struck by the locomotive of south-bound train No. 84. Mrs. Merrill was killed, and the other three occupants of the car received various injuries.

There are no natural obstructions to a clear view of a train approaching from either direction. The engineer of train No. 84 testified: "We were passing the rear end of No. 67 when they started up onto the crossing, the first that I saw of them." Train No. 67 had been proceeding along the passing track at the rate of 5 or 10 miles an hour. The crew of train No. 84, which had the right of way over the main line track, testified that the train (No. 84) was going at from 40 to 45 miles an hour. Members of the crew testified that the crossing whistle was blown at the Ashland avenue whistling post, which is 1,320 feet back from the crossing, and that the bell had been ringing continuously and was ringing at the time of the accident. The engineer testified that after the accident he shut off the bell ringer. Certain of the plaintiff's witnesses testified that no whistle or bell was heard. Three special issues were submitted to the jury: "No. 1. Did the engineer upon approaching the crossing blow the whistle on the engine at or about the whistling post?" to which the answer was "Yes." "No. 2. Was the bell of the engine ringing immediately before and at the time of the accident?" Answer: "Yes." "No. 3. Was the train of the defendant Southern Pacific Company moving at an excessive rate of speed as it approached the crossing?" to which nine of the jurymen answered "No" and three "Yes." The jury found a general verdict for the defendants. The pleadings presented the issue of contributory negligence.

It is not claimed on this appeal that there was any error during the course of the trial or that the motion for a new trial was granted on any ground other than that of alleged newly discovered evidence. The defendants contest the granting of the motion for a new trial on the grounds: (1) That the accident happened because of contributory negligence on the part of the plaintiff, as determined by the verdict of the jury, and that the alleged newly discovered evidence had no bearing on the plea of contributory negligence; (2) that the affidavits upon which the motion for a new trial was granted were not sufficient in themselves to justify the order of the court, because the alleged newly discovered evidence was cumulative merely, and was not such as to render a different result probable on a retrial; and (3) that a want of diligence is shown in not producing the evidence at the trial.

[1-6] As to the first point, it is contended by the defendants that the general verdict determined the issues in their favor; one of these issues being the alleged contributory negligence of the plaintiff. The plaintiff replies, first, that the special issues submitted to the jury and the answers thereto show that the general verdict must have been predicated upon the absence of negligence on the part of the defendants and not on the contributory negligence of the plaintiff; and, secondly, that, assuming negligence on the part of the driver of the motorcar, the evidence does not establish negligence on the part of the plaintiff, a passenger in the car. As to the first reply of the plaintiff, it is observed that the complaint charges negligence in general terms. Section 486 of the Civil Code prescribes the duties of the operators of the train in ringing the bell and blowing the whistle on approaching a highway crossing. It is therein provided that the bell must be rung at a distance of at least 80 rods from the place where the railroad crosses the highway, and must be kept ringing until it crosses the same, or the steam whistle must be sounded, except in cities, at a like distance, and be kept sounding at intervals until it has crossed the highway. Failure to comply with this regulation is prima facie negligence on the part of the railroad company. Orcutt v. Pacific Coast Ry. Co., 85 Cal. 291, 24 P. 661. But blowing the whistle "at or about the whistling post," as the jury found was done in answer to question No. 1, and the ringing of the bell "immediately before and at the time of the accident," as the jury found was

done in the answer to question No. 2, were not sufficient to constitute findings that the Code section was fully complied with. In other words, the special findings are not comprehensive enough to amount to a conclusion on the part of the jury that the bell was ringing continually from a point 80 rods back from the crossing, or that the whistle was sounded at intervals for a like distance. While the special findings are, of course, not inconsistent with the general verdict herein rendered on the other hand, they would not necessarily be inconsistent with a general verdict for the plaintiff if, on the issue of the alleged negligence of the defendants, the jury had concluded, on sufficient evidence, that the defendants had otherwise acted in violation of the Code section. Under this state of the record it cannot be said that the jury did not pass upon the issue of the contributory negligence of the plaintiff. Such being the case, and as the alleged newly discovered evidence had no pertinency to the issue of contributory negligence, the trial court committed prejudicial error in granting the motion for a new trial on the ground of the newly discovered evidence alone if the evidence on the issue of contributory negligence was sufficient to support the general verdict for tho defendants.

Therefore, as we are to presume that the motion was not granted on the ground that the evidence was insufficient to support the verdict (Biaggi v. Ramont, 189 Cal. 675, 209 P. 892; section 657, Code Civ. Proc.), we then proceed to discover whether there is any substantial evidence of contributory negligence on the part of the plaintiff. In determining the responsibility of the plaintiff in the premises, the situation in which she was placed by the conduct of the driver of the car must be adverted to. It is the settled law of this state that an approach to a railroad crossing is in itself a warning of danger of which the traveler is bound to take notice. See N. Y. Oil Co. v. United Railroads, 191 Cal. 101, 215 P. 72; Griffin v. San Pedro, L. A. & S. L. R. R. Co., 170 Cal. 772, 151 P. 282, L. R. A. 1916A, 842; Chrissinger v. Southern Pacific Co., 169 Cal. 619, 149 P. 175. When, as in the present case, the view of the railroad track from the parallel highway is unobstructed, it is the duty of the motorist to see what can be seen, and it is not due care to assume that trains are operated on the track only in one direction. Klusman v. Pacific Electric Ry. Co., 190 Cal. 441, 213 P. 38. The plaintiff in this case took a lively interest in her situation as her party approached the Ashland avenue crossing. She testified that when they were nearing the crossing the motorcar in which she was riding was going slowly and could, she thought, be stopped instantly; that she looked up and down the track to ascertain whether a train was approaching on the second track; that she knew there might be a train coming on the main track, and she took every precaution to observe whether a train was approaching from the north or the south; and that she saw no train except the slowly moving train No. 67 as the rear coach thereof was from 125 to 150 feet north of the crossing. Notwithstanding her realization that a train might be approaching on the main track, and that the driver might, by starting up her car to cross that track, plunge the party, including the plaintiff, into the jaws of death, she made no remonstrance and uttered no warning to the driver of the danger in entering upon the perilous position on the track. It is impossible to lay down a general rule as a test of a passenger's responsibility under such circumstances. At times it might be highly improper to suggest any course of action on the part of the driver. At other times the circumstances might be such as to charge the passenger with some duty to suggest caution or otherwise endeavor to protect himself. See Parmenter v. McDougall, 172 Cal. 306, 156 P. 460; Stewart v. San Joaquin L. & P. Corp., 44 Cal. App. 202, 186 P. 160. Each case must rest upon its own set of facts, and the determination of those facts, as a general rule, is one for the jury. Stewart v. San Joaquin L. & P. Corp., supra. On the record before us it cannot be said that the jury might not find that the plaintiff was in some degree at fault in not apprising the driver of the impending danger.

The contention of the defendants to the effect that the alleged newly discovered evidence was wholly cumulative is well taken. It bore entirely on the question of the alleged negligence of the defendants in the operation of the train No. 84, and particularly as to the giving or failure to give the required signals and as to the speed of that train. The affidavit of Ruth E. Gall set forth that on the day in question she was driving her car near the scene of the accident; that she saw quite a crowd of people assembled about the wrecked motorcar; that she stopped her car and joined the observers; that she knew, recognized, and spoke to the plaintiff, and was requested by the latter to telephone to the plaintiff's friends; that the affiant recognized among the bystanders and spoke to Miss Zena B. Bradley and her sister, Mrs. J. L. C. Smith, both of whom she theretofore had known; that in December, 1925, or January, 1926, the plaintiff called the affiant on the telephone and asked her what information she could give or what knowledge she had concerning the accident; that affiant told the plaintiff that she knew nothing of the facts of the accident or of the plaintiff's injuries; that she did not tell the plaintiff that she had seen Miss Bradley or Mrs. Smith at the scene of the accident; that several days after the trial, and on or about June 21, 1926, the plaintiff and her attorney called at the home of the affiant, at Fresno, and that then for the first time the affiant told the plaintiff of having met Miss Bradley and Mrs. Smith at the scene of the accident. Miss Bradley, Mr. and Mrs. Smith, and Sydney N. Jacobs stated in their affidavits that they were traveling in a southerly direction in an automobile on the highway north of Ashland avenue and parallel with the railroad tracks; that when they were a short way north of the same the south-bound train overtook and passed them; that no whistle was blown nor bell rung as the train passed them; and that the train was traveling about 60 miles per hour. Much evidence was introduced by both parties on the question of whether the required signals were given and as to the speed of the train. There was the positive evidence of ten or more witnesses on behalf of the defendants that the signals were given. There was also evidence that the south-bound train was traveling at the rate of from 40 to 45 miles per hour. On behalf of the plaintiff, there was evidence that the signals were not given, or, if given, were not given as required by the statute. A storekeeper near the crossing testified that he heard no whistle until the collision occurred, and that the south-bound train was going about 50 miles per hour. Witness Minoni was in the store at the time of the crash. He heard the bell and the whistle from the train on the passing track, but heard no whistle from the south-bound train until the accident occurred. The plaintiff testified that she did not hear the bell rung or the whistle blown on either train up to the time of the accident. Mrs. Miller, the driver of the car, testified that she heard the bell ringing on the train No. 67, but that she heard no signal, by bell or whistle, from the south-bound train. John M. Miller, her husband, testified that he heard no signal from either train.

[7] From the evidence taken at the trial with reference to signals, and the alleged newly discovered evidence on the same subject, if it had gone to the jury, it is difficult to perceive how the verdict would have been different. But, assuming this point to be a debatable question, we pass to the question which in itself may well be terminative of this appeal; namely, whether the alleged newly discovered evidence could not, with reasonable diligence, have been discovered and produced at the trial. The accident occurred on October 4, 1925. The plaintiff saw and spoke to her friend, Miss Gall, at the time of the accident. The plaintiff interviewed Miss Gall early in the year 1926 and asked her what she knew concerning the accident. With the reply that "she knew nothing of the facts of the accident," the plaintiff remained content, and did not pursue the subject further. She did not, as diligence would prompt, question Miss Gall concerning those who were present at the time of the accident, or the circumstances attending the same. The trial was commenced on June 9, 1926, and was concluded three days later. It was through this same Miss Gall, with whom the plaintiff conversed at the time of the accident, and who was interviewed by the plaintiff in January, 1926, that the plaintiff claims she first discovered, on June 21, 1926, that the Smiths, Mr. Jacobs, and Miss Bradley were at or near the crossing at the time the accident occurred. No reason is advanced or excuse offered for not ascertaining from Miss Gall, prior to the trial, the fact that these four persons might know something of the matters concerning which they are claimed to have had knowledge. The means of ascertaining the facts were readily available to the plaintiff through information possessed by her long prior to the trial.

[8] Diligence is a relative term. It is incapable of exact definition, and depends upon the particular circumstances of each case. Heintz v. Cooper, 104 Cal. 668, 38 P. 511; 20 Cal. Jur. 87. Conceding to the trial court a wide discretion in granting a new trial, nevertheless that discretion is a legal one, and the proper exercise thereof presents a question of law. On the record in this case, it must be concluded (1) that the alleged newly discovered evidence related solely to the alleged negligence of the defendants, whereas there was sufficient evidence upon which the jury could find against the plaintiff and for the defendants on the issue of contributory negligence; (2) that the alleged newly discovered evidence was cumulative, and it cannot be said that a different result would have been accomplished as to the issue of the negligence of the defendants if the said evidence had been before the jury at the trial; and (3), assuming that the jury might have found for the plaintiff on the new evidence as to the alleged negligence of the defendants, the proper diligence was not shown in the discovery and production thereof.

The order is reversed.

We concur: RICHARDS, J.; LANGDON,. J.

205 Cal. 26

LOGAN v. THORNE et al.

THORNE et al. v. LOGAN et al.

(L. A. 9484.)

Supreme Court of California. Aug. 18, 1928.

As Modified Sept. 14, 1928.

1. Husband and wife 🔑266—Husband may make gift of community property to wife without written consent of wife (Civ. Code, § 172a).

Civ. Code, § 172a, requiring wife to join with husband in executing any instrument by which community real property is leased for longer period than one year or conveyed, does not preclude husband from making gift of community property to wife without written consent of wife.

2. Husband and wife 🔑266—Amendment exempting transfer between spouses from statute requiring wife to join husband in transferring community realty did not change statute, but exempted gifts between spouses from statute (Civ. Code, § 172a).

Amendment to Civ. Code, § 172a, providing that statute shall not apply to lease or transfer of realty between husband and wife, *held* not to change force or effect of original section, providing that wife must join with husband in executing lease or conveyance of community realty, but was intended to exempt gift between spouses from letter of statute.

3. Husband and wife 🔑266—Wife, not signing husband's assignment to her of realty, found not in fraud of creditors, could quiet title against husband's attaching creditors.

Where husband and wife entered into agreement for purchase of realty, and husband assigned all interest in agreement to wife in writing, and court found that assignment was not in fraud of husband's creditors, wife was entitled to prevail in action to quiet title against husband's creditors attaching realty as property of husband, though assignment was not signed by wife.

Department 1.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action to quiet title by Elsie M. Logan against L. C. Thorne and others, in which defendant named and another filed cross-complaint against plaintiff named and another. From a judgment for plaintiff and cross-defendants, defendants and cross-complainants appeal. Affirmed.

Davis & Thorne, of Los Angeles, for appellants.

James Westervelt, of Los Angeles, for respondents.

CURTIS, J. Action to quiet title to real property. W. G. Logan and Elsie M. Logan were at all of the times herein mentioned husband and wife. On the 27th day of January, 1919, as such husband and wife, they entered into an agreement with Elmer and Georgia M. Smith, whereby they contracted to purchase said real property from the Smiths. This agreement was somewhat complicated, but it is not necessary, as we view this case, to set forth the details thereof. Thereafter, and on January 23, 1922, the said W. G. Logan by a writing signed and acknowledged by him, assigned to his wife, Elsie M. Logan, all his right, title, and interest in and to said agreement. This assignment was not signed by Mrs. Logan. It was signed and acknowledged by her husband, but never recorded. The Smiths gave their written assent to this assignment from Logan to his wife, and on May 26, 1923, they conveyed by grant deed said real property to the said Elsie M. Logan as her separate property. On September 7, 1923, said deed was recorded in the office of the county recorder of the county of Los Angeles, in which county the said real property is situated. On December 31, 1925, the appellants L. C. Thorne and the Western Wholesale Drug Company, a corporation, filed an action against W. G. Logan, seeking to recover from him a money judgment, and caused a writ of attachment to be issued therein and levied upon said real property as the property of the said W. G. Logan. The present action was then instituted by Mrs. Logan, claiming to be the sole owner of said real property, to quiet her title against appellants, who claim under said attachment proceedings. In addition to the main question, which we will hereafter consider, the appellants at the trial of said action claimed that the conveyance to plaintiff was a fraud upon the creditors of W. G. Logan and for that reason it should be set aside. The trial court found against appellants upon this claim, and appellants now concede that, as there was a conflict of evidence regarding the question of fraud, the finding of the trial court thereon is conclusive upon this court, and that the question of fraud has been eliminated from this controversy.

The only question, therefore, involved on this appeal, is the validity of the written assignment made by W. G. Logan to his wife, whereby he transferred or attempted to transfer to her his interest in said agreement with the Smiths. Appellants rely upon section 172a of the Civil Code as in force prior to its amendment in 1925, and the case of Bone v. Dwyer, 74 Cal. App. 363, 240 P. 796. Said section read as follows:

> "The husband has the management and control of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or incumbered. * * *"

In Bone v. Dwyer, supra, Dwyer assigned to Bone his interest in an agreement with one Maria E. Lindahl for the purchase and sale of certain real property, which interest was the community property of Dwyer and wife. The wife did not join in said assignment. Thereafter a deed of said real property was made by the said Lindahl to Bone, the assignee of Dwyer. The action was brought by Bone against Dwyer and wife to quiet his title to said real property, and it was held, quoting from the syllabus:

> "The transfer or conveyance from defendant husband to plaintiff, in whatever form or words it was made, or purported to be made, not having been signed by defendant wife, was wholly insufficient to assign, transfer or convey to plaintiff an indefeasible interest in and to the contract of purchase, or the real property therein described, and left the right of defendant wife to maintain or defend her interest or title to the premises in the same condition as though the instrument had not been executed."

It is quite apparent that the facts in the case of Bone v. Dwyer, supra, are materially different from those in the present action. In that case the purported conveyance was adverse to the interest of the wife, and was an attempt to deprive her of her rights in the community property.

[1-3] In the present action the assignment or conveyance was in favor of the wife, and by it the husband sought to augment her rights and make her the sole owner of the interest in the real property theretofore held by them as husband and wife. Section 172a of the Civil Code was enacted for the protection of the wife and of whatever rights she might have in the community property. There is nothing in said section which would preclude or prevent the husband from making a gift of the community property to his wife without the written consent of the wife. The precise question was before this court in the case of Kaltschmidt v. Weber, 145 Cal. 596, 79 P. 272, where the court in construing section 172 of the Civil Code, prior to its amendment in 1901, used the following plain and significant language:

> "There can be no doubt that the husband may make a gift of the community property to the wife, and that the effect of such gift will be to transmute it into her separate estate. The provision in section 172 of the Civil Code, that he cannot make a gift of community property unless the wife, in writing, consent thereto, is a provision for her benefit and protection, and it has no application to the case of a gift by the husband directly to the wife."

The fact that section 172a of the Civil Code was in 1925 amended so as to include the following proviso:

> "Provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife"

—does not in any way change the force or effect of the original section of the Code as it stood prior to said amendment. Evidently the Legislature out of an abundance of caution enacted this amendment in order to expressly exempt gifts between the spouses from the strict letter of the section of the Code thus amended. The amendment did not in fact add anything to or change the real meaning of the section as it stood prior to said amendment. It simply expressly made a part of the section that which, before the amendment, was clearly implied therefrom.

The judgment is affirmed.

We concur: PRESTON, J.; SEAWELL, J.

NATHAN v. NATHAN. (S. F. 12315.)

Supreme Court of California. Aug. 21, 1928.

Divorce ⚷40—Spouses' agreement to live apart held to preclude divorce for desertion (Civ. Code, §§ 99, 107).

Spouses' agreement to live apart, executed before cause of action for divorce on ground of desertion accrued, under Civ. Code, § 107, effected a separation by consent, within section 99, so as to preclude divorce on such ground.

Department 2.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Alfred Nathan against Hattie Nathan. Verdict for plaintiff. From an order granting defendant's motion for a new trial, plaintiff appeals. Affirmed.

B. M. Jackson, of San Francisco, for appellant.

Walter McGovern, of San Francisco, for respondent.

SHENK, J. This is an appeal from an order granting the defendant's motion for a new trial. The action is one for divorce, and was brought on the ground of the defendant's alleged willful desertion of the plaintiff. The motion was granted on the ground of the insufficiency of the evidence to justify the decision.

The evidence as to the alleged desertion was sharply in conflict, and no abuse of discretion in making the order complained of appears. The order would be justified, if for no other reason, upon the proper construction of a contract of separation entered into between the parties on December 26, 1924. The complaint alleged the desertion of the defendant on or about the 4th day of September, 1924. The plaintiff testified that he and his wife separated on or about that date. The defendant testified by deposition that the separation occurred on December 4, 1924. The agreement of December 26, 1924, recited the desire of the parties to confirm their separation, and it was mutually agreed that they live separate and apart one from the other. This agreement effected a separation by consent, as contemplated by section 99 of the Civil Code. Because of its terms, desertion would not result, notwithstanding the continued separation of the parties. At the time the contract was entered into, the cause of action on the ground of desertion had not accrued under section 107 of the Civil Code.

In this respect the case is distinguishable from Walker v. Walker, 14 Cal. App. 487, 112 P. 479, relied upon by the plaintiff. In that case the cause of action for desertion had accrued at the time of the execution of the agreement involved therein. That case is further distinguishable for the reason that the agreement in that case was held to be one merely adjusting the property rights of the parties; whereas the agreement in the present case not only effected a property settlement, but also confirmed and consented to the separation of the parties.

The order is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

205 Cal. 29

PEOPLE v. MALONE. (Cr. 3122.)★

Supreme Court of California. Aug. 20, 1928.

Rehearing Denied Sept. 17, 1928.

1. Homicide ⚷180—Insanity not being pleaded and intoxication no defense exclusion of evidence defendant had long been drunk held not error.

In murder trial, refusal of court to permit introduction of evidence showing length of time defendant had been drunk prior to commission of the crime, drunkenness under Pen. Code, § 22, being no excuse for crime, and in absence of plea of insanity, *held* not error.

2. Homicide ⚷339—Excluding evidence showing how long before murder defendant was drunk, if error, held harmless; record showing he had been drinking for two weeks prior thereto.

Exclusion of evidence in murder trial, showing how long prior to killing defendant had been drunk, where there was sufficient and substantial evidence in the record showing he had been drinking heavily for two weeks before crime, if error, *held* harmless.

3. Criminal law ⚷829(1)—Court did not err in murder trial by refusing instructions on subject covered previously by instruction including statute provisions (Pen. Code, § 22).

In murder trial, court did not err in refusing to give offered instructions, in amplified form of Pen. Code, § 22, on subject fully covered by instructions already given, wherein provisions of the Code section were quoted.

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

John Joseph Malone was convicted of murder in the first degree, and he appeals. Affirmed.

L. V. Beaulieu, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn and John W. Maltman, Deputy Atty. Gen., for the People.

RICHARDS, J. This appeal is from a judgment of conviction of the defendant upon a charge of murder in the first degree, based upon the verdict of the jury finding him guilty of that offense without recommen-

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★For opinion on rehearing, see 270 P. 196.

dation, and from an order denying the defendant a new trial.

The undisputed evidence in the case showed that the defendant and his victim were husband and wife, and that they had become separated some time before the homicide, and that such separation had been caused in part, at least, by the drinking habits of the defendant. After such separation, the wife obtained employment in a drug store, which also contained a soda fountain and luncheon counter, in the city of Los Angeles, where she was engaged in waiting upon customers on the morning of December 7, 1927, when the defendant entered the place in a state of intoxication and demanded that his wife should go with him somewhere, which she refused to do, and, in connection with her refusal, reproached him with having been drinking; whereupon the defendant went out, and shortly thereafter returned, armed with a .32 Colt's automatic pistol, seeing which his wife undertook to flee, but was followed by the defendant into the kitchen, where she was fired upon and immediately slain by him, following which he attempted unsuccessfully to kill himself. Upon being brought to trial, the defendant entered a plea of not guilty, but did not enter a plea of not guilty by reason of insanity, nor did the defendant during the trial rely upon insanity as a defense, but seems to have solely depended upon the undisputed showing that he had been drinking and was drunk at the time of the homicide, in an effort to mitigate the imposition of the extreme penalty for his crime.

[1, 2] The first contention on which the defendant relies upon this appeal is that the trial court was in error in refusing to permit the introduction of evidence showing the length of time during which the defendant had been drunk prior to the commission of the crime. We discover no reversible error in the ruling of the court in that regard, for the twofold reason that under section 22 of the Penal Code drunkenness is no excuse for crime, and that, while under that section evidence is admissible showing the state of the accused as to intoxication at the time of the commission of the crime, in order to determine the purpose, motive, or intent with which it was committed, the question as to how long he had been in that state of intoxication is entirely immaterial, in the absence of a plea of insanity, or any attempt on the part of the defendant during the trial to show that by reason of a long-continued state of intoxication he had reached such a besotted condition at the time of the commission of the homicide as to be practically insane. The evidence in question, not being offered for any such purpose, but merely in attempted mitigation of the crime, was properly excluded by the trial court. People v. Allen, 166 Cal. 723, 729, 137 P. 1148, 47 L. R. A. (N. S.) 892, Ann. Cas. 1915B, 1039. Even if such evidence had been admissible, however, any error on the part of the trial court in its rejection would have been harmless, in view of the fact that there is sufficient and substantial evidence in the record showing that the defendant had been drinking heavily for about two weeks before the date of his crime.

[3] The defendant's next contention is that the trial court was in error in refusing to give certain offered instructions, which he identifies by reference to certain pages of the clerk's transcript, but which he neither quotes nor offers any argument, reason, or authority whatever for his claim that the trial court was in error in refusing to give them. It appears, however, by reference to the designated pages in the clerk's transcript, that these instructions bore upon the question as to the extent to which intoxication is an excuse for crime. These instructions purported to be merely an amplification of the provisions of section 22 of the Penal Code, and since the trial court, not only in the instruction which it gave quoted the said section of the Code, but also in other instructions fully explained to the jury the scope and meaning of the same, it is clear that the court was not in error in refusing to give the defendant's offered instructions upon a subject which had been fully covered by the instructions already given.

The record herein discloses no sufficient reason for a reversal of the conviction of the defendant for a brutal and unprovoked murder and the imposition of the death penalty following such conviction.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

93 Cal. App. 42

PEOPLE v. KUDER et al. (Cr. 3165.)

Supreme Court of California. Aug. 27, 1928.

1. Licenses 🔑42(3)—Indictment for violation of Corporate Securities Act should expressly allege defendants' relationship to corporation whose stock was sold.

Indictment should expressly allege relationship which defendants bore to corporation, stock of which was alleged to have been issued and sold, and proceeds misapplied, in violation of Corporate Securities Act (St. 1917, p. 673).

2. Criminal law 🔑1186(4)—Error in upholding indictment for violating Corporate Securities Act, failing to expressly allege defendants' relationship to corporation, held not reversible, where relationship was established at trial (Const. art. 6, § 4½).

Where relationship between defendants, prosecuted for violating Corporate Securities Act, and corporation, whose stock was sold and proceeds misapplied, was fully established at trial, error in not sustaining demurrer to indictment for defect in failing to expressly allege relationship between defendants and corporation did not result in miscarriage of justice, under Const. art. 6, § 4½, relating to errors in matters of pleading and procedure.

In Bank.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

On hearing. Petitions for hearing denied. For former opinion, see 269 P. 198. See, also, 266 P. 337.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

J. M. Friedlander, Corp. Com'r, H. A. I. Wolch, Asst. Corp. Com'r, and Vernon S. Gray, Deputy Corp. Com'r, all of Los Angeles, amici curiæ.

Arthur L. Veitch, of Los Angeles, for respondent Kuder.

Estudillo & Schwinn, of Riverside, for respondents Fishel.

P. N. McCloskey, of San Bernardino, for respondent Luke.

William Guthrie and R. E. Hodge, both of San Bernardino, for respondent Bedford.

PER CURIAM. The several petitions for a hearing in this court after decision by the District Court of Appeal in and for the Second District, Division 2, are denied.

[1, 2] In denying these petitions, however, we desire to state that, in our opinion, the indictment herein was defective through its failure to expressly allege the relationship which these defendants bore to the corporation, the stock of which was alleged to have been issued and sold, and the proceeds thereof misapplied, in violation of the provisions of the Corporate Securities Act (St. 1917, p. 673), and that the demurrer to the indictment should have been sustained upon that ground. Upon the trial of the cause, however, the relationship between these defendants and said corporation was fully established, and, this being so, we are of the opinion that section 4½ of article 6 of the state Constitution, which has relation to errors in matters of pleading and procedure, should be given application to this cause, since, after an examination of the entire cause, this court is of the opinion that the error complained of has not resulted in a miscarriage of justice.

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204 Cal. 653

CITY OF PASADENA v. CHAMBERLAIN, City Clerk. (S. F. 12888.)

Supreme Court of California. Aug. 3, 1928.

1. Statutes 🔑68—Metropolitan Water District Act is general law (St. 1927, p. 694).

Metropolitan Water District Act (St. 1927, p. 694) is a general law, though contemplating course of action which might be confined to municipalities of particular region under present conditions.

2. Statutes 🔑94(2)—Metropolitan water district act is not special law because conferring powers and benefits on residents of municipalities only (St. 1927, p. 694).

That Metropolitan Water District Act (St. 1927, p. 694) confers on residents of municipalities powers and benefits not conferred on residents or owners of property in unincorporated areas within same general territory, with special relation to distribution of water for domestic uses, does not make it a special law.

3. Waters and water courses 🔑182—Metropolitan Water District Act held not unconstitutional as permitting municipality taking initiative to impose duties on or vest powers in other municipalities beyond scope of their charters; "municipal affair" (Metropolitan Water District Act; Const. art. 11, §§ 6, 12, 13).

Metropolitan Water District Act (St. 1927, p. 694) *held* not contrary to Const. art. 11, § 6, as permitting municipality taking initiative in formation of district to impose duties on, or vest powers in, other municipalities beyond scope of those conferred on them by their charters; formation of common purpose for acquisition and distribution of water in large quantities from sources outside such municipalities in accordance with common plan not being a merely municipal affair within sections 12 and 13.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Affairs.]

4. Waters and water courses 🔑182—Metropolitan Water District Act held not unconstitutional as giving persons ultimately affected no voice in formation of district (St. 1927, p. 694).

Metropolitan Water District Act (St. 1927, p. 694) *held* not unconstitutional as giving persons ultimately affected no voice in formation of district, though providing that single municipality may set proceedings in motion, in view of provisions for special election in each municipality to approve initial action taken before act shall be further operative.

5. Constitutional law ⇨284(1)—Statute authorizing water district to collect general taxes within municipalities therein held not contrary to due process clause (Metropolitan Water District Act).

Metropolitan Water District Act (Laws 1927, p. 694) *held* not void as contrary to due process clause of state Constitution in investing such districts with power, through their properly appointed officials, to collect general taxes within municipalities uniting in formation thereof for common purpose of supplying each with water for domestic uses.

6. Waters and water courses ⇨183½—Metropolitan water district board of directors is not special commission, to which Legislature cannot delegate power of taxation (Metropolitan Water District Act; Const. art. 11, § 13).

Board of directors of metropolitan water district, created by St. 1927, p. 694, is not a special commission, to which Legislature cannot delegate power of taxation under Const. art. 11, § 13, but governing body of district.

In Bank.

Application by the City of Pasadena, a municipal corporation, for a writ of mandate requiring Bessie Chamberlain, as City Clerk, to certify to the passage and contents of a certain ordinance. Writ granted.

R. C. McAllaster, City Atty., and J. H. Howard, both of Pasadena, for petitioner.

Ray L. Morrow, of Glendalle, for respondent.

Nowland M. Reid, City Atty., and Edmund J. Callaway, Deputy City Atty., both of Long Beach, and Harry F. Sewell, of Whittier, amici curiæ.

RICHARDS, J. This is a proceeding wherein the city of Pasadena, a municipal corporation, applies for a writ of mandate directed to the respondent, as the city clerk of said city, requiring her, in her official capacity, to certify to the passage and content of a certain ordinance, theretofore adopted by the city council of said city, and to transmit a certified copy thereof to the chief executive officer of each of the several municipalities referred to in said ordinance, in accordance with the terms thereof and of a certain act of the Legislature, known and referred to herein as the "Metropolitan Water District Act," approved May 10, 1927. The respondent herein has appeared to said application and has presented and argued various objections to the validity of said ordinance and of said act. A number of amici curiæ have also filed briefs herein and which will be considered in the course of this opinion.

The Metropolitan Water District Act, adopted in 1927 (Stats. 1927, p. 694), is an act entitled:

"An act to provide for the incorporation, government and management of metropolitan water districts, authorizing such districts to incur bonded debt and to acquire, construct, operate and manage works and property, providing for the taxation of property therein and the performance of certain functions relating thereto by officers of counties, providing for the addition of area thereto and the exclusion of area therefrom and authorizing municipal corporations to aid and participate in the incorporation of such districts."

The act in its body provides for the organization of so-called metropolitan water districts for the purpose of developing, storing and distributing water for domestic purposes, and which districts are to be formed of the territory included within the corporate boundary of any two or more municipalities, which need not be contiguous, and which districts are to be incorporated and organized and thereafter governed, maintained, and operated as in said act provided. Such districts when so incorporated are to be each a separate and independent political corporate entity. The act proceeds to provide that the method for the inception, organization, and incorporation of such districts shall be as follows: The legislative body of any municipality desiring to take the initiative in the formation of such district may do so by the adoption of an ordinance declaring that public convenience and necessity require the incorporation of a municipal water district and that the names of the municipalities proposed to be included within the said district are those specified in said ordinance, which shall also contain an estimate of the preliminary cost and expense of conducting the proceeding for the organization of such district and for the apportionment thereof among the municipalities proposed to be included therein. When the municipality initiating such proceeding has adopted such ordinance it shall be the duty of the clerk of the legislative body thereto to certify to the same and to transmit a certified copy thereof to the executive officer of each of the other municipalities designated therein and which other municipalities are required, within 60 days after the receipt of such certified copy of such ordinance, by the action of the legislative body thereof, to either approve or reject such ordinance without alteration or amendment. The failure of the legislative body of any such municipality to so act upon such ordinance within said period is to be deemed a rejection thereof. Within 120 days after the transmission of such ordinance and after the municipalities named therein have signified by their action or nonaction their adoption or rejection thereof, the legislative body of the initiating city shall call a special election in all of the municipalities, the legislative bodies of which have approved such ordinance, at which election the proposition of the incorporation of such metropolitan water district shall be submitted to the electors residing within such municipalities for their adoption or rejection. The ordinance calling such election shall contain the details relating to the holding thereof in each of the several cities which have approved the original ordinance. Such election may be held concurrently with or may be consolidated with any primary or general election, in which event the precinct, polling places, and election officers of such primary or general election shall be the same for such special election. The majority of the electors voting affirmatively shall be sufficient to cause the adoption of the proposition and to organize and incorporate such water district by each of the respective cities whose electors shall vote thereon and to authorize the governing body of the initiating city to transmit to the secretary of state a certified copy of such proceedings up to and including the holding of such election, together with the result thereof. Within ten days after the receipt of such certificate the secretary of state shall issue a certificate of incorporation declaring such district duly incorporated, and shall transmit to each of the municipalities therein a copy of such certificate of incorporation; whereupon the incorporation of such metropolitan water district shall become effective from the date of the issuance of such certificate or certificates, and such district shall thereupon and thereafter become vested with all the rights, privileges, and powers in said Metropolitan Water District Act provided. Section 5 of said act prescribes with much detail the powers with which such water district and the officers in charge thereof are to be invested, and, generally speaking, they are in substance the same powers with which public utility districts of various sorts have in the past by various legislative acts been invested. Particular reference to certain of these powers will hereinafter be made. The exercise of such powers is by the terms of said act to be intrusted to and performed by and through a board of directors, which shall consist of at least one representative from each municipality which has become, for the purposes stated in said act, an integral part of such water district. In addition to the powers with which said district has, as heretofore stated, been invested, the act provides for the particular powers, and the method of their exercise, which the said board of directors shall possess in order to carry forward the purposes for which such district has been organized. It is not necessary to enumerate herein these powers, nor to set forth the detail of their exercise, and this for the reason that the concluding section of said act provides that "if any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act." We are concerned in this decision with those questions only which arise upon the threshold of the formation of the particular metropolitan water district which has been initiated by the City of Pasadena and with those limited considerations which involve the constitutionality of the act itself as distinguished from the validity of the particular portions of said act and which are to be put to trial after the organization of the district and in the course of the conduct of its various operations as provided for in said act.

[1, 2] The first contention which the respondent makes, and in which she is joined by the several amici curiæ who have appeared herein, is that the Metropolitan Water District Act is not a general law. This contention requires but brief consideration. The act purports to be a general law applicable to all portions of the state of California embracing municipalities which might desire to unite in a larger organization with the object of accomplishing a common purpose which it might not be possible or practical for such municipalities, acting singly or separately, to accomplish. The mere fact that the legislative act contemplated a course of action which might, under present conditions, be confined to municipalities of a particular region, does not militate against the validity of the act in question as a general law. The act does not by its terms attempt any classification, either of the municipalities which may take advantage of its provisions or of the area to which its operation might in the nature of things be confined; but, even had it done so, the act would be none the less a general law under the authority of our decision in the case of Wores v. Imperial Irrigation District, 193 Cal. 609, 227 P. 181, and of the cases cited therein. The respondent, however, insists that the act in question is not a general law for the reason that it confers powers and benefits upon those who reside within the corporate limits of municipalities, with special relation to the distribution of water for domestic uses, which are not conferred upon or made available under said act to those who reside or have their properties within unincorporated areas within the general territory affected by the organization of such metropolitan water district, but outside the municipalities which may elect to combine in the organization and for the purpose specified in said act. We are of the opinion, however, that there is no merit in this contention for the reason, if for none other, that the matter of the distribution of water for domestic uses in cities having compacted populations within limited areas is one which is very different in the detail of its operation and service from that which

would be possible or practical in unincorporated areas occupied by a scattered as contrasted with a compacted population.

[3] The next contention which the respondent and amici curiæ urge against the validity of said act relates to the method provided therein for the initiation of the proceeding for the formation of metropolitan water districts. The respondent argues that to permit one municipality proposing to take the initiative in the formation of such water districts to impose upon other municipalities duties, or to invest such municipalities with powers in the course of the formation of such districts which are not within the scope of the duties and powers of such municipalities, as conferred upon them by the particular terms of their respective charters, would be invalid as in violation of article 11, § 6, of the Constitution, which expressly delegates to chartered cities the right to make and enforce all laws and regulations in respect to their own municipal affairs. This contention raises the question as to whether the general purpose to be subserved by the organization of the metropolitan water district through the co-operation of several municipalities, as contemplated in the terms of said act, is or is not a municipal affair. It may be admitted that, generally speaking, the distribution of water within municipalities would be as to each of such municipalities a municipal affair, but it would be entirely too narrow an interpretation of the purposes and scope of the Metropolitan Water District Act to hold that because the distribution of water for domestic use in each of a number of the municipalities within a designated area is a municipal affair, the formation of a common purpose for the acquisition of water in large quantities from sources outside of such municipalities, and even outside of the area within which they exist, and the distribution of such water, when so acquired, among such cities, in accordance with a common plan, and with a view to achieving equitability in the distribution and use of such water, would in any sense be, as to each or any of such combined municipalities, a municipal affair. The impossibility or impracticability of any one or more of such municipalities acting separately and independently in the acquisition and distribution of such water would seem to argue conclusively that in achieving such object by the means provided for in said act the municipalities engaged therein could not be held to be engaged in the conduct of a merely municipal affair. The language used by this court in deciding a similar question in the case of Pixley v. Saunders, 168 Cal. 152, 141 P. 815, would seem to have exact application to this phase of the present proceeding:

> "The condition above described leads inevitably to the conclusion that while generally the question of sanitation is a municipal affair, in many instances it is one of broader scope, which cannot be adequately handled by the municipal authorities of a single town. Therefore it cannot be said to be a 'local' or 'municipal affair' within the inhibition of sections 12 and 13 [of article 11] of the Constitution above quoted, and it falls within the class of public purposes such as irrigation and reclamation, for which the Legislature has the undoubted authority to provide governmental agencies or districts by general laws."

If, therefore, we are correct in the conclusion that the Metropolitan Water District Act is a general law, and if we are also correct in holding in accord with the foregoing authority, that the general purpose proposed to be accomplished by said act takes it beyond the narrow scope of dealing with a merely municipal affair, it follows irresistibly that the Legislature under the express provisions of section 6 of article 11 of the state Constitution had full power by the passage of said act to impose duties and impress powers upon municipalities other than those provided for in their charters for the purpose of accomplishing the objects contemplated by such legislative act. The objection that the Legislature had no authority to invest one municipality with the power of initiating the proceedings which were expected to result in the formation of a metropolitan water district through the favorable action of other municipalities has not even the merit of novelty, since the state Legislature has with increasing frequency in recent years in the proposed formation of irrigation districts, drainage districts, sanitary districts, water districts and like governmental agencies adopted the plan of investing a few individuals with the power of taking the initiatory steps looking to the formation of such districts affecting wide areas and large numbers or varied groups of individuals, and its action in so doing has been generally upheld.

[4] The contention of the respondent that the act under review is unconstitutional for the reason that the persons who are ultimately to be affected thereby are given no voice in the formation of such district is answered by the terms of the act itself, for, while it is provided therein that a single municipality may set in motion the proceedings for the formation of such water district, the act itself provides that after the initial action is taken, the question of whether or not the residents and electors of each and all of the municipalities within the proposed area shall approve or disapprove the action thus taken is to be committed in each separate municipality to a special election, and as to each the act is not to be further operative until a majority of the electors shall at such special election approve the initiatory proceedings which have thus far been taken.

[5] We have thus disposed of the several questions which arise upon the threshold of the proceedings which have thus far been

taken looking to the formation of the metropolitan water district in question, and we therefore come to the main objection which is urged by the respondent and also by the several amici curiæ against the validity of said legislative act and of the proceedings which have thus far been initiated thereunder. This objection is that under the terms of said act the necessary cost and expenditures incident to the functioning of said metropolitan water district in the way of acquiring large quantities of water from outside sources and of providing for the distribution thereof for domestic uses among the inhabitants of the various municipalities which may elect to come within the terms and be bound by the burdens and be the recipients of the benefits of said act and of the incorporation of said water district thereunder are to be imposed in the form of taxes upon the people of these several municipalities, and are in the nature of assessments to be levied and collected upon their individual properties for benefits conferred and that the imposition of such assessments without an opportunity on the part of the property owners to be heard upon the question as to whether the burden of such assessment shall be imposed, or as to whether it is their desire that their property should receive the benefits which are to follow the imposition of such burdens, renders the entire act unconstitutional and void as contrary to the provisions of both the state and the federal Constitutions which relate to due process of law. This contention presents precisely the same question which was presented to this court in several recent cases. Henshaw v. Foster, 176 Cal. 507, 169 P. 82; Miller & Lux v. Board of Supervisors, 189 Cal. 255, 208 P. 304; In re Orosi Public Utility District, 196 Cal. 43, 235 P. 1004. An examination of these cases will serve to show that the former distinction sought to be drawn between what are governmental and what are proprietary powers to be exercised by public corporations, in so far as the maintenance of these by general taxation is concerned, is fast fading out of our jurisprudence. The most recent case, above cited, aptly expresses this tendency, wherein it says:

> "We take it to be now a generally accepted proposition that, while a municipality, which undertakes to supply those of its inhabitants who will pay therefor with utilities and facilities of urban life, is performing a function not governmental, but more often committed to private corporations * * * with whom it may come into competition, it is, in fact, engaging in business upon municipal capital, and for municipal purposes."

The question presented in that case arose out of the formation of a public utility district under the provisions of the act of the Legislature relating to that subject adopted in 1921. Stats. 1921, p. 906. Under the terms of said act, public utility districts were permitted to be created in unincorporated territory having for their purpose that of supplying the inhabitants of the proposed district with light, water, power, heat and sanitation. It was with reference to such purposes that the language of the court above quoted was employed, and in its use the court indicated that whether such district was to be organized for the purpose of carrying out all or any of the foregoing purposes would be immaterial in determining whether or not the particular purpose to be subserved in the formation of such district was in the nature of a governmental purpose having for its end that of extending to the inhabitants within the area of the district to be formed the use and benefit of certain utilities which they might not be able to attain in any other way, and which from common experience we know would tend to promote the general welfare of the people within such area. The supplying of water for domestic uses within municipalities has grown of recent years to be one of the most common and well-recognized forms of municipal activities wherein public property is employed and wherein public taxation is imposed and collected upon the inhabitants of the municipalities regardless of benefits conferred upon particular property, and by the same method by which taxes are generally levied and collected for the carrying on of the governmental functions of incorporated cities and towns. Municipal corporations, whether organized under special charters or general laws, derive these particular powers from the same legal sources as those which provide for the organization of quasi municipal corporations such as that provided for in this act, and we can perceive no real distinction between the organization of a municipal corporation, strictly so-called, for the carrying forth of the purposes usually committed to such governmental agencies and the organization under legislative sanction of such other governmental agencies as municipal water districts or public utility districts or metropolitan water districts, which, while these may not exercise all of the functions committed to municipal corporations, strictly so-called, are empowered to exercise certain of these functions which have come to be recognized as at least quasi governmental in character. Nor can we perceive any substantial reason why such district when so organized may not be invested with the same powers in the matter of the levying and collection of taxes for the carrying forth of its limited purposes with which municipal corporations are invested for the carrying forth of similar, though more diversified purposes. Nor can we discover any rational theory upon which in the levy and collection of such taxes the powers of either should be limited by those rules which have been given application in the formation of that class of public agencies wherein the assessments imposed upon a particular property have such direct reference to benefits conferred as to require notice and opportunity for hearing to be given to the owners of the property to be affected by the assessments thus to be imposed. The decision last above cited expressly holds that any tax levied and imposed for the purpose of supplying capital for the foregoing municipal or quasi municipal purposes is not to be regarded as "a tax or assessment on property directly benefited by the construction of some local improvement, but is a general tax levied just as, and for the same purpose that, any general municipal tax is imposed for carrying on the governmental functions and utilitarian objects of duly incorporated cities or towns." We are constrained, therefore, to the conclusion that the Legislature in investing metropolitan water districts to be formed under the provisions of the act in question with power, through their properly appointed officials, to collect general taxes within the municipalities uniting in the formation of such districts for the common purpose of supplying each with water for domestic uses has not acted in violation of any provision of the state Constitution to which our attention has been directed.

[6] It is the further contention of the respondent, however, that even if it be conceded that metropolitan water districts to be formed under said act have been properly invested with power to impose taxes upon the property of the inhabitants of the municipalities uniting in such formation and in the manner provided for in said legislation, the act is still unconstitutional as an attempt to unlawfully delegate the power of taxation to a special commission under the provisions of section 13 of article 11 of the Constitution, which reads as follows:

> "The Legislature shall not delegate to any special commission, private corporation, company, association or individual any power * * * to levy taxes or assessments or perform any municipal function whatever, except that the Legislature shall have power to provide for the supervision, regulation and conduct, in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this state."

The difficulty with the foregoing contention as to the application of the above constitutional provision to the situation presented in the instant proceeding consists in the fact that the official body or board of directors to whom the management and control of municipal water districts has by the terms of said act been intrusted and which is to exercise the powers and perform functions of the governmental agency thus to be created does not come within any of the designations of commissions, corporations, companies, associations or individuals to which the inhibition of the foregoing section of the Constitution applies. On the other hand, the governing body or board of directors of metropolitan water districts are in the same sense the governing officials thereof as are the city council or boards of trustees of municipalities or of such other governmental agencies as have heretofore been invested with powers and duties of a quasi municipal character. This question was fully disposed of by this court in the case of Henshaw v. Foster, 176 Cal. 507, 169 P. 82, wherein, in interpreting the Municipal Water District Act approved May 1, 1911, together with the amendments thereto, approved May 29, 1915 (Stats. 1915, p. 921), containing similar provisions and against the validity of which a similar contention was made, this court said:

> "Respondents take the position that the act in question violates the above-quoted sections 12 and 13 [art. 11] because 'it delegates to some one other than the corporate authorities the power to assess and collect taxes for city and municipal purposes.' This argument, like the other objection discussed herein, is based in part upon the supposed exclusive authority conferred by section 19 of article 11 upon cities. But, as we have seen, that article applies not merely to cities and towns, but to all municipal corporations, and power to acquire and sell water may be given to municipalities larger in territory and including within themselves cities and towns or similar corporations. This is done in the statute before us not in opposition to section 12, but by general provisions which vest in the corporate authorities of the district the power to assess and collect special taxes for the purposes contemplated. The corporate authority of such a district is the board of directors, and to that board is delegated the taxing power not in relation to matters of a purely local character in the included city or cities, but having reference to the affairs of the larger municipality embracing within it the others of lesser areas. In this view of the statute there is no violation of section 13, because the Legislature does not delegate to the directors control or supervision of any of the purely local affairs of the cities, but by general law enables the inhabitants of a region, including cities, to form a district and to elect their own taxing board to raise the necessary funds for district purposes."

A similar question was before this court in the case of Doyle v. Jordan, 200 Cal. 170, 252 P. 577, and in which the foregoing language from Henshaw v. Foster, supra, was fully approved. We are therefore of the opinion that there is no merit in the respondent's foregoing contention.

Various other propositions have been urged by the respondent and more particularly by amici curiæ in their somewhat elaborate briefs, but we are of the opinion that these are practically all covered by the matters considered and decided in the foregoing opinion. Whatever questions may arise as to the validity of particular provisions of the Metropolitan Water District Act other than those herein expressly considered will come into view in the course of the administration of the affairs of this particular metropolitan water district after it shall have reached the stage of incorporation, and entered upon the administration of its diversified functions as a corporate body. It is not necessary to anticipate these questions in this the preliminary stage of its proposed incorporation.

Let the writ issue as prayed for.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.

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205 Cal. 38

MILLS v. BROWN et al. (Sac. 4025.)

Supreme Court of California. Aug. 20, 1928.

1. Chattel mortgages ⇨168—Facts held to authorize suit against mortgagor, as well as other defendants, for conversion of mortgaged wool.

Execution of note and chattel mortgage, wherein mortgagor covenanted properly to care for mortgaged sheep, and not to sell them, nor their increase or wool, without mortgagee's written consent, authorized maintenance of suit by mortgagee against mortgagor, as well as other defendants named, for wrongful taking and conversion of wool.

2. Venue ⇨22(3)—Suit against mortgagor and others for conversion of mortgaged wool held properly brought in county of mortgagor's residence (Code Civ. Proc. § 395).

Presence of mortgagor being necessary for mortgagee to secure full relief demanded in suit against him and others for wrongful taking and conversion of wool grown on mortgaged sheep, venue was properly laid in county of mortgagor's residence, under Code Civ. Proc. § 395.

3. Chattel mortgages ⇨168—Statutory provision for but one action to recover debt or enforce right secured by mortgage held inapplicable to action for conversion of mortgaged wool (Code Civ. Proc. § 726).

Provision of Code Civ. Proc. § 726, that but one action for recovery of any debt or enforcement of any right secured by mortgage may be brought, *held* inapplicable to action by mortgagee against mortgagor and others for wrongful taking and conversion of wool grown on mortgaged sheep; such action not being on debt, but to protect value of security given.

4. Venue ⇨41—Defects in complaint, attempting in good faith to charge all defendants, as joint tort-feasors, with conversion of mortgaged property, are not available on application for change of venue.

Any defects in complaint, wherein effort is apparently made in good faith to charge all defendants, as joint tort-feasors, with conversion of part of property on which plaintiff has mortgage lien, are not available to defendant on application for change of place of trial.

Department 1.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Elizabeth Mills against Royal G. Brown and others. From an order denying the application of defendant Addie I. Tryon for a change of the place of trial, she appeals. Affirmed.

Ira S. Lillick, of San Francisco, for appellant.

A. B. Reynolds and George E. McCutchen, both of Sacramento, for respondent.

PRESTON, J. Appeal by defendant Addie I. Tryon from an order refusing to change the place of trial from the county of Sacramento to the city and county of San Francisco. She supports her demand by an affidavit of merits, containing the averment that she is a resident of the city and county of San Francisco. Defendant E. H. Tryon consented to the making of said application by his codefendant. The defendant Brown did not appear in this proceeding.

[1, 2] Briefly, the facts are that on the 1st day of October, 1925, defendant Royal G. Brown, a resident of the county of Sacramento, gave to plaintiff his promissory note in the sum of $5,647.50, and at the same time executed to her a chattel mortgage upon some 2,000 head of sheep, also the increase thereof and the wool grown upon them. The maturity date of the note was October 1, 1926. Two provisions of said mortgage were: First, it covenanted that the mortgagor would properly care for the animals, and would not sell the same or any number thereof, nor any of the increase thereof, nor any of the wool grown upon them, without the written consent of the mortgagee; and, second, that, in case of default in any of the covenants or conditions thereof, said note, together with interest accrued thereon and all other indebtedness secured by said mortgage, should immediately become due and payable, and said mortgagee "is hereby empowered to enter into the possession of the mortgaged property, may remove, sell, and dispose of said property. * * *"

In addition to pleading said note and mortgage, and the amount due thereon, the complaint alleged that on or about April 1, 1926, defendants above named wrongfully took, carried away and converted to their own use and benefit all of the wool produced and grown on said sheep so mortgaged by said defendant Royal G. Brown to plaintiff.

It is too clear for controversy that the foregoing facts authorize the maintenance of a suit by the plaintiff against defendant Brown, as well as the other defendants named. Mathew v. Mathew, 138 Cal. 334, 336, 71 P. 344. It is also clear that the plaintiff cannot secure the full relief demanded without the presence of the defendant Brown, who is a resident of the county of Sacramento; hence, under the provisions of section 395 of the Code of Civil Procedure, the venue is properly laid at Sacramento county. McClung v. Watt, 190 Cal. 155, 158, 211 P. 17. See, also, Quint v. Dimond, 135 Cal. 572, 67 P. 1034; and Hellman v. Logan, 148 Cal. 58, 82 P. 848.

[3] Appellant, in a further attempt to show that a cause of action cannot be stated against defendant Brown, seeks to invoke section 726 of the Code of Civil Procedure, which provides:

> "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter. * * *"

This provision has no application whatever to the facts of this case. The action before us is not an action upon the debt, but, on the contrary, is an action to protect the value of the security given. If plaintiff should be forced to foreclose the mortgage upon the remaining portion of the property covered thereby before she could secure any other relief, she might thereby lose altogether the value of the property converted and upon which the defendants had destroyed her lien.

The case of Mathew v. Mathew, supra, is a suit by a chattel mortgagee against the mortgagor for conversion of the property, and, while there is no mention of section 726, apparently it is thereby intended to hold that said section does not interfere with the rule therein announced. In fact, the holding we here make has been clearly foreshadowed a number of times. Bank of Ukiah v. Moore, 106 Cal. 673, 39 P. 1071, was a case where the mortgage was not given the right of possession and the debt secured by the mortgage had not matured; nevertheless relief by injunction against waste and conversion by the mortgagor was given. In Harper v. Gordon, 128 Cal. 489, 61 P. 84, it was held that, where a chattel mortgage contained a special contract allowing the mortgagee to take possession of the mortgaged chattels after default, such contract might be enforced after default by an action of replevin, the court expressly holding that section 726 of the Code of Civil Procedure did not apply in that case. To the same effect see Flinn v. Ferry, 127 Cal. 648, 60 P. 434, and many other cases. No possible reason exists why a writ of repelevin against the mortgagor should be allowed in such a case and an action in conversion be denied. Each action is incidental to the mortgage, and, as above announced, each is for the protection of the security given.

[4] The complaint in this action is apparently an effort made in good faith to charge all of the defendants as joint tortfeasors with the conversion of a part of the property upon which plaintiff has a mortgage lien. If there be any defects in it, they are not such as are available to appellant upon a proceeding of this character. The rule in that behalf is also found in McClung v. Watt, supra, 190 Cal. at page 161, 211 P. 20, as follows:

> "It is enough, however, upon the hearing and determination of the demand for a change of venue, that the cause of action purported to be stated against the corporation defendant was apparently pleaded in good faith, and is not, prima facie, so glaringly and vitally defective as to be beyond correction by amendment."

The order appealed from is affirmed.

We concur: CURTIS, J.; SEAWELL, J.

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205 Cal. 44

ROSETTI v. CASAZZA et al. (S. F. 12431.)

Supreme Court of California. Aug. 21, 1928.

Master and servant 🔑286(3)—Evidence held insufficient to make out case, on theory that gangplank on which laborer was moving wheelbarrow was not reasonably safe.

In action for injuries sustained by agricultural laborer, by slipping or stumbling while moving loaded wheelbarrow on gangplank, evidence *held* insufficient to make out a case for plaintiff, on theory that employer did not furnish reasonably safe appliance, in that gangplank was old, and that wooden cleats thereon were worn out, and defendant's motion for nonsuit was therefore properly granted.

Department 2.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Stefano Rosetti against John Casazza and others. From a judgment for defendants, after their motion for nonsuit was granted, plaintiff appeals. Affirmed.

Edward J. Lynch, of San Francisco, for appellant.

T. H. Delap, of Richmond, for respondent.

RICHARDS, J. This appeal is from a judgment in favor of the defendants, after motion for nonsuit granted. The plaintiff was employed as an agricultural laborer by the defendants, and during and in the course of his employment was directed to assist others, who were engaged in clearing out chicken manure from a chicken house and placing the same in boxes, which boxes, having been placed upon a wheelbarrow, the plaintiff was to wheel over and along a gangplank 18 inches wide and 10 or 12 feet long, which led from the doorway of the chicken house to a truck, where the same was to be unloaded. The gangplank had wooden cleats on either side, with a space in the middle for the wheel of the barrow. Upon coming out of the chicken house door with a loaded wheelbarrow, the plaintiff either slipped or stumbled, and the wheelbarrow went over the edge of the gangplank, followed by plaintiff, who fell heavily on one of the upturned iron handles thereof and was severely injured. He sues herein to recover damages for such injury, basing his complaint upon the alleged negligence of his employers in failing to provide a reasonably safe appliance for his work.

The appliance provided was one reasonably adapted to the simple purpose for which it was used, and the only evidence which the plaintiff offered tending to show negligence on the part of the defendants in the supplying and use of the same consisted in the plaintiff's statement that the gangplank was "kind of old and the cleats were kind of weared out." His evidence entirely failed to disclose whether either of these alleged defects in the appliance caused him to slip and fall. The trial court, after hearing the evidence, arrived at the conclusion that it was insufficient to make out a case for the plaintiff, and we are satisfied that its conclusion in that regard ought not to be reversed upon appeal, in the presence of the very meager showing as to the cause of the plaintiff's injury.

The judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.

205 Cal. 34

PALMER v. CONTINENTAL CASUALTY CO. et al. (L. A. 9450.)★

Supreme Court of California. Aug. 20, 1928.

Hearing Denied in Bank Sept. 17, 1928.

1. Brokers 🔑4—Plaintiff, suing on broker's bond, had burden to prove misappropriation by broker during time bond was effective (St. 1923, p. 93).

One suing on real estate broker's bond, given under St. 1923, p. 93, had burden to establish fact that broker converted to his own use or embezzled money paid him by plaintiff during the time the bond was in effect.

2. Brokers 🔑4—Evidence in suit on real estate broker's bond held not to sustain plaintiff's burden of showing misappropriation occurred after bond became effective (St. 1923, p. 93).

One suing on bond of real estate broker, licensed under St. 1919, p. 1252, and required to be bonded under St. 1923, p. 93, who merely showed deposit with broker of sum of money some three months before new license and bond became effective, and that she was informed of his disappearance after effective date of bond, failed to sustain burden of showing that broker's misappropriation of money deposited occurred after the time the bond went into effect.

3. Appeal and error 🔑1071(1)—Error of court in fixing date of real estate broker's bond sued on was immaterial, where plaintiff failed to prove time of defalcation (St. 1923, p. 93).

In action on real estate broker's bond, given under St. 1923, p. 93, erroneous finding of trial court as to date when broker's license and bond became effective *held* immaterial, where plaintiff failed to show date of broker's defalcation.

4. Appeal and error 🔑1071(1)—Finding that broker appropriated money before date of bond sued on held not prejudicial, where there was no evidence of date of appropriation.

In action on real estate broker's bond to recover sum of money deposited with broker prior to the time the bond became effective, finding of court that broker appropriated money before the date of license and bond *held* not prejudicial to plaintiff, where there was no evidence as to the time of the appropriation.

Department 1.

Appeal from Superior Court, Los Angeles County; P. E. Keeler, Judge.

Action by Abbie S. Palmer against the Continental Casualty Company and others upon a real estate broker's bond. From an adverse judgment, plaintiff appeals. Affirmed.

Ben M. Goldman, of Los Angeles, for appellant.

Joe Crider, Jr., and Clarence B. Runkle, both of Los Angeles, for respondent.

CURTIS, J. [1, 2] Grant McCartney was, on the 28th day of December, 1923, and for some years prior thereto had been, a licensed real estate broker under the provisions of an act of the Legislature of this state. Stats. 1919, p. 1252. On that day the plaintiff deposited with him the sum of $2,000, which sum of money he was to use in making the first payment on a piece of real property which plaintiff had agreed to purchase. He failed to use said money for that purpose, but evidently converted the same to his own use, and some time subsequent to the 6th day of March, 1924, he absconded without ever having paid any part of said money upon the purchase price of said property as directed by the plaintiff. Prior to the year 1923, no bond was required of one following the business of a real estate broker, but during that year the law was amended requiring that all applicants for a broker's license should file with the real estate commissioner a satisfactory bond in amount of $2,000, conditioned for the faithful performance by said broker of any undertaking as a licensed real estate broker under said act. Laws of 1923, p. 93. By said act, both in its original and amended form,

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★Hearing denied in bank.

all licenses expired on the 31st day of December of the year in which they were issued. On the 31st day of December, 1923, the defendant herein, the Continental Casualty Company, a corporation, gave and executed its bond or undertaking in compliance with the amendatory provisions of said act as surety of the said Grant McCartney, conditioned for the faithful performance by the said Grant McCartney of every undertaking entered into by him as a licensed real estate broker under said act or acts amendatory thereof, for the period commencing January 1, 1924, and ending on December 31, 1924. On January 7, 1924, Grant McCartney filed with the real estate commissioner of the state his application for a license to act as a real estate broker for the year 1924, together with said bond executed by said defendant, the Continental Casualty Company. There was opposition to the granting of his application, and it was first denied, but, upon a further showing on McCartney's part, it was granted on the 6th day of March, 1924, and sent to him by mail. It was never delivered to him, undoubtedly due to the fact that he had absconded, and was subsequently returned by the postal authorities to the office of the state real estate commissioner. The plaintiff thereupon instituted this action upon said bond to recover from the bonding company the money paid to him on December 28, 1923. At the trial, the foregoing facts were either proven or stipulated to by the parties to the action. The trial court found for the defendant, the bonding company, and the plaintiff has appealed.

It was incumbent upon the plaintiff, in order for her to recover on the bond, to establish that McCartney had converted to his own use or embezzled the money paid him by plaintiff during the time the bond was in effect. The condition of the bond was that "the said above-bounden Grant McCartney, doing business as Grant McCartney Company, will comply with the provisions of that certain act (giving its title), and will faithfully perform every undertaking entered into by him as a licensed real estate broker under the said act, and acts amendatory thereof." While this bond was executed and bore date the 31st day of December, 1923, it only purported to cover the undertakings of the principal entered into by him as a licensed real estate broker for the period beginning January 1st and ending December 31, 1924. As we have already seen, the license under which he was doing business during the year 1923 expired on the last day of that year. The bond was issued on condition that a license issue to McCartney for the year 1924. The license was not issued to him, as we before said, until March 6, 1924, and he could not legally carry on the business of a real estate broker, after his license expired on December 31, 1923, until this new license was issued, on March 6, 1924. The bond therefore did not become effective before the date of March 6, 1924, and the bonding company was not responsible for any transaction entered into by McCartney prior to March 6, 1924. In addition to the facts already recited, the evidence shows that the plaintiff paid to McCartney the $2,000 by check dated December 28, 1923, on the Pacific Southwest Trust & Savings Bank of Los Angeles. This check was paid by the bank on January 3, 1924. The plaintiff called at McCartney's office some time in March, 1924, and he was out. She called the next day and was told that he had disappeared. The evidence does not show what day in March it was that plaintiff called at McCartney's office. It was conceded that it was after March 6th. Appellant, in her briefs filed herein, claims that it was on the 28th of March. Assuming this to be the fact, although we find no evidence to that effect, we fail to see how plaintiff has made out her case against the bonding company. The burden was upon her to establish the fact that McCartney misappropriated the money during the time the bond was effective. There is not a scintilla of evidence in the record to show the time when McCartney made this misappropriation. Appellant claims that he did not abscond until after the 6th day of March, 1924; that this fact is some evidence that he misappropriated the money subsequent to that date. This claim cannot be sustained. His absconding may have been the result of his embezzlement, but that fact offers no proof whatever as to when the embezzlement occurred. Appellant has failed to show any right to recover on the bond, and, for this reason, the judgment must stand.

[3] Appellant contends that the trial court erred in finding that McCartney's license was not effective until March 9, 1924. The uncontradicted evidence is that it became effective March 6, 1924. But this discrepancy between the proof and the findings is of no consequence whatever. Appellant, as we have before stated, failed to show the date of McCartney's defalcation. Her evidence is just as deficient upon this issue, whether we accept March 6th or March 9th as the effective date of McCartney's license. Neither is there any merit in appellant's contention that the trial court erred in finding that McCartney's application was denied on February 20, 1924. The undisputed evidence shows this to be the fact. Equally untenable is appellant's claim that the court erred in finding that McCartney was not a licensed real estate broker during the period from January 1, 1924, to March 6, 1924. We have already shown the reason why this claim is unfounded.

[4] Finally, appellant contends that the court erred in finding that Grant McCartney appropriated said sum of $2,000 to his own use prior to March 6, 1924. If it be true that there is no evidence to support this finding, it

does not necessarily follow therefrom that the appellant was prejudiced by reason of said finding, for the reason that there is an entire absence of any evidence in the record as to when said misappropriation occurred. All that was necessary for the court to have found was that the money was not appropriated by McCartney after his license was issued to him on March 6, 1924. Such a finding is well within the evidence. The court went further than was necessary, and found, not only that the money was not appropriated after the license was issued, but also that it was appropriated prior thereto. It may be said, however, that, as the money was appropriated either before or after the license was issued, and as there was no evidence to prove that it was appropriated after the license was issued, it necessarily must have been appropriated before the issuance of the license. Considering the evidence in this light, the finding complained of may well be said to find support in the evidence. We find no reversible error in the record.

Judgment affirmed.

We concur: SEAWELL, J.; PRESTON, J.

205 Cal. 42

SACRAMENTO TRANSP. CO. v. CALIFORNIA RECLAMATION CO. (S. F. 12248.)

Supreme Court of California. Aug. 21, 1928.

Dismissal and nonsuit ⚿60(1)—Court must dismiss action not brought to trial within five years after filing of answer and counterclaim, though plaintiff made motion (Code Civ. Proc. §§ 437, 583).

Under Code Civ. Proc. § 583, it was court's mandatory duty to dismiss action for failure to bring it to trial within five years after filing of answer and counterclaim under section 437, though motion to dismiss was made by plaintiff.

Department 2.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Sacramento Transportation Company against the California Reclamation Company, which filed a cross-complaint. From orders granting plaintiff's motion to set aside an order entering plaintiff's default for failure to answer the cross-complaint and dismissing the action for want of prosecution, defendant appeals. Affirmed.

Irving H. Frank and Nathan H. Frank, both of San Francisco (Keith Ferguson, of San Francisco, of counsel), for appellant.

Devlin & Devlin, of Sacramento, and Andros, Hengstler & Dorr, of San Francisco, for respondent.

RICHARDS, J. This appeal is from an order of the superior court of the city and county of San Francisco granting the motion of the plaintiff and cross-defendant to set aside an order of said court entering the default of said plaintiff and cross-defendant for failure to answer the cross-complaint, and from the further order of said court dismissing the action on the ground of failure on the part of the plaintiff to bring the same to trial within five years from the time the answer and cross-complaint were filed. The complaint herein was filed in the superior court of the county of Sacramento on January 14, 1910, and on February 15, 1910, the plaintiff filed an amended complaint, wherein it was alleged that the defendant was indebted to it for work, labor, and material of the reasonable value of $1,989.43. Thereafter, and on March 17, 1910, the defendant filed a general demurrer to the complaint and a motion for a change of place of trial to the city and county of San Francisco, which latter motion was granted. Thereafter, and on August 31, 1915, the defendant's demurrer was overruled, and on October 11, 1915, the latter filed its answer and also filed what it denominated as both a counterclaim and a cross-complaint, but which in reality was only a counterclaim. Code Civ. Proc. § 437; Thomas Fruit Co. v. Start, 107 Cal. 206, 40 P. 336; Pickwick Stages v. Board of Trustees, 189 Cal. 417, 208 P. 961. Thereafter, for approximately ten years, no action was taken by either party. On September 10, 1925, however, the plaintiff filed a general demurrer to the defendant's alleged cross-complaint, whereupon the defendant moved to strike said demurrer from the files and have entered the default of the plaintiff for failure to answer the same. The court granted the defendant's said motion, whereupon, and on May 24, 1926, the plaintiff served and filed a motion to set aside the aforesaid order of default and to dismiss the action for want of prosecution; the latter motion being made upon the ground that the trial court had no jurisdiction to enter the default of the plaintiff for its failure to answer the defendant's pleading, for the reason that, under section 583 of the Code of Civil Procedure, the cause not having been brought to trial within five years after the filing of said answer and counterclaim, the court had no jurisdiction to do other than dismiss said action.

In the recent case of Wutchumna Water Co. v. Stevenson (Cal. Sup.) 267 P. 537, upon a quite similar state of facts, this court held that, notwithstanding the fact that the defendant had on file a cross-complaint and counterclaim to which the plaintiff had not joined issue by either demurrer or answer, the trial court had jurisdiction to dismiss the action under the provisions of section 583 of the Code of Civil Procedure when it appeared that a sufficient period had elapsed since the filing of the defendant's answer and cross-complaint to bring the action within the provisions of said section of the Code. The difference between these two cases consists in the fact that in the case above cited the motion to dismiss was made by the defendant within the five-year period, while in the present case the motion to dismiss is made by the plaintiff beyond the five-year period of inaction after answer filed. This distinction, however, only serves to bring the case within the latter clauses of section 583 of the Code of Civil Procedure, which make it mandatory upon the trial court, either upon motion of the defendant or on its own motion, unless such action is brought to trial within five years after defendant has filed his answer, to dismiss the action. In the former case, the fact that the cross-complaint was on file upon which issue had not been joined was held not to justify the delay or interfere with the operation of the foregoing section of the Code, and this principle is equally applicable to the instant case.

The purpose of section 583 of the Code of Civil Procedure is to compel the parties to action in the direction of a speedy trial of causes after issue joined. The trial court in the instant case would have been bound on its own motion to dismiss the action upon having the facts showing an unwarrantable delay brought to its attention, and the fact that it was the plaintiff itself who made the motion is immaterial, since the duty of the court in the premises was mandatory, whether or not a motion to dismiss was made under said section by either of the parties to the action.

The order is affirmed.

We concur: SHENK, J.; LANGDON, J.

FOGARTY et al. v. DEPARTMENT OF INDUSTRIAL RELATIONS OF CALIFORNIA, DIVISION OF INDUSTRIAL ACCIDENTS AND SAFETY et al. (S. F. 12793.)★

Supreme Court of California. Aug. 20, 1928.

Rehearing Granted Sept. 17, 1928.

1. Master and servant 🔑398—Claims of minors for death benefits held not barred by limitations, where guardian was not appointed until minors were brought into proceeding pending before commission (Workmen's Compensation Act, §§ 9(b), (3), (c), 11(d).

Claims of minor brothers and sisters of deceased employee for death benefit provided by Workmen's Compensation Act (St. 1917, p. 831) § 9(c), and for accrued compensation covered by section 9(b) (3), *held* not barred by limitations provided by section 11(d), which did not run against minors until guardian had been appointed, where appointment of minors' father as guardian was not made until minors, as parties claimant, were brought into proceeding pending before commission.

2. Master and servant 🔑398—Filing of minors' application for death benefits gave commission jurisdiction to determine claims of parents and dependents of deceased, whose claims were barred by limitations (Workmen's Compensation Act, § 11(a).

Under Workmen's Compensation Act (St. 1917, p. 831) § 11(a), providing that filing of application with commission for any portion of benefits shall render limitations inoperative as to all further claims of persons arising from same transaction, filing of application of minors for death benefit and accrued compensation in proceedings pending before commission gave commission jurisdiction to hear claims of all persons for compensation arising from same transaction, including claims of parents of deceased, regardless of whether latter were seasonably filed or not.

3. Master and servant 🔑417(7)—Supreme Court can only overthrow Industrial Commission's finding on question of fact, where there is no substantial evidence supporting finding.

Power of Supreme Court to overthrow finding of Industrial Accident Commission on question of fact is confined to cases in which there is no substantial evidence to support finding.

4. Master and servant 🔑405(4)—Evidence showed employment and exposure caused rheumatism, diseased heart condition, and death, which arose in course of employment.

In proceedings to recover compensation for death of employee, evidence that employment and exposure induced acute attack of rheumatism in employee, which led to diseased heart condition, which ultimately proved fatal, showed that exposure and exhaustion from work precipitated train of symptoms resulting in death, and hence Industrial Accident Commission erred in finding that employee's illness and death were not caused or precipitated by employment or injury arising out of or in course of employment.

In Bank.

Proceeding under the Workmen's Compensation Act (St. 1917, p. 831) by K. J. Fogarty and others to recover compensation for the death of Harlan Fogarty, employee, opposed by the Pacific Gas & Electric Company, employer. From an order of the Industrial Accident Commission, denying application for adjustment of claim, petitioners bring certiorari. Annulled and remanded with directions.

Matthew A. McCullough, of San Francisco, for petitioners.

John J. Briare and Leo H. Susman, both of San Francisco, for respondent Pacific Gas & Electric Co.

G. C. Faulkner, of San Francisco, for other respondents.

★Superseded by opinion, 273 P. 791.

WASTE, C. J. The dependents of Harlan Fogarty, deceased, are seeking to have annulled an award of the respondent commission denying their application for adjustment of claim. At the time of his death, which occurred on June 24, 1926, the deceased was a minor. Commencing May 8, 1924, and for a period terminating, by reason of his disability, on June 3, 1924, Harlan Fogarty was employed by the Pacific Gas & Electric Company as a laborer and rough carpenter on the timber flume which supplies water to one of its power houses. Before he began any actual work, but on the same day that he assumed his duties as such employee, the deceased was subjected to a thorough physical examination at the hands of Dr. W. P. Sawyer, representing the employer. The examination disclosed that the deceased at the time was a normal youth of 19 years, in apparent excellent health. The examining physician testified before the respondent commission that:

> "There [was] no pathology on the whole card. It [was] one of the cleanest cards of any examination I ever made."

The deceased commenced work immediately following this physical examination. On June 2, 1924, together with other workers, he was summoned to repair a break in the flume some 84 feet in length, which interrupted the flow of water to the power house. In their endeavor to complete the repair work with all possible expedition, the men worked laboriously for many hours. One shift was engaged continuously without sleep for 18 hours, another for 16 hours, and a third, of which the deceased was a member, for 38 hours. During this prolonged period the men were subjected by day to the heat of the sun's rays and by night to the cool air. There is evidence to the effect that during the night Fogarty worked in wet clothes and shoes, and "felt pain and stiffness in both knees." By reason of exhaustion and the presence of pains in his knees and ankles, he was incapable of going to his home, some distance away when the work was done, and he remained with a fellow employee during the night of June 3d. While there he received some slight care intended to relieve his plight. He was conveyed by automobile the following day to his own home. Dr. Sawyer, who, as previously noted, had examined him, was called and found the young man to be the victim of an acute attack of rheumatism, for which he prescribed salicylates, a specific for acute rheumatism. Dr. Sawyer's medical statement, introduced in evidence, shows that the knees and ankles of the deceased were at that time swollen, hot, and tender, and that he had a pulse rate of 110 and a temperature of 103.4.

Dr. Sawyer attended Fogarty until July 10th, at which time he entered the Sutter Hospital, in Sacramento, and came under the care of Dr. J. W. James. The hospital records show that deceased had a pulse rate of 120 and a temperature of 102 on that date. Dr. James found:

> "Nearly all small joints swollen and tender; heart increased in all diameters; and murmur replacing first sound. Tongue heavily coated. Patient rather stupid in action."

As to the patient's past history the record noted:

> "Occasional sore throat 8 years ago; had tonsils removed. Otherwise well; present illness first serious trouble."

Fogarty remained in the hospital approximately 10 days, and then visited with an aunt for 2 weeks, continuing all the while under the care of Dr. James. It appears that some years prior to his employment by the Pacific Gas & Electric Company Fogarty had been operated upon by Dr. G. E. Chappell and had his tonsils removed. In the fall of 1924 Dr. Chappell examined him, and found that he was suffering from enlarged heart and valvular trouble, as well as weakness of the heart muscle. The doctor advised him to remain at home and to do no manual labor. The rheumatic and heart condition continuing, in October, 1925, Dr. Chappell removed certain remnants of deceased's tonsils, in the hope that it might effect a cure. On March 24, 1926, the deceased was taken to the Krull Hospital, in Sacramento, where, upon examination, Dr. Chappell found his condition aggravated, and by means of an operation removed fluid from the pleural cavity. A similar operation was thereafter performed by Dr. Brown. Fogarty was continuously nursed and cared for during the following months. He died on June 24, 1926, the death certificate giving chronic endocarditis, which is a diseased condition of the membrane lining the valves and cavities of the heart, as the cause of death.

At the conclusion of the several hearings of the dependents for adjustment of their claim, the respondent commission, on September 23, 1927, made its findings and award denying the application, and discharging the employer from all liability in connection with the death of the deceased. Among other things it was found that the death of Harlan Fogarty had not been caused or precipitated by his employment, or by any injury arising out of or in the course of such employment. The applicants' petition for a rehearing was granted and the cause resubmitted without the taking of further testimony. The findings thereafter filed declared the evidence to be insufficient to establish that the deceased had received an injury arising out of and in the course of employment, or that the employment had caused any temporary disability. It was further found that the disability complained of had not been caused by any injury arising out of and in the course of said employment, or by said employment; that the deceased died from disease, and said death had not been caused or precipitated by the employment, or by an injury arising out of or in the course of said employment; that the death of the deceased had not ensued within one year from the date of the alleged injury, and that no disability payment had been made for the injury complained of, or agreement made therefor, or proceedings for its collection commenced, and that no right, therefore, accrued to the applicants to claim a death benefit as a result of the death of the deceased.

[1, 2] Because of this latter finding there is first presented for consideration the question whether the application for adjustment of claim had been timely filed. Certain of the applicants are minors, against whom the limitations of time provided by the Workmen's Compensation Act (St. 1917, p. 831) § 11(d), do not run unless and until a guardian has been appointed. Therefore the respective claims of the minor brothers and sister of the deceased, both for the death benefit provided by section 9(c) and for the accrued compensation covered by section 9(b) 3 of the act, were not barred, because the appointment of their father as their guardian was not made until they as parties claimant, were brought into the proceeding then pending before the commission. We are of the view that, under the provisions of section 11(a) of the act, the filing of the application of such minors gave to the commission jurisdiction to hear and determine the claims of any and all persons for compensation arising from the same transaction, including the claims of the parents of the deceased, whether the latter were seasonably filed or not. Section 11(a), supra, provides:

> "Unless compensation is paid or an agreement for its payment made within the time limited in this section for the institution of proceedings for its collection, the right to institute such proceedings shall be barred; provided, that the filing of an application with the commission for any portion of the benefits prescribed by this act shall render this section inoperative as to all further claims of any person or persons for compensation arising from the same transaction, and the right to present such further claims shall be governed by the provisions of section 20(d) and section 65(b) of this act."

This court had occasion, in the case of Great Western Power Co. v. Ind. Acc. Comm., 196 Cal. 593, 602, 238 P. 662, 666, to interpret the foregoing section of the act. It is there declared:

> "By both constitutional enactment * * * and legislative decree * * * the Industrial Accident Commission is vested with wide powers, to the end that the administration of legislation, enacted to create and enforce a complete system of workmen's compensation, 'shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character.' The Workmen's Compensation Act provides—section 17(c)—that there shall be but one cause of action for each transaction coming within the provisions of the act. All claims brought for medical expense, disability payments, death benefits, burial expense, liens, or any other matter arising out of such transaction, may, in the discretion of the commission, be joined in the same proceeding at any time. Going one step further, we see no reason why the Legislature may not have intended to provide, in the proviso to section 11 (a), that, when a claim for any portion of the benefits prescribed by the act has reached the point where it is necessary or expedient to submit the matter to the decision of the Industrial Accident Commission, the whole subject-matter of the controversy, including the further claims of the applicant, or of any and all other persons, should be thereby submitted to the jurisdiction of the commission for a complete determination, provided, of course, that all claims relating to the transaction be presented within the life of the continuing jurisdiction of the commission. That, we conclude, was the legislative intent, and the effect of the proviso added to section 11(a)."

Having reached such conclusion, we held in that case that the commission had jurisdiction to make an award in favor of a dependent grandparent of the deceased, even though it appeared that such claimant had not been made a party to the proceeding before the commission until after the expiration of the time limited for the institution of proceedings for the collection of the death benefit. It therefore follows that the respective claims of the parties hereto, both for accrued compensation and for the death benefit, may properly be determined by the commission.

[3, 4] This brings us to a consideration of the important point as to whether the illness and death of the deceased were compensable within the provisions of the Workmen's Compensation Act. This court is well aware that its power to overthrow a finding on a question of fact made by the respondent commission is confined to those cases in which there is no substantial evidence to support the finding. That is the exact situation now before us. The history of the case, as testified to by the witnesses for the applicants and for the employer, presents an unbroken chain of events indicative of the fact that, whatever the condition of the health of the employee had theretofore been, the exposure and exhaustion to which he was subjected precipitated the train of symptoms which culminated in his death. In Singlaub v. Ind. Acc. Comm. (Cal. App.) 262 P. 411, it is declared to be the—

> "unquestioned law that, where the death of an employee may be traced to two causes: First, to that of a primary disease; and, secondly, to overexertion in the work in behalf of his employer in which the employee is engaged, at the time of his death, the employer or his insurer

is liable. In other words, notwithstanding the previous diseased condition of the employee and in the natural consequence of which the inevitable death of the employee will ensue, if satisfactorily established that the demise of the employee, though primarily caused by his idiopathic condition, nevertheless was superinduced by overexertion of the employee arising out of his employment, the liability of the employer is fixed. As is said in Eastman Co. v. Industrial Accident Commission, 186 Cal. 587, 594 (200 P. 17, 20): 'If the disability, although arising from a chronic heart trouble, was brought on by any strain or excitement incident to the employment, the industrial liability still exists. Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration (citing cases).'"

To the same effect is Knock v. Ind. Acc. Comm., 200 Cal. 456, 253 P. 712, wherein it appeared from the medical testimony adduced that, while the deceased must have been affected with a previous heart affection, the conditions of his employment were such as to have precipitated his collapse sooner than would otherwise have happened.

In the case at bar an effort was made by the employer to show that the deceased employee was the victim of a latent and pre-existing rheumatic and heart condition. The evidence is in apparent conflict on this point. There is also testimony which points to a "focus of infection" as a major causative factor. There is, however, but one conclusion which can be drawn from the whole evidence, and that is that, aside from all other factors, the employment, with its consequential exposure, was the precipitating cause, and induced the acute attack of rheumatism with which Fogarty was immediately thereafter seized, and, further, that such attack not only could, but actually did lead to the heart condition which ultimately proved fatal. It is necessary to only briefly epitomize the evidence relating to this phase of the case to demonstrate that it falls squarely within the rule of the cases previously cited.

Dr. Sawyer, the physician who examined the deceased prior to his employment by the Pacific Gas & Electric Company, and later attended him, testified that at the time he made the examination he found nothing suggesting that the deceased was then suffering from or a victim of either endocarditis or myocarditis, and that there was no doubt in his mind but that the acute attack of rheumatism was brought on by the exposure, which was the sudden cause of it. Dr. Chappell, called by the employer, testified that, with all the facts before him, he would say there was a causal connection between the prolonged period of labor, with its resultant exposure and exhaustion, and the acute attack of rheumatism suffered by the deceased. Dr. R. W. Harbaugh, assistant medical director of the respondent commission, informed the referee in the proceeding that exposure to cold or wetting or sudden changes of temperature, are among the factors in determining the onset of an attack of rheumatism; that it is generally recognized that a certain kind of heart disease is directly connected with an attack of rheumatism, and he had no doubt but that that was "what happened in this particular case."

There was much evidence as to the "major" and "minor" factors of heart disease, and some of the witnesses refused to commit themselves beyond the assertion that the strain and exposure to which the employee was subjected was only "some slight factor" in precipitating the acute and fatal attack. But the record read as a whole—and we have given it a most searching scrutiny—removes any and all doubt, and sets the case beyond the realm of argument, inference, or conjecture. The employer's own witnesses established that the deceased's employment was a factor in the precipitation of the rheumatic and heart condition which ultimately led to his death. There is not a substantial contradiction on that point. The only fair inference that may be drawn from the evidence is that, if it should be conceded that the deceased was the victim of a latent and preexisting rheumatic and heart condition, a condition which, in our opinion, was not established, the exposure and exhaustion incident to his employment accelerated his collapse. Any contrary inference is inconsistent with the verity of the record. The respondent commission, therefore, erred when it found that the deceased's illness and death had not been caused or precipitated by his employment, or by an injury arising out of or in the course of his employment.

The award is annulled, and the cause is remanded, with directions to the commission to proceed as outlined, and to further find upon the degree of dependency, in order to properly ascertain the amount of the benefits payable to the claimants.

We concur: SEAWELL, J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

204 Cal. 618

STANDARD LIVE STOCK CO. v. PENTZ.★
(S.F.11931.)

Supreme Court of California. July 31, 1928.

Rehearing Denied Aug. 30, 1928.

1. Landlord and tenant ⟹130(2)—Covenant of quiet possession in lease is not breached until eviction.

Covenant of quiet possession in a lease is not breached until there has been an actual or constructive eviction.

2. Limitation of actions ⟹47(1)—Lessee's action for breach of covenant of quiet enjoyment, commenced two years from date of actual eviction, held not barred (Civ. Code, § 1927; Code Civ. Proc. § 338, subd. 1).

Lessee's action for damages for breach of implied covenant of quiet enjoyment of a lease pursuant to Civ. Code, § 1927, commenced two years from date of actual eviction, *held* not barred by reason of Code Civ. Proc. § 338, subd. 1, though foreclosure proceeding resulting in subsequent eviction was instituted more than four years before bringing of action.

3. Principal and agent ⟹146(2)—That lessor executing lease as owner was in fact merely agent held no defense in lessee's action for breach of implied covenant of quiet enjoyment.

Where lease contained nothing to indicate that lessor was executing the same other than as owner of the premises described therein, the fact that such lease was made by lessor merely as agent and trustee of true owner *held* no defense, in lessee's action for damages for breach of implied covenant of quiet enjoyment, since an agent is personally bound by contract purporting to be made in behalf of himself alone, notwithstanding his lack of personal interest in consideration.

4. Estoppel ⟹70(2)—Lessee's failure to claim damages for breach of covenant of quiet enjoyment in foreclosure action did not estop claim therefor in subsequent action against lessor.

Lessee's failure to assert claim for damages for breach of covenant of quiet enjoyment in foreclosure action, wherein lessee and owner were made defendants, together with certain other codefendants, *held* not to estop him from asserting claim for such damage in subsequent action against lessor, since prior to and up to time of entry of judgment in foreclosure action and eviction from premises as a consequence thereof lessee had sustained no damages, for the reason that there had occurred no breach of covenant of quiet possession.

5. Landlord and tenant ⟹130(3)—Law relating to rights of assignees of lease did not preclude action by assignee against lessor for breach of covenant of quiet enjoyment (Civ. Code, § 823).

Civ. Code, § 823, relative to rights of assignee of lease relating wholly to remedies as distinguished from rights, *held* not to preclude assignee from maintaining action against lessor for breach of implied covenant of quiet possession.

6. Landlord and tenant ⟹130(3)—Lessee's failure to pay rent after institution of foreclosure against lessor did not preclude action against lessor for breach of covenant of quiet enjoyment (Code Civ. Proc. § 1161, et seq.; Civ. Code, § 791).

Failure of lessee to pay rent after institution of foreclosure action against lessor, giving lessor only the right of his option to terminate and end the lease in accordance with provisions of Code Civ. Proc. § 1161 et seq., as expressly provided in Civ. Code, § 791, did not preclude lessee, after eviction by purchaser at mortgage sale, from maintaining action against lessor for breach of implied covenant of quiet enjoyment, particularly since lessee's failure to pay such rent was not made the basis of eviction.

7. Appeal and error ⟹241—Point not made one of grounds on which motion for directed verdict was predicated was not available on appeal.

Point which is not made one of grounds on which motion for directed verdict was predicated is not available to respondent on appeal.

8. Landlord and tenant ⟹130(3)—Refusal to authorize jury to find substantial damage in lessee's action for breach of covenant of quiet enjoyment held error, under evidence (Civ. Code, § 3304).

Where evidence to effect that lessee appeared in defense to foreclosure action to which lessee and lessor were made parties in order to protect its rights as holder of lease, thereby being put to an outlay of expense for counsel fees and expense in defending possession, refusal of trial court, in subsequent action against lessor for breach of covenant of quiet enjoyment, to commit to jury the right to find some measure of substantial damage, *held* error, even though recovery was limited by Civ. Code, § 3304.

9. Landlord and tenant ⟹130(3)—Landlord's bad faith as to obligations owed lessee in connection with breach of covenant of peaceable possession held for jury.

Evidence in lessee's action for breach of covenant of quiet enjoyment relative to bad faith on part of lessor in respect to obligations owed to lessee *held* such as to require submission to jury of such issue in connection with breach of covenant of peaceable possession.

10. Landlord and tenant ⟹130(4)—Damages recoverable by lessee for breach of covenant of quiet possession are value of his term (Civ. Code, §§ 1927, 3300, 3304).

Under Civ. Code, § 1927, insuring lessee a quiet possession of premises during term of hiring against all persons lawfully claiming the same, and section 3300, relative to measure of damages for breach of obligation arising from contract, the damage recoverable by lessee in case of breach of covenant of quiet enjoyment is the value of his term, notwithstanding section 3304, which is not intended to have reference to leases of real estate or to detriment

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★Rehearing denied.

caused by breaches of covenants for peaceable possession.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by the Standard Live Stock Company against William R. Pentz. Judgment for defendant, and plaintiff appeals. Reversed.

Preston & Duncan and Robert Duncan, all of San Francisco, for appellant.

Pillsbury, Madison & Sutro, Marshall P. Madison, and Frank D. Madison, all of San Francisco, for respondent.

RICHARDS, J. The plaintiff herein appeals from a judgment rendered and entered after a directed verdict in the defendant's favor. The action is one for the recovery of both general and special damages for the breach of the implied covenant of quiet enjoyment in a lease executed by the defendant on November 1, 1917, to the assignor of the plaintiff, and covering a large tract of land in the county of Mendocino, chiefly adapted to the raising and breeding of stock. The plaintiff in its second amended complaint sets forth said lease in full, and also sets forth the written assignment thereof from one P. B. Noonan, the original lessee named therein, to the plaintiff, together with the written consent to such assignment on the part of the lessor. The plaintiff further avers its entry upon said premises under said lease and the performance by it of all of the covenants and agreements therein to be by it performed prior to its eviction from the premises covered thereby; and also avers its various acts and expenditures in the way of stocking and operating said premises as a stock ranch up to the time of its eviction therefrom. The plaintiff then proceeds to allege that at the time of the making and execution of said lease there were in existence two mortgages made and executed by a prior owner of said premises and then held and owned by the First Federal Trust Company, a corporation; that, said mortgages and the moneys due thereon not having been paid, the said mortgagee, on November 6, 1918, commenced an action for the foreclosure thereof in the superior court in and for the county of Mendocino, to which action both the plaintiff and the defendant herein were made parties, together with certain other defendants; that in due course in said action a decree of foreclosure and sale was duly given and made, under the terms of which the whole of said premises was sold to one W. H. Sullivan on the 8th day of November, 1919; that a deed thereto was in due course, one year later, executed and delivered to said W. H. Sullivan as the purchaser at said judicial sale; that thereupon the said purchaser demanded of the plaintiff herein that it surrender and abandon the possession of the whole of said leased premises to the said purchaser, and, this demand being refused, the said W. H. Sullivan applied to and procured from the said superior court a writ of assistance, under which writ, in the hands of the sheriff of said county, the plaintiff herein, with all of its properties then upon said premises, was ejected and removed from said premises and the whole thereof on the 28th day of February, 1921, and the said plaintiff and its said properties have ever since been excluded therefrom; that said plaintiff resisted said eviction, by all of the legal means within its power, unsuccessfully.

The plaintiff then alleges that the defendant herein at all times knew of the existence of said superior mortgages of the First Federal Trust Company and of the institution of said action for the foreclosure thereof. The plaintiff then proceeds to allege that under the terms of section 1927 of the Civil Code the lessor of said premises was obligated to secure to the plaintiff herein, as the assignee of said lease, the quiet possession of said premises against all persons lawfully claiming the same, and that such obligation became and was a part of said lease; that the plaintiff herein, immediately upon the commencement of said foreclosure action, notified the defendant herein, as such lessor thereof, and demanded that he maintain and keep the plaintiff herein in the quiet and peaceable possession of the whole of said leased lands and premises; that said defendant not only failed so to do, but, on the contrary, united with the Bank of California National Association, a corporation, and a codefendant in said foreclosure action, in filing a cross-complaint in said action, wherein the plaintiff herein was also made a cross-defendant, and wherein it was alleged that the plaintiff herein claimed some right, title, or estate in the property described in said lease and in said action, but that such claim was subsequent and subject to the right, title, interest, and estate of said corporation and also the defendant herein as the said cross-complainants in said foreclosure action; that the plaintiff herein was obliged to appear in said action to defend itself against said cross-complaint; that, when said cause came to trial upon the original complaint, and also upon said cross-complaint, it was adjudged and decreed by said court that the lease of the plaintiff herein was in full force and effect at the date of said decree and was prior to and superior to the right of the said Bank of California National Association and of the defendant herein, as asserted in their said cross-complaint, but was subject and subordinate to the right of the First Federal Trust Company, the original plaintiff in said foreclosure suit.

The plaintiff further alleges that it had paid all of the rents due and owing under the provisions of said lease up to and including the 30th day of November, 1918; that, upon the institution of said foreclosure action, the plaintiff herein offered and agreed to pay to the defendant herein the rents subsequently to accrue under the terms of said lease, provided said defendant would protect and agree to protect the plaintiff herein in the quiet and peaceable possession of said leased premises against said foreclosure action and the claims of the plaintiff therein thereunder, but that the defendant herein failed and refused so to do. The plaintiff then proceeds to allege, with much of detail, the damages, both general and special, which it sustained as the result of its aforesaid eviction from said leased premises, both as to the loss of the value of its said term and of the particular losses which it suffered in the way of the destruction of and detriment to its property due to said eviction, and the hardships with which it was executed and attended. It is not necessary to refer to these averments with much of detail for the purposes of this decision, but as a result thereof it is sufficient to state that the plaintiff herein prayed for general and special damages in the aggregate sum of $112,214.

The defendant in his answer to the plaintiff's second amended complaint, admits the making and execution of said lease, the assignment thereof to the plaintiff, his consent to said assignment, the possession of the plaintiff thereunder, and the eviction of the plaintiff from the premises by the holder of a superior title, as set forth in the plaintiff's said complaint, and denies most of the other averments therein contained. The defendant alleges that, in the making and execution of said lease to the original lessee, and in the consent to the assignment thereof to the plaintiff, he was acting throughout, not as the owner of said premises, but at all times as the agent and representative of one L. B. McMurtry, and was known by the said original lessee so to be and so to be acting. He denies, for want of information and belief practically all of the plaintiff's averments with respect to its operation of and expenditures upon said premises, as well as its alleged losses incident to its eviction therefrom. In addition to its foregoing denials, the defendant pleads the following special defenses: He alleges that the plaintiff's cause of action is barred by the provisions of section 337, subd. 1, section 338, subd. 1, and section 339, subd. 1, of the Code of Civil Procedure. He sets forth certain affirmative matter intended to show that the plaintiff's assignor, in taking said lease, did not deal with said defendant as the owner of said premises, but solely as the agent and representative of L. B. McMurtry, the real owner thereof, prior to and at the time of the execution of said lease and of the assignment thereof. He then proceeds to plead certain facts with relation to the proceedings in the action for the foreclosure of the mortgage of the First Federal Trust Company upon said premises, and as to the pleadings, proceedings, and judgment rendered and entered in said action, which are averred to have the effect of res adjudicata upon the asserted rights of the plaintiff in the present action. He further pleads the pendency of another action instituted by the plaintiff herein against the Bank of California National Association, and which it is averred operates as an estoppel against the said plaintiff as to its maintenance of the present action. He therefore prays that the plaintiff take nothing by this action, and that he go hence with his costs.

The plaintiff filed a general and special demurrer to the defendant's said answer and to each of the affirmative matters set forth therein, which, upon hearing thereon, the trial court overruled. The cause then came to trial before a jury, in the course of which the plaintiff offered and there was received, over objection, a large amount of evidence having more particular relation to the elements of damage, both general and special, which the plaintiff was seeking to recover.

At the conclusion of the plaintiff's case, the defendant moved the court for a nonsuit upon several grounds. He also moved to strike out all of the evidence offered and admitted under objection on behalf of the plaintiff and having reference to the various elements of damage claimed to have been suffered by it as a result of its eviction from the leased premises. In connection with said motions, it was stipulated that the judgment roll in the case of First Federal Trust Company v. McMurtry et al., might be introduced in evidence.

The court denied the defendant's motion for a nonsuit, whereupon the defendant moved the court for a directed verdict in the defendant's favor upon all of the grounds theretofore made and argued upon its previous motions. The trial court then proceeded to grant the defendant's aforesaid motion to strike out so much of the plaintiff's offered evidence as had relation to its averments of the value of the plaintiff's term under said lease and to its special losses as a result of its eviction. The trial court also granted the defendant's motion for a directed verict in his favor, and directed the jury to return such verdict, which, having been so returned, the court made and entered its judgment accordingly in the defendant's favor. From such judgment, the plaintiff has taken and now prosecutes this appeal.

[1, 2] We shall first consider the special defenses which the defendant pleaded and urged at the trial and upon his motion for a directed verdict and which he insists upon here, since, if these should be sustained, the judgment, regardless of other matters in issue,

must be affirmed. The defendant urges that the plaintiff's action was barred by the provisions of several sections and subdivisions of the Code of Civil Procedure. These all have relation to the time when the plaintiff's right of action arose. It is the respondent's contention that the breach of any of the lessor's obligations, under the provisions of section 1927 of the Civil Code, to insure to the lessee quiet possession of the leased premises during the term thereof against all persons lawfully claiming the same, occurred upon the institution of the foreclosure proceeding wherein the plaintiff in that action asserted a superior right to that of both the lessor and lessee of the premises in question, and that such asserted breach occurred upon the filing of the complaint in the foreclosure action on November 6, 1918, and, since the plaintiff herein did not institute the present action until February, 1923, its action was barred by the aforesaid provisions of the Code of Civil Procedure, and particularly by section 338, subd. 1, of said Code. There is no merit in this contention, nor do the authorities cited in the respondent's brief sustain it. The law is too well settled to require extensive comment or citation of authority that the covenant of quiet possession in a lease is not breached until there has been an actual or constructive eviction. The rule upon this subject is stated with sufficient citation of authority in the case of McCormick v. Marcy, 165 Cal. 386, 389, 132 P. 449, 450, wherein it is said:

> "There is no breach of the covenant for quiet and peaceable possession of land until there has been an eviction by the true owner, or an assertion by him of his paramount right in such a manner that the holder through the covenantor is compelled to yield possession or buy the outstanding superior title [citing cases]. As no cause of action accrues until a breach occurs, it follows that the statute of limitations upon an action for breach of this covenant begins to run only from the time of such breach."

In this case the plaintiff's actual eviction occurred on February 28, 1921. It commenced this action on February 28, 1923. The provisions of section 1927 of the Civil Code were, as we have already seen, read into the lease of plaintiff's assignor and hence constituted the covenant of quiet possession upon which the lessee and his assigns were entitled to rely until disturbed by an actual eviction. The plaintiff's action was thus commenced in time under any of the pleas of the statute of limitations urged by the respondent herein.

[3] The next affirmative defense relied upon by the respondent herein is that one L. B. McMurtry was at all times prior to the plaintiff's eviction the owner of the premises in question, and that the plaintiff's assignor well knew this fact and also the fact that, while the defendant Pentz, at the date of the execution of said lease, held a deed to said premises from said McMurtry, he was in fact and to the knowledge of all parties merely the agent and trustee of McMurtry, and hence that the plaintiff's cause of action, if any, was against McMurtry and not against the defendant herein. The facts as shown by the record herein are that some time prior to the date of the execution of said lease McMurtry had deeded the premises covered thereby to the defendant Pentz, and had thereafter taken from said Pentz a sublease of said premises; that, in the making of the lease in question to Noonan, the assignor of the plaintiff herein, Pentz purported to act as the owner of said premises; that he executed said lease as such and as a principal party thereto and not as an agent or trustee of any other person; that, in letters which passed between himself and his immediate lessee, authorizing the assignment thereof by the latter to the plaintiff herein, Pentz described himself as "the owner of Ridgewood ranch." The lease itself contains nothing to indicate that Pentz was executing the same, other than as the owner of the premises described therein, nor did the defendant offer any proof upon the trial that either the immediate lessee or its assignee, the plaintiff herein, had any knowledge that Pentz in the execution of the same was acting otherwise than as the owner of the leased premises. In Cal. Juris. vol. 1, p. 610, it is said that—

> "The rule has been long and continuously settled that an agent who signs in his own name instead of that of the principal, when he intends to bind the latter, becomes himself liable, the contract being considered his own."

In the case of Hall v. Jameson, 151 Cal. 606, 91 P. 518, 12 L. R. A. (N. S.) 1190, 121 Am. St. Rep. 137, the rule is thus stated:

> "Where an agent makes a contract really on behalf of his principal, but which purports to be his promise and to bind himself alone, and he has not in fact any authority to make that particular contract for his principal, the general rule is that the agent will be personally bound by the contract, notwithstanding his lack of personal interest in the consideration. He will be conclusively presumed to have intended to bind himself."

The following cases uphold the same doctrine: Gambrill v. Dworack, 58 Cal. App. 524, 208 P. 995; Kerry v. Pacific Marine Co., 121 Cal. 566, 54 P. 89, 66 Am. St. Rep. 65; Estrella Vineyard Co. v. Butler, 125 Cal. 232, 57 P. 980; 10 Cal. Jur., p. 617, and cases cited. In the case of Standard Livestock Co. v. Bank of California, 67 Cal. App. 381, 227 P. 962, it was decided that, where a contract must be in writing under the statute of frauds and has been executed by a party thereto as a principal, no one else can be held thereon as a principal except by proof that such other person has authorized in writing such contract. There is no such showing in this case. The respondent's contention in this behalf is without merit, and the plaintiff's demurrer to this affirmative defense should have been sustained.

[4] The next affirmative defense which the defendant pleaded in the trial court and urges upon this appeal is the defense of res adjudicata. The defendant in his answer and in furtherance of this plea set forth the facts showing the institution of the foreclosure action by the First Federal Trust Company, in which action the plaintiff and the defendant in the instant action were made defendants, and that there were also certain other codefendants, including L. B. McMurtry, the original mortgagor, and the Bank of California, etc., a later incumbrancer; that the plaintiff herein appeared in said action and set forth the existence and terms of its lease therein, and asked to have the same established and its rights against certain subsequent lienholders protected therein. The trial court in that action took cognizance of the plaintiff's said lease and adjudged it to have precedence over said subsequent lien claimant. It is the contention of the respondent herein that the plaintiff herein ought there and then to have asserted its claims for reimbursement for the injuries it had suffered or might thereafter suffer as a result of the defendant's breach of his covenant of quiet possession, and that, not having done so in that action, in which both the plaintiff and the defendant herein were parties, it is estopped by the judgment therein to assert its claims for such damages in the instant case. The difficulty with the respondent's contention in the foregoing regard is that prior to and up to the time of the entry of judgment in that action and of the plaintiff's eviction from said premises as a consequence thereof, it had sustained no damages, for the reason that there had occurred no breach of the covenant of quiet possession upon which it was entitled to rely; that, by virtue of such covenant and the obligation of its lessor thereunder it had a right to assume that its codefendant, said lessor, would protect his covenant by paying off or otherwise compounding with the holder of the superior right so as to avoid the breach of the said obligation through the occurrence of an actual dispossession of his tenant. Such tenant, though possibly in peril of having his possession of the leased premises disturbed by the eventualities of said foreclosure suit, would have been premature in assuming that these would certainly occur and in asserting damages which had not yet arisen. It could not in fact do so, for the simple reason that no estimate of the nature or extent of such damages could be made until an actual and total eviction had taken place. All that the plaintiff in this action was required to do in said foreclosure suit was, as a party thereto, to assert the existence of its lease and to protect the same against subsequent lienholders. As to the protection of itself against the assertion of a superior right on the part of the plaintiff in that action, it was entitled to rely upon the protection which its covenant afforded and upon the obligation of its codefendant Pentz to see to it that such protection was accorded. This being so, there was nothing in the nature of res adjudicata in that action which could in anywise affect or foreclose the assertion of the plaintiff's rights and remedies in the present action arising out of its eviction occurring after said former action.

[5] There is one other contention of the respondent which was urged upon his motion for a directed verdict and to which the trial court gave much weight in granting such motion. The respondent insists that, since the undisputed facts showed the plaintiff herein to have been not the original lessee of the premises in question, but merely an assignee of the original lessee, it was not entitled to maintain this action or to assert any right therein arising out of a breach of a covenant of quiet possession by reason of the provisions of section 823 of the Civil Code. Said section read as follows:

> "Whatever remedies the lessee of any real property may have against his immediate lessor, for the breach of any agreement in the lease, he may have against the assigns of the lessor, and the assigns of the lessee may have against the lessor and his assigns, except upon covenants against encumbrances or relating to the title or possession of the premises."

The respondent argues that, since a covenant in a lease with respect to quiet possession on the part of a lessee is one which relates to the "title or possession of the premises," it comes within the exceptions embraced in said section, and hence does not exist in favor of the assignee of a lessee. This assertion, however, involves a total misconception of the meaning and intent of said section of the Civil Code. The section by its terms relates to "remedies" as distinguished from "rights," and when so considered its meaning is clear. The remedy which a lessee of premises has against the lessor, or his assigns, for an accrued or already created breach of any agreement in the lease passes to the lessee's assigns, and may be asserted by the latter against the lessor or his assigns. The two exceptions expressed in the section are that accrued remedies for already ripened breaches of covenants against incumbrances or relating to the title or possession of the premises do not so pass but remain with the original lessee. But neither of these exceptions nor in fact the section as a whole, has any reference to breaches of the lease which have not occurred, nor to remedies therefor which have not arisen prior to the assignment of the lease. The assignment of a lease when legally accomplished transfers to the assignee thereof the right to the enforcement of every unbroken covenant which the lease contains, but does not transfer those ripened choses in action which come within the exceptions in the section of the Code above referred to. The respondent's contention in the foregoing regard is therefore without merit.

[6-8] The respondent makes the further contention that since, from the pleadings and evidence in the case, it appeared that, while the plaintiff, up to the time of the institution of the foreclosure action, had paid the installments of rent which had theretofore fallen due, it did not pay the installment thereof which, according to the terms of said lease, became due shortly after the institution of said action; and that, being thus in default in its own agreement to pay rent at the time of his eviction, it was not entitled to enforce in this action the defendant's obligation to insure him the peaceable possession of the leased premises during the term of said lease. The plaintiff made at the trial, and repeats here, several answers to this contention, but it seems to us that a sufficient answer thereto is to be found in the fact that according to the terms of said lease, the failure of the lessee to pay rent does not ipso facto work a forfeiture of the leasehold, but only gives to the lessor the right "at his option to terminate and end said lease." This amounts to no more than the right on the part of the landlord to terminate the lease in the manner provided by law; that is to say, in accordance with the provisions of section 1161 et seq. of the Code of Civil Procedure. It is so expressly provided in section 791 of the Civil Code. The agreement to pay rent and the covenant of peaceable possession are not thus interdependent covenants unless expressly made so by the terms of the lease. Besides, the plaintiff's failure, if any, to keep its agreement as to payment of rent after suit commenced for the assertion of a superior title was not made the basis of its eviction at the termination of such suit, nor was it made one of the grounds upon which the motion for a directed verdict herein was predicated. The point is not, therefore, available to the respondent upon this appeal. The case stood, therefore, in this wise at the time when the defendant made and the trial court granted the motion for a directed verdict. The grounds of said motion, in so far as they were based upon the foregoing special defenses of the defendant, were not well taken; and the order of said court in granting said motion, in so far as it did so upon such grounds, was erroneous. This being so, upon the case as it stood at the time of the making and granting of the defendant's motion for a directed verdict in his favor, the plaintiff was, at the very least, entitled to a verdict and judgment for nominal damages, and, this being so, the trial court was clearly in error in directing the jury to find a verdict otherwise than in the plaintiff's favor, at least to that extent. It is, however, argued by the respondent that since, upon the state of the record, the utmost to which the plaintiff was entitled was a verdict for nominal damages, the appellate tribunal will not reverse a case upon appeal when the effect of such reversal could only amount to the eventual recovery by a plaintiff of nominal damages. There is authority to sustain this view. 2 Cal. Juris. pp. 1009, 1010, § 600, and cases cited. We are not, however, satisfied that in any view of the law governing the measure of damages recoverable in an action founded upon a breach of the covenant for peaceable possession, which is either expressed in, or which by virtue of section 1927 of the Civil Code becomes a part of every lease, the plaintiff in the state of the record in this case would or should have been limited in its recovery to merely nominal damage. There were two states of facts fairly established by the undisputed evidence in this case which would militate against such a conclusion. The first of these relates to the showing which the record contains in support of the plaintiff's averment in its second amended complaint to the effect that the plaintiff "resisted said eviction and removal from said property by all the legal means within its power."

The record discloses that the plaintiff was made a party to the action instituted by the First Federal Trust Company for the foreclosure of its superior liens; that being served with process it appeared in said action by counsel and filed an answer therein; that thereafter its codefendant, W. R. Pentz (the defendant herein) and the Bank of California National Association joined in the filing and service of an answer and cross-complaint in said action, wherein they made the plaintiff herein a cross-defendant and in which these cross-complainants sought to have it determined that the said Bank of California National Association was the owner and holder of a lien upon said premises which was superior to whatever right, title, and interest or estate the plaintiff herein had in said premises, and that said premises be sold in satisfaction of said superior lien, and that the plaintiff herein be foreclosed from all right or claim in or to said premises. The record discloses that the plaintiff herein, having been served with process as a cross-defendant in said cross-action, also appeared and answered therein by counsel, and in its said answer set forth its said lease and alleged its superior right thereunder to the asserted claims of said cross-complainants; that a trial was had upon the issues thus framed, during which much evidence was presented and as a result of which the plaintiff succeeded in having it decreed that its rights and claims as the holder of said lease were superior to the asserted rights and claims of said cross-complainants. It thus sufficiently appears that the plaintiff herein was put to an outlay of expense for counsel fees and costs in defending its possession, not only against the superior right of the plaintiff in said foreclosure proceeding, but also against the asserted superior right and claims of the cross-complainants therein, the defendant Pentz herein being one of these. It is true that the plaintiff herein had not, at the time of the making of the motion for a directed verdict herein, proffered any very definite proofs as to the exact or proximate amount of its said outlays, but it had prayed for a lump sum in damages, and, in the absence of any assault upon the sufficiency of its proofs in the foregoing regard, we think the jury might properly have made an allowance for such damages under the plaintiff's general prayer. The respondent herein had steadfastly contended that the plaintiff's utmost limit of recovery in this action is defined by the provisions of section 3304 of the Civil Code. But, even if we should so hold, we find among the items of recoverable detriment under the terms of said section that of "three any expenses properly incurred by the covenantee in defending his possession"; and, if we should not so hold, but should conclude to relegate the plaintiff to other remedies in the way of damages than those provided for in section 3304 of the Civil Code, the plaintiff would be clearly entitled to recoup in damages for its outlays in defending its possession against the assertion of a superior title. 1 Tiffany, Landlord and Tenant, p. 548. It would seem to follow irresistibly that the trial court committed reversible error in its refusal to commit to the jury the right to find some measure of substantial damages as a recompense for the plaintiff's outlays in defending its possession, both against the assertion of the superior claims of the plaintiff in the foreclosure proceeding and the asserted superior claims of the cross-complainants therein, of which the defendant herein was himself a direct actor.

[9] There is yet another aspect of this case from which, even in respondent's view of the law of the case, the plaintiff herein would have been entitled to an award of substantial damages upon the state of the record as it stood when the motion for a directed verdict was granted. The undisputed evidence in this case disclosed that the defendant Pentz was guilty of a degree of bad faith in his entire dealing and attitude toward the plaintiff, who came to be his lessee. The defendant Pentz was the brother-in-law of L. B. McMurtry, the original owner of the premises in question, and was at all times entirely familiar with the state of the title to said premises and of the extent to which said McMurtry had involved his title and ownership thereof prior to his execution of the grant deed to his brother-in-law, Pentz, which antedated the making of the plaintiff's lease. Pentz was also during all of said times the assistant cashier of the Bank of California corporation, and as such was fully familiar with the transactions of said McMurtry with the latter institution, if he did not actively negotiate the same. He was thus fully conversant with all of the perils in which the title to the premises was enmeshed at the time of the making and execution of the lease in question to the assignor of the plaintiff and also of the assignment thereof, with his express consent, to the plaintiff. He executed such lease, and consented to such assignment in his assumed capacity as the owner of the leased premises, and was therefore, as we have held, subject to all of the obligations and liabilities incident to such ownership. When the foreclosure action was instituted and the plaintiff was made a party thereto, and when the plaintiff's acquired lease and its peaceable possession thereunder were put in peril, the plaintiff herein directed the attention of its lessor, Pentz, to such peril and demanded that its lessor take steps to protect it in its peaceable possession of the premises covered by its said lease; but the undisputed evidence shows, not only that the defendant Pentz took no action looking toward the plaintiff's protection, but that, on the contrary, he actively joined with his employer and codefendant, the Bank of California, in the assertion, by way of cross-action, to which he made the plaintiff herein a party, of a superior claim on the part of the said corporation to which he and it sought to subordinate the rights of the plaintiff herein, derived from the lease which he himself had made. The record further discloses that, after the said foreclosure action had resulted in a decree and sale of said premises, the said defendant Pentz, notwithstanding his assurances to the plaintiff herein that its peaceable possession of the premises would not be disturbed, took no action of any kind to prevent or delay its eviction or to mitigate in any way the rigors and losses thereof. The plaintiff, in its second amended complaint herein, sets forth in detail the foregoing acts, neglects, refusals, and hostilities on the part of the defendant Pentz, and thus sufficiently charges the said defendant with a want of good faith in respect to his obligations owed to his lessee. There was no denial or dispute as to the foregoing facts, and, this being so, we are of the opinion that the plaintiff herein was entitled to have had submitted to the jury the issue as to the defendant's bad faith in connection with the latter's breach of his covenant of peaceable possession.

In the case of Mack v. Patchin, 42 N. Y. 167, 173, 1 Am. Rep. 506, the defendant lessor was upon quite a similar state of facts held chargeable with a want of good faith in his duty and dealing with regard to his lessee, and a judgment against him for the value of the unexpired term was upheld. The foregoing case is a leading case upon the right of a lessee to substantial damages in cases where the lessor was chargeable with a want of good faith in respect to the protection of his lessee in response to his obligation to insure the latter peaceable possession for the term of his lease. We are of the opinion that in the instant case the jury should have been permitted to pass upon the weight of the evidence as to the presence or absence of good faith on the part of the defendant in the premises, and that in the event of a finding by it of absence of good faith on the defendant's part it would have been entitled to render a verdict in the plaintiff's favor for substantial damages. This being so, it was reversible error on the part of the trial court to deny it that right by the compulsion of a directed verdict in the defendant's favor. The citation of the New York case, above referred to, brings us to consideration of the whole subject of the measure of damages recoverable in this state for the breach of covenants of peaceable possession in leases of real estate, since, if this case must be reversed and retried, the question in its entirety will necessarily arise. It is the contention of the respondent herein that the measure of damages recoverable in such cases is controlled by the provisions of section 3304 of the Civil Code, which reads as follows:

> "The detriment caused by the breach of a covenant of 'seisin,' of 'right to convey,' of 'warranty,' or of 'quiet enjoyment,' in a grant of an estate in real property, is deemed to be:
>
> "1. The price paid to the grantor; or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property;
>
> "2. Interest thereon for the time during which the grantee derived no benefit from the property, not exceeding five years;
>
> "3. Any expenses properly incurred by the covenantee in defending his possession."

A reading of this section discloses that it does not directly or expressly designate leases and the right of recovery of lessees within its terms; but it is argued by the respondent that, under the other provisions of our Codes and under the authorities generally, a lease of real estate is declared to constitute "a grant of an estate in real property," and hence is to be embraced within the provisions of the foregoing section of the Civil Code. While it is true that under the provisons of certain sections of the Civil Code, such as sections 1053, 1108, 1213, 1214, and 1215 thereof, the transfer of any interest in real estate is generally designated as a "grant" thereof, it does not follow therefrom that the term "grant," wherever found in our Constitution or Codes, must be interpreted to embrace every transaction in which some interest in real estate is conveyed. That this term "grant" is one of general significance, applicable to all transfers in writing of either real or personal property, is made clear by the provisions of section 1053 of the Civil Code, but whether or not a particular transaction referred to in our Constitution or statutes is to be included within the general meaning of that term depends upon the nature of the transaction and upon the context in connection with which the term is used. This was made very clear by the decision of this court in the case of San Pedro, etc., R. R. Co. v. Hamilton, 161 Cal. 610, 119 P. 1073, 37 L. R. A. (N. S.) 686, wherein the foregoing sections of the Civil Code are adverted to and the authorities are collated and reviewed. In that case the question as to the interpretation to be given to the term "grant" as used with respect to tidelands, in article 5, § 3, of the state Constitution, expressly forbidding the grant of such lands, was under review; the contention being that by the use of said term the leasing of such lands was forbidden. After an exhaustive examination of the decisions, not only of our own state, but of other jurisdictions, this court reached the conclusion that leases of such lands were not inhibited and were not to be held embraced within the term "grant" as used in that provision of the Constitution. In so deciding, this court referred with approval to the case of Simonson v. Burr, 121 Cal. 582, 54 P. 87, wherein it was held that the leasing of a homestead was not to be construed as an abandonment thereof under section 1243 of the Civil Code declaring that a homestead is abandoned "by * * * a *grant* thereof." The court also cites the case of Des Moines Co. v. Tubbessing, 87 Iowa, 138, 54 N. W. 68, wherein the authorities collated in American and English Encyclopedia of Law are referred to as supporting the rule that, according to the weight of authority, the term "grant" in its ordinary significance does not embrace a chattel interest in realty. From the review of the authorities, the court concludes that the meaning of the word "grant" has by judicial determination been narrowed or enlarged to meet the exigencies of particular cases and the spirit of the law in which the word is employed. In the case of Jeffers v. Easton, Eldridge & Co., 113 Cal. 345, 45 P. 680, this court held that an estate for years was personal property, that under the provisions of section 1113 of the Civil Code the covenants which are implied in transfers of property are limited to conveyances by which "an estate of inheritance or fee simple is to be passed," and that by section 765 of the same Code "the common-law distinction between freehold estates and estates for years" is preserved, and that it is expressly declared therein that "estates for years are chattels real," and that an assignment of a term for years is therefore governed generally by the rules applicable to sales of personal property.

In the light of the foregoing authorities, we are of the opinion that, in determining the question as to whether the clauses in section 3304 of the Civil Code, defining the detriment caused by the breach of a covenant of quiet enjoyment in a "grant of an estate in real property" are to be so interpreted as to include leases of real property for a term of years, is a question which depends, among other things, upon the context of this and the contiguous sections of said Code wherein the same phrase is employed. Looking to the immediate wording of section 3304 of the Civil Code, we find it stated therein that the "detriment caused by the breach of a covenant of * * * 'quiet enjoyment,' in a grant" of an interest in real estate, "is deemed to be: 1. The price paid to the grantor," etc. But in the case of the ordinary lease there is no price paid to the lessor. The consideration of the lease is the rentals therein provided to be paid at specified times during the term of the lease. In so far as such rentals cover that portion of the term during which the lessee has been suffered to remain in the peaceable possession of the premises, it has never been held that these are recoverable as such in an action brought after eviction for the reason that, as to these, the lessee has received the full return therefor prior to his eviction. It is only such rentals as a lessee may have paid in advance covering a period subsequent to his eviction that he has been allowed a recovery. These are exceptional cases which cannot be held to justify a ruling that the recovery of rentals was intended to be referred to in the section as "the price paid to the grantor." Indeed, when the entire language of subdivision 1 of this section is read, it must be apparent that it can only have reference to the purchase price of premises paid upon a grant or sale, as distinguished from a lease thereof. This is made all the more apparent by a consideration of the two succeeding sections wherein the same phrase "a grant of an estate in real property," is used. Section 3305 obviously can only have reference to such "grants" as contain or imply covenants against incumbrances and a breach thereof. But leases neither contain nor imply covenants against incumbrances, and as to leases there can be no such thing as the breach of such covenants, since the tenant is in nowise interested in what prior incumbrances the landlord may have placed upon his title to the leased premises so long as his peaceable possession is not disturbed thereby. Section 3306 of the Civil Code is equally, and even more obviously, inapplicable to leases and the rights of prospective lessees, since the detriment therein provided for embraces such items as the cost of examining the title, which need not be an outlay of a mere lessee.

[10] We conclude that, judged by the context thereof and of its accompanying sections of the Civil Code, section 3304 thereof was never intended to have reference to leases of real estate or to the detriment caused by breaches of covenants for the peaceable possession of leased premises. We are further enforced in this conclusion by a reference to section 1927 of the Civil Code. This section contains the lessor's agreement to insure the lessee the quiet possession of the premises during the term of the hiring against all persons lawfully claiming the same. It is, in fact, the lessor's covenant which is read into every lease; and, since this section insures to the lessee his peaceable possession "during the term of the hiring," it would seem logically to follow that the detriment caused by a breach of the obligation of this agreement would naturally be the damage suffered by the hirer through the loss of his term, and hence the value of his term. But no such recovery would be possible to the lessee if his detriment is to be measured in the terms of section 3304 of the Civil Code, and the substantial guaranties of section 1927 of the Civil Code would thus become meaningless.

It is important to note in this connection that the provisions of section 1927 of the Civil Code, while a portion of the unadopted Field Code of New York, were derived by the compiler of that Code, not from the laws of New York, but from the Civil Code of France. See Annotated Civil Code 1872, Commissioner's Notes; Baranov v. Scudder, 177 Cal. 458, 465, 170 P. 1122. The rule of damages for the breach of covenants of peaceable possession in leases, not only in those states wherein the civil law originally prevailed (see Dehan v. Youree, 161 La. 806, 109 So. 498; Hodges v. Fries, 34 Fla. 63, 15 So. 683), but most of the other states of the country permit the award of damages for the value of the term. When we turn to the decisions of our own court upon the question of the amount of a lessee's recovery for the breach of covenants of this character, we find that these have uniformly upheld the doctrine that a lessee is entitled to recover, among other damages for his eviction, the value of his term. In the early case of Dwyer v. Carroll, 86 Cal. 298, 305, 24 P. 1015, it was held, with special reference to section 1927 of the Civil Code, that a tenant whose peaceable possession was so far interfered with by his landlord as to amount to his eviction was entitled to recover in damages the value of his lease, citing Dexter v. Manley, 4 Cush. (Mass.) 14. In the case of McDowell v. Hyman, 117 Cal. 67, 48 P. 984, it was held that for a breach of the obligation imposed upon the landlord by virtue of the provisions of section 1927 of the Civil Code the tenant was entitled to the recovery of substantial damages covering the continuance of his term. The case of Baranov v. Scudder, supra, is instructive, for, while that was an action by a sublessee to recover damages from his immediate lessor for his eviction by the original landlord of his said lessor, it was held that the plaintiff was entitled to the benefit of the provisions of section 1927 of the Civil Code and to be secured in his quiet possession of his leasehold during the entire term thereof. The plaintiff sued for the recovery of damages for the value of his lease during the term thereof, and recovered such damages, and the judgment therefor was both by the District Court of Appeal and by this court affirmed. In that case of Klein v. Lewis, 41 Cal. App. 463, 467, 182 P. 789, it was decided that, for a substantial eviction of a tenant by his landlord, the former, under proper pleadings and proofs would be entitled to recover the value of his unexpired lease, together with any other loss which was the proximate and natural result of his eviction. The most recent case in this state touching the recovery allowed under the terms of section 1927 of the Civil Code is that of Pedro v. Potter, 197 Cal. 751, 242 P. 926, 42 A. L. R. 1165, which was also an action by a sublessee for the recovery of damages for his eviction, but in which case it appeared that the sublease contained an express agreement that it was made subject to the conditions of the original lease, and it was accordingly held that the termination of the original lease put an end to the term of the sublease and hence that there was no room for the application of the provisions of section 1927 of the Civil Code. There are certain other decisions in this state to which we have been referred, such as McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456, McCormick v. Marcy, 165 Cal. 386, 132 P. 449, and Lynn v. Knob Hill Co., 177 Cal. 56, 169 P. 1009, wherein the provisions of sections 3304 and 3306 of the Civil Code were referred to as furnishing the proper rules of damages; but each of these cases arose upon a breach of the covenant of quiet possession in conveyances or agreements to convey the title to land, and hence, for reasons which we shall presently see, these cases have no application to agreements for the quiet possession of lessees under the provisions of section 1927 of the Civil Code. The respondent herein makes the final contention that section 3304 of the Civil Code is controlling as to the damages recoverable for all detriment suffered through the breach of covenants of quiet enjoyment in "grants of an interest in real estate," and that the above-quoted clause embraces not only conveyances of title to real estate, but leases thereof as well. The basis of this contention is that the Civil Code of California, as adopted in 1872, was in the main a replica of the so-called Field Code, prepared for but never adopted by the state of New York, but which was supposed to embody the existing law in New York at the time of its adoption in California, and hence, under the well-known rule of construction, this state, in adopting said Code, and particularly section 3304 thereof, took said provision with the interpretation already given to it by the courts of New York. We are thus led to the very interesting inquiry as to just what was the state of the laws of New York touching the measure of damages for breaches of covenants of quiet enjoyment at the time of the adoption in 1872 of the California Civil Code. It may be stated incidentally that the original Field Code, as to most of its provisions was framed, not upon the basis of statutory law in that state, but upon the decisions of its courts prior to the formation of said Code. The leading case touching the recovery of damages for the breach of a covenant for quiet enjoyment was the case of Staats v. Executors of Ten Eyck, 3 Caines (N. Y.) 111f, 2 Am. Dec. 254. That case involved the breach of a covenant of quiet enjoyment expressed in a grant of the title to real estate, and the rule as to the measure of damages therein laid down and later follow by other New York cases was substantially and, in fact, almost literally that later set forth in the Field Code and adopted in the form of section 3304 of the California Civil Code. In the case of Kinney v. Watts, 14 Wend. (N. Y.) 38, it was sought to give application of the rule declared in the previous case, and certain other cases which had followed it, to leases, but, since the court held that the rule could be given no application to the implied covenant sued upon in that case, the dictum in that case is of no value. In the case of Mack v. Patchin, 42 N. Y. 167, 1 Am. Rep. 506, however, decided in the year 1870, and which directly involved the breach of a covenant of quiet enjoyment in a lease, the New York Court of Appeals decided that, upon the breach of such a covenant, where an eviction was occasioned through the fault of the lessor, the measure of damages was the value of the unexpired term, less the rent reserved. In the case of Clarkson v. Skidmore, 46 N. Y. 297, decided in 1871, it was held that a lessee for years of mortgaged premises holding under a lease containing a covenant of quiet enjoyment, upon foreclosure and sale under the mortgage, by which his eviction resulted, was entitled to receive the value of the use of the premises for the remainder of his term, less the rent reserved. These two cases, and others which might be cited, declared the law as it stood in the state of New York at the time of the adoption of the Civil Code of California, and necessarily thereof of section 3304 of said Code, and it requires no argument to show that the rule expressed in these cases is not embraced in the rule of damages contained in section 3304 of said Code.

It fairly follows that the measure of damages embodied in that section and derived from cases which applied it to covenants in conveyances of title was not intended to be given application to leases of real estate. It may be said that the rule in the state of New York with respect to the measure of damages for the breach of the covenants of quiet enjoyment in leases has ever since been that declared in these early decisions of the court of last resort in that state, and that this will appear from the recent decision in the case of Dorb v. Modern Holding Co. (Co. ct.) 183 N. Y. S. 639, decided in 1920, wherein the rule is again stated that "the measure of damages to a lessee, who is ousted on foreclosure of mortgage on the premises, is the value of the use of the premises for the remainder of the term, less the rents reserved." It may be said in conclusion that this is not only the rule in New York, but that it is the rule which has been given general adoption in most of the states of the country, and is so stated to be in the leading text-books upon the subject. Tiffany on Landlord and Tenant, p. 538; Rawle on Covenants (5th Ed.) § 169, p. 237. In the latter authority it is pointed out that the earlier and harsher rule relating to the enforcement of covenants for quiet enjoyment has not only been found unsatisfactory to the courts of this country, but "that it has been relaxed or modified to meet the injustice done by it to lessees in particular cases," and has been repudiated in England, from which, according to the Staats Case, supra, it was originally derived, in the two recent and well-considered cases of Williams v. Burrell, 1 Com. Bench 402, and Lock v. Furze, 19 Com. Bench (N. S.) 96, and the rule adopted allowing a recovery to evicted lessees of the value of the term.

Having thus determined that section 3304 of the Civil Code does not provide the measure of damages in cases of this character, we are brought to the final question as to where the statutory rule governing the measure of both general and special damages for the breach of agreements for the peaceable possession of real estate by the lessee thereof under the terms of section 1927 of the Civil Code is to be found. The answer is, in section 3300 of the Civil Code, which reads as follows:

> "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

We do not deem it necessary to discuss in detail the various questions suggested in the light of the plaintiff's pleadings and proofs upon the former trial, since these may vary upon a retrial of the cause. We deem it proper to decide, however, that the trial court was in error in its order striking out practically all of the evidence offered on behalf of the plaintiff in support of its claims for special damages for losses of property and outlays incident to its eviction. In so ruling, we do not wish to be understood as holding that all of such offered evidence was admissible, but simply that the order of the court striking out in its entirety such evidence was too broad. Upon a retrial of the cause, in the light of the applicability of section 3300 of the Civil Code to the instant case, the parties concerned and the trial court should have no difficulty in arriving at the proper rulings to be given upon the proffer of evidence in support or denial of the plaintiff's claims for damages. We have considered certain other points upon this appeal but do not consider these sufficiently important to require separate discussion.

The judgment is reversed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; TYLER, Justice pro tem.; LANGDON, J.

204 Cal. 643

LA FRANCE v. KASHISHIAN et al.
(L. A. 8292.)

Supreme Court of California. July 31, 1928.

1. Landlord and tenant 🔑130(1)—Lease without guaranty of ownership carries implied warranty of title and consequent quiet possession in lessee.

A lease which is silent as to guaranty of ownership of leased premises by the lessor nevertheless carries an implied warranty of title in him and consequent quiet possession in lessee during term specified in lease.

2. Evidence 🔑397(1)—Implied stipulation in contract cannot be contradicted or varied by parol evidence.

An implied stipulation in a contract is of as great force as though it were fully set forth therein, and such implied stipulation may no more be contradicted or varied by parol evidence than may be that which is clearly expressed.

3. Evidence 🔑393(1)—Parol evidence having effect of contradicting implied warranty of title of lessors in leased premises held erroneously admitted (Civ. Code, § 1625; Code Civ. Proc. § 1856).

Under Civ. Code, § 1625, and Code Civ. Proc. § 1856, precluding the admission of oral evidence as to terms of written contract, parol evidence having the effect of varying or contradicting implied warranty of title of lessors in leased premises *held* erroneously admitted.

In Bank.

Appeal from Superior Court, Los Angeles County; Erwin W. Owen, Judge.

Action by George La France against G. S. Kashishian and another. Judgment for defendants, and plaintiff appeals. Reversed.

Superseding opinion, 259 P. 86.

McWhinney & Clock, of Long Beach, for appellant.

Denio & Hart, of Long Beach, Andrew F. Burke, of San Francisco, and M. C. Simpson, of Long Beach, for respondents.

Garret W. McEnerney, amicus curiæ.

RICHARDS, J. This is an appeal by the plaintiff from a judgment against him in an action in which he sought damages for breach of an alleged implied warranty of title and of quiet enjoyment, made by his lessors, the defendants herein.

Plaintiff leased from defendants a certain piece of real property, for a term of 10 years, at a stated consideration of $25 per month for the first 7 years of the term and $35 per month for the remaining 3 years thereof. Approximately 2 years and 10 months after the execution of the lease, plaintiff was evicted from the leased premises by one who had established paramount title to the property; and thereupon, on account of damages ensuing from such eviction, plaintiff commenced an action against defendants which resulted in a judgment for defendants.

On the trial of the action, it was shown that defendants' claim of title to the leased property was by virtue of a tax title only, which fact was known to each of the parties to the lease prior to its execution, and that the defense interposed by defendants to the action in effect was that, before the lease was signed by the parties thereto, a contemporaneous oral agreement was entered into between them, in substance, that, in consideration of the low rental to be paid for the use of the property as specified in the lease, plaintiff would take the risk of paramount title being established in another person. The introduction of all evidence tending to show such oral negotiations between the parties, not included within the terms of the lease, was allowed over plaintiff's objection, and it is upon such claimed error of the court that appellant bases his argument for reversal of the judgment.

As is substantially declared in section 1625 of the Civil Code and section 1856 of the Code of Civil Procedure, the general rule is that, where a contract between parties thereto has been reduced to writing, no evidence of terms of the agreement other than as contained within the contract as thus expressed may be received.

[1, 2] The lease in question contained no express warranty of title in the lessor. The law, however, seems to be well established that a lease which is silent as to guaranty of ownership of the leased premises by the lessor, nevertheless carries an implied warranty of the title in him, and consequent quiet possession in the lessee during the term specified in the lease. Section 1927, Civ. Code; McDowell v. Hyman, 117 Cal. 67, 70, 71, 48 P. 384; Agoure v. Lewis, 15 Cal. App. 71, 75, 76, 113 P. 882; Tiffany on Landlord and Tenant, vol. 1, pp. 518, 540; 24 Cyc. 1057. Coupled with such principle of law, it is contended by respondent, as set forth in several authorities, that an implied covenant of warranty may be rebutted by parol evidence. See Miller v. Van Tassel, 24 Cal. 458, 465; Johnson v. Powers, 65 Cal. 179, 3 P. 625; 22 Cor. Jur. 1097, 1261. But the weight of authority, especially as bearing upon a matter such as is here presented, is to the effect that an implied stipulation in a contract is of as great force as though it were fully set forth therein, and such implied stipulation may no more be contradicted or varied by parol evidence than may be that which is clearly expressed.

In the case of Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 746, 750, 103 P. 938, 939, among other things, the following appears as the language of the court:

> "It is a well-settled principle that that which is implied by law becomes as much a part of the contract as that which is therein written, and if the contract is clear and complete when aided by that which is imported into it by legal implication, it cannot be contradicted by parol in respect of that which is implied any more than in respect of that which is written."

Also, in Peterson v. Chaix, 5 Cal. App. 525, 527, 90 P. 948, 954, it is said:

> "There is another principle to be observed, namely, that whatever the law implies from a contract in writing is as much a part of the contract as that which is therein expressed; and to the extent that the contract, with that which the law implies, is clear, definite and complete, it cannot be added to, varied or contradicted by extrinsic evidence. * * *"

To the same effect is California D. & M. Co. v. Crowder, 58 Cal. App. 529, 531, 533, 209 P. 68.

Supported by a long list of authorities, the rule is stated in 17 Cyc. p. 570, as follows:

> "The legal effect of a written instrument, even though not apparent from the terms of the instrument itself, but left to be implied by law, can no more be contradicted, explained, or controlled by parol or extrinsic evidence than if such effect had been expressed. * * *"

[3] We are therefore of the opinion that, so far as the questioned evidence had the effect of varying or contradicting the implied warranty of title of defendants in the leased premises, the contention of appellant should be sustained.

As to the other questions involved in this appeal, these have all been considered and determined by this court in the case of Standard Livestock Co. v. Pentz, 269 P. 645, this day decided.

For the foregoing reasons, and upon the authority of the above-named decision, the judgment herein is reversed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

205 Cal. 70

PLATT v. PLATT et al. (L. A. 10573.)

Supreme Court of California. Aug. 24, 1928.

Appeal and error 🔑766—Motion for affirmance because appellant's briefs failed to set out record to justify reversal was denied, where record was supplied before motion (Code Civ. Proc. § 953c).

Motion for affirmance of judgment appealed from, based on ground that appellant failed to print, in her opening brief or any supplement thereto, in accordance with Code Civ. Proc. § 953c, any part of record sufficient to justify reversal of the judgment, should be denied, where subsequent to filing notice of motion to affirm and prior to making such motion appellant, with court's permission, filed a supplement to her opening brief setting out at length the complaint, amended answer, and other parts of the record.

In Bank.

Appeal from Superior Court, Los Angeles County; Daniel Beecher, Judge.

Action by M. Lucile Platt against Harry O. Platt and another. Judgment for defendants, and plaintiff appeals. On defendants' motion to affirm. Motion denied.

H. C. Hopkins, of Los Angeles, for appellant.

Miller & Ellis, Herbert N. Ellis, and L. E. Brogden, all of Los Angeles, for respondent Harry O. Platt.

David D. Stuart and Howard F. Shepherd, both of Los Angeles, for respondent Mary V. Platt.

PER CURIAM. The respondents move to affirm the judgment appealed from upon the ground that the appellant has failed to print in her opening brief or any supplement thereto, in accordance with the requirements of section 953c of the Code of Civil Procedure, any part of the record herein sufficient to justify a reversal of said judgment. At the time of the filing of respondents' notice of motion to affirm, the state of the record was such as would have warranted an affirmance of the judgment, for the appellant's opening brief falls far short of satisfying the requirements of section 953c, supra. However, subsequent to the filing of the notice of motion to affirm, but prior to the making of such motion, the appellant, with permission of court, filed herein a supplement to her opening brief in which she sets out at length the complaint, the amended answer thereto, the trial court's findings of fact and conclusions of law, the judgment, the notice of appeal, the notice to prepare transcript, several exhibits introduced in evidence, appellant's assignments of error, and certain of the testimony adduced upon the trial. In view of this showing, we think the motion to affirm should be denied. This conclusion is not at variance with the holding in Dahlberg v. Dahlberg, 260 P. 290, for the appellant in that case, upon the hearing of the motion to affirm, merely offered to print in a supplemental brief such portions of the record as this court might suggest. The approval of the suggested procedure would have placed the burden of presenting the appellant's appeal upon the court. Such is not the case here.

The motion to affirm is denied.

SMELLIE et al. v. SOUTHERN PAC. CO. et al. (Sac. 4057.)★

Supreme Court of California. Aug. 13, 1928.

Rehearing Granted Sept. 11, 1928.

1. Automobiles 🔑224(1)—Guest in automobile must act as reasonably prudent man.

Though negligence of driver of automobile is not imputed to guest, guest must act as reasonably prudent man would act in similar circumstances.

2. Automobiles 🔑224(4)—Railroads 🔑327(12)—Guest in automobile, stating to driver, "It's all clear; let's go," held contributorily negligent as to injury received in crossing collision.

In action against railroad and driver of automobile for death of guest in car, resulting from collision at crossing, deceased, who made statement to driver after freight train had passed, "It's all clear; let's go," *held* contributorily negligent as matter of law.

3. Evidence 🔑591—Testimony of driver of automobile, called as adverse party in action for death at crossing, that deceased guest made statement, "It's all clear; let's go," held admissible and binding on plaintiff, where not rebutted (Code Civ. Proc. § 2055).

In action against railroad and driver of automobile for death of driver's guest at crossing, testimony of driver under examination as adverse party under Code Civ. Proc. § 2055, that guest made statement, "It's all clear; let's go," *held* admissible and binding on plaintiff, where not rebutted.

4. Automobiles 🔑224(5)—Guest in automobile is not relieved from contributory negligence where he encourages driver to take obviously hazardous risks.

While guest in automobile is not chargeable with contributory negligence of driver, guest is not immune where he acquiesces in or encourages and advises taking risks which are obviously hazardous to his own personal security and safety.

5. Negligence 🔑136(12)—Disputable presumption that person exercises ordinary care makes no issue of fact in face of direct evidence of contributory negligence (Code Civ. Proc. § 1963, subd. 4).

Disputable presumption under Code Civ. Proc. § 1963, subd. 4, that person takes ordi-

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★Superseded by opinion of Supreme Court 299 P. 529.

nary care for his own concerns, does not make issue of fact for jury, where presumption is overcome by direct evidence of contributory negligence.

6. Trial ⚷139(1)—Court should direct verdict in defendant's favor, where verdict for plaintiffs would have to be set aside.

Where trial court is of opinion that verdict for plaintiffs would have to be set aside, court is under duty to direct verdict in defendant's favor.

7. Railroads ⚷344(10)—Railroad's allegation that injuries were caused solely by negligence of deceased and another was insufficient plea of contributory negligence, in action for death.

In action against driver and railroad for death of guest in automobile, allegation in railroad's answer that injuries were caused solely because of negligence of driver and deceased was insufficient plea of contributory negligence.

8. Appeal and error ⚷197(5)—Objection raised for first time on appeal, that no issue of contributory negligence was raised by pleadings, held unavailing.

Where, in action for death, evidence on issue of contributory negligence was introduced without objection that it was inadmissible under pleadings, and no such objection was raised in argument upon motions for directed verdict and nonsuits, objection raised for first time on appeal was unavailing.

Department 1.

Appeal from Superior Court, Madera County; S. L. Strother, Judge.

Action by Lillie D. Smellie and others against the Southern Pacific Company and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

W. M. Conley, Philip Conley and Matthew Conley, all of Fresno, for appellants.

L. L. Cory, of Fresno, Cooley, Crowley & Gallagher and Cooley & Gallagher, all of San Francisco, Gallaher & Jertberg, of Fresno, and H. I. Maxim, of Madera, for respondents.

SEAWELL, J. This appeal is taken from a judgment for defendants upon a directed verdict returned by the jury in an action brought by the widow and four minor sons of Robert S. Smellie, deceased, to recover damages for the death of said decedent, who was killed when the automobile truck in which he was riding as the guest of defendant L. Ireland, the driver and owner thereof, was struck by a train of defendant Southern Pacific Company. The court held at the conclusion of plaintiffs' case that the evidence established as a matter of law contributory negligence on the part of said decedent, and directed a verdict to be returned in favor of defendants. The correctness of this ruling is here challenged.

The accident occurred at about 5 o'clock p. m. on June 25, 1926, in the city of Madera. The truck in which decedent was riding, and which was being driven by defendant Ireland, was of the Reo manufacture, and was used by Ireland in a general trucking business conducted by him. Ireland was called by plaintiffs as their witness under the provisions of section 2055, Code of Civil Procedure. He testified that he turned off the state highway, on which he had been traveling in a northerly direction, into Ninth street. The situs of the accident seems to have been in an outlying district of the city of Madera. He proceeded easterly on Ninth street to a point between 20 and 25 feet from the westerly rail of a side track of defendant Southern Pacific Company which intersects Ninth street, and there brought his car to a stop to permit a freight train to pass. No signal of any kind was maintained at the intersection. The freight train was moving south at a speed of 5 or 6 miles an hour, and 6 or 8 cars remained to pass the intersection when Ireland brought his truck to a stop. East of the sidetrack and parallel thereto was the main line track of the Southern Pacific Company. The distance between the center line of the side track and the center line of the main track was 13 feet. Both Ireland and decedent had resided in Madera for many years, and Ireland testified as to his familiarity with the crossing. Doubtless the decedent was also generally familiar with existing conditions. The moment the caboose, which was the rear car of the freight train, cleared the crossing, Ireland started his truck and crossed the side track, and, in an attempt to cross the main track, the autotruck was struck by the Fresno Flyer, north bound, which was traveling on the main track at a rate of speed estimated to be about 55 miles an hour. The accident happened so quickly that not more than an interval of a second intervened between the time Ireland saw the train and the time his truck was hit by it. He looked before starting, but the outgoing freight train blocked a view of the main track, and consequently his view to the south was obstructed, and he did not see the approaching passenger train. He listened, but did not hear the passenger train because of the noise made by the passing freight train. The distance which the passenger train traveled before it could be brought to a stop furnishes some evidence as to the speed at which it was moving. Upon cross-examination by counsel for the codefendant Southern Pacific Company, Ireland testified that both he and Smellie looked before Ireland started the truck, and Smellie, who was seated by his side, said, "It's all clear; let's go." The testimony of Ireland was not contradicted by that of any other witness. Respondents did not offer any evidence in their own behalf, but, upon the conclusion of plaintiffs' case, made motions for nonsuits and directed verdicts, and the court granted the motions for directed verdicts, upon which the judgment appealed from was entered.

[1, 2] We are of the view that the evidence is susceptible of no reasonable interpretation under the rule of this state, but that as a matter of law decedent was contributorily negligent in advising Ireland to go forward when he made the remark, "It's all clear; let's go;" and hence we must sustain the action of the court below in taking the case from the jury and directing a verdict for defendants. Respondents do not contend that the negligence of Ireland was imputable to descendent, his guest. Decedent, however was himself bound to act as a reasonably prudent man would act in similar circumstances. This is not a case where the guest, reposing complete confidence in the driver, fails himself to note the situation of possible danger, nor is it a case where a guest, observing an imminent and suddenly approaching peril, remains silent in the realization that the highest degree of prudence may consist in inaction, rather than meddlesome interference. The guest, being as fully aware of the circumstances creating the peril as was the driver, assumed to advise the driver that he could proceed in safety, and thereby consented to accept the risk to be encountered. It must be held that he has brought the misfortune upon himself, and that he can recover neither from the driver nor the third party whose negligence concurred in causing the collision. Ireland and the decedent were acquaintances, and the latter had been riding with the former for several hours prior to the accident. They had discussed the hauling of some freight which the decedent had in contemplation. At the moment of the accident, they were engaged in casual conversation as they awaited the passing of the freight train. We are unable to give any other construction to the request or advisory remark made by the decedent, "It's all clear; let's go," than that, whatever risk there might be in attempting to cross the railroad tracks, decedent was willing to assume and share it with Ireland. It amounted to the assumption of responsibility for all consequences that might flow from the attempt to cross the railroad tracks. Appellants suggest that said statement made by the decedent should be limited to the crossing of the first track or switch, and not to the main track. There can be no doubt that decedent was aware of the existence of the two parallel tracks, and that said remark applied to the situation as it was presented by the physical fact. Besides, it would have been indulging in folly for decedent to have advised Ireland as to the obvious condition of the track over which the train had just passed.

[3] It is strongly insisted by appellants that the statement or remark attributed to decedent should not have been considered for any purpose. We cannot agree with this contention. Ireland was called to the stand to show the circumstances of the accident. We do not understand it to be the rule that that portion of a transaction which is favorable to a party calling a witness may be inquired into and his adversary denied the right to elicit other parts of the identical transaction which may put a different aspect upon the case. Certainly section 2055, Code of Civil Procedure, was not intended to work any such result. We think the remark formed a material part of the transaction, if it is not indeed in the nature of res gestæ. Ireland was asked by plaintiffs if decedent was not his guest, and he replied that he was. This alone entitled the defendants to bring out the fact as to whether decedent by his participation in the movement of the truck had not taken himself out of the class into which Ireland, by his conclusion, had placed him.

The effect of testimony elicited under the provisions of section 2055, Code of Civil Procedure, was clearly stated in Figari v. Olcese, 184 Cal. 775, 195 P. 425, 15 A. L. R. 192, as follows:

> "There is no merit in appellant's objection that no testimony was taken in behalf of defendants, because of the fact that the defendants were called only as plaintiff's witnesses. Section 2055, Code of Civil Procedure, provides that a party calling and examining as a witness an adverse party 'shall not be bound by his testimony' and that the testimony of such adverse witness 'may be rebutted by the party calling him.' This provision does not mean that such testimony may not be given its proper weight, but merely, as it declares, that the party calling such witness shall not be concluded from rebutting his testimony, or from impeaching the witness. Dravo v. Fabel, 132 U. S. 487, 33 L. Ed. 421, 10 Sup. Ct. Rep. 170, see, also, Rose's U. S. Notes. In other words, such testimony is to be treated as though given on cross-examination."

See, also, Goehring v. Rogers, 67 Cal. App. 253, 227 P. 687; Gates v. Pendleton, 71 Cal. App. 752, 236 P. 365.

No attempt was made to impeach Ireland or to rebut his testimony. But, if it be conceded that, strictly speaking, the testimony objected to should not have been considered by the court as a part of the plaintiffs' case, it was admissible as a part of the defendants' case, and its effect, irrespective of order, was fatal to plaintiffs. We are of the opinion, however, that it was properly before the court and jury for consideration.

[4] The law as declared in Smith v. Maine Central R. R. Co., 87 Me. 339, 32 A. 967, is strikingly applicable to the facts of the instant case. The rule is well settled that a guest is not responsible or chargeable with the contributory negligent acts of the driver of an automobile. This rule, however, does not offer him immunity from culpability in cases where he acquiesces in or encourages and advises the encountering of risks which are obviously hazardous to his personal security and safety, such as no reasonably prudent person should assume.

[5, 6] Appellants contend that the disputable presumption "that a person takes ordinary

care of his own concerns" (section 1963, subd. 4, Code Civ. Proc.), created a conflict on an issue of fact as between said presumption and the direct testimony given by witness Ireland to the effect that the directions or advice were given to him to move the truck forward, and that said issue should have been submitted to the jury. As against positive testimony, this was but a bare presumption, not supported or fortified by any independent fact in the case. "Disputable * * * presumptions, while evidence, are evidence the weakest and least satisfactory. They are allowed to stand, not against the facts they represent, but in lieu of proof of them. The fact being proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled." Savings & L. Soc. v. Burnett, 106 Cal. 514, 39 P. 922. The trial court having heard the witness Ireland testify and having observed his manner was unquestionably of the opinion that, should the jury return a verdict in favor of the plaintiffs, it would be its bounden duty to set the verdict aside. This being so, under a long line of decisions of this state, the trial court was acting in the purview of its duty when it directed the jury to return a verdict in favor of the defendants. We cannot say, in the circumstances of the case, that the court's direction was not fully sustained by the case as presented.

[7, 8] Further, it is argued that the motions for directed verdicts on the ground of contributory negligence of the deceased were improperly granted because contributory negligence was not made an issue by the pleadings. It must be conceded that the allegation, that the injuries were caused solely and alone because of the negligence and want of care of the driver of the truck and the decedent was an insufficient plea of contributory negligence. Crabbe v. Mammoth Channel G. Min. Co., 168 Cal. 500, 143 P. 714; Hughes v. Warman Steel Casting Co., 174 Cal. 556, 163 P. 885; Off v. Crump, 40 Cal. App. 173, 180 P. 360. However, evidence relevant to the issue of contributory negligence was introduced without objection on the part of plaintiffs that it was inadmissible under the pleadings because contributory negligence was not properly pleaded, and upon argument of the motions for directed verdicts and nonsuits no question was raised on behalf of plaintiffs as to the defective plea of the issue, but, on the contrary, it was assumed that it was involved in the case. Where the defense of contributory negligence is considered as properly pleaded throughout the trial, an objection for the first time on appeal that no such issue was made by the pleadings will not be of any avail to the objecting party. Western States, etc., Co. v. Bayside L. Co., 182 Cal. 140, 187 P. 735; Schuh v. Herron Co., 177 Cal. 13, 169 P. 682; Coffman v. Singh, 49 Cal. App. 342, 193 P. 259. Ireland at the conclusion of the evidence was granted leave to set up the defense of contributory negligence on the part of the deceased. Defendant Southern Pacific Company attempted to plead by its answer contributory negligence on the part of both Ireland and the deceased. Its answer alleged that the accident was caused "solely and alone" by the contributory negligence of said Ireland and deceased. No objection was taken by demurrer or motion as to the insufficiency of said allegation, and no specific objection was made by plaintiff as to the admission of the evidence on the ground that contributory negligence had not been sufficiently pleaded, but it was resisted by plaintiffs on other grounds. No doubt the court would have permitted an amendment which would have cured the defective pleading had the plaintiffs made the point.

The judgment appealed from is affirmed.

We concur: PRESTON, J.; CURTIS, J.

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205 Cal. 46

WAYT et al. v. PATEE et al. (L. A. 9394.)

Supreme Court of California. Aug. 22, 1928.

1. Deeds 🔑149—Agreement by lot owners not to permit occupancy of their lots by persons other than Caucasians held valid and not restraint of alienation (Civ. Code, § 711).

Written agreement between lot owners, binding parties thereto for a period of 25 years not to permit their respective lots to be occupied by any persons other than of the Caucasian race and to incorporate such restriction in all deeds, was a valid covenant, binding on parties thereto, since it did not restrain alienation in violation of Civ. Code, § 711; occupancy by, and not conveyance of, title to persons other than of Caucasian race being prohibited thereby.

2. Records 🔑19—Recording written agreement restricting occupancy of property to certain classes of persons gave purchasers constructive notice thereof.

Recording of agreement restricting occupancy of respective lots of parties to certain class of persons gave purchasers constructive notice thereof.

3. Injunction 🔑62(1)—Violation of personal covenant restricting use of land by assignee taking with notice will be enjoined.

Court of equity will grant injunctive relief against the violation of covenants restricting the free use of land, not only as against parties to such covenants, but as against an assignee taking with notice thereof, even if the covenant is merely personal and does not run with the land.

4. Records 🔑6—Written agreement against occupancy of lots by persons other than Caucasians held "conveyance" within recording statute, as respects constructive notice (Civ. Code, §§ 1213, 1215).

Written agreement between lot owners, binding parties not to permit their respective lots to be occupied by persons other than those of the Caucasian race, *held* to constitute a "conveyance" within Civ. Code, § 1213, providing that every recorded conveyance of realty is constructive notice to subsequent purchasers of its contents, since section 1215 defines conveyance as every instrument by which an estate in realty is created, alienated, mortgaged, or incumbered, or by which the title to any realty may be affected, except wills.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conveyance.]

5. Trial ⚿404(2)—Finding that agreement was mere personal covenant not binding on assigns held mere conclusion of law.

Finding that written agreement restricting occupancy of respective lots of signers to persons of Caucasian race was a mere personal covenant, not binding on assigns of signers thereof, was a mere conclusion of law, which may be disregarded by appellate court as a finding.

Department 1.

Appeal from Superior Court, Los Angeles County; John F. Pullen, Judge.

Action by W. B. Wayt and others against George Patee and others. From an adverse judgment, plaintiffs appeal. Reversed, with directions.

Killian & Bentson and Victor L. Bentson, all of Los Angeles, for appellants.

Willis O. Tyler, of Los Angeles, for respondents.

CURTIS, J. The Crestmore tract is a real estate subdivision situated in the city of Los Angeles, containing a large number of lots, the exact number of which is not shown by the record, but it is apparent that they exceed sixty in number. All the lots in said tract had been originally sold subject to restrictions against subsequent sale to or occupancy by persons other than those of the Caucasian race. These restrictions expired on the 1st day of January, 1925. They are not set forth in the record, and we have no means of knowing their precise import. Their significance, however, is not material to any of the issues in the present proceeding. After the expiration of these restrictions, and some time during the year 1925, certain owners of lots in said tract signed and acknowledged a certain instrument in writing, of which the following is a copy:

"Whereas, all real estate in Crestmore subdivision, in the city of Los Angeles, California, was originally sold subject to restrictions against sale or occupancy to or by any person other than of the Caucasian race; and

"Whereas, the said restrictions expire on the first of January, 1925, we, the undersigned owners of real estate in the Crestmore subdivision, in the city of Los Angeles, California, agree to bind ourselves for a period of 25 years to the following restriction: That we will not permit occupancy of our land or property by any persons other than of the Caucasian race, and that this restriction shall be incorporated in all deeds of transfer of this property.

"These covenants to run with the land until January first, 1950."

This instrument was filed for record in the office of the county recorder of said county of Los Angeles on June 30, 1925. Whether it was signed by all of the then owners of lots in said tract does not appear, but it was signed and acknowledged by the owners of at least sixty of said lots, including all of the plaintiffs and the defendants Fred R. Stewart and Nellie Stewart. Said defendants were the owners of lot 108 of said tract at the time of the execution by them of said instrument. Thereafter said Fred R. Stewart and Nellie Stewart negotiated for the sale of said lot to said defendants A. D. Kinchlow and Mattie Kinchlow, his wife, who are not of the Caucasian race, but are negroes. By virtue of these negotiations, the Stewarts had executed and placed in a certain bank in said city, as the escrow holder, the necessary instruments of conveyance, and had given possession of said lot to the defendants Kinchlow and wife. Thereupon the plaintiffs instituted this action to enjoin the conveyance of said lot by the Stewarts to the Kinchlows and also to enjoin the Kinchlows from occupying said lot. The complaint set forth the foregoing facts, and the answer of the defendants Stewarts and Kinchlows contained no denial of the allegations of the complaint. George Patee and Jane Doe Patee were, by the complaint, made defendants, but it does not appear that they were ever served with process or appeared in said action, and the court found that they had no connection with the negotiations or transactions between the Stewarts and the Kinchlows. Upon the pleadings and certain affidavits, which do not state any facts materially different from the above-stated facts, the court rendered judgment in favor of defendants. From this judgment the plaintiffs have appealed.

[1] The sole question presented on this appeal relates to the construction and legal effect of the instrument or agreement of the parties above set forth, whereby they sought to confine the occupancy of lots in said tract to persons of the Caucasian race. Since the decision by this court of the case of Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P. 596, 9 A. L. R. 115, it has been the settled law of this state that there is a material difference between a condition in a deed or other instrument whereby the owner of real property binds himself not to transfer or convey said real property to a certain class of indviduals and a condition whereby the owner binds himself not to permit said real prop-

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

erty to be occupied by the same class of individuals. The first condition is held to be in restraint of alienation, and thereby void under the terms of section 711 of the Civil Code. But a condition in a deed or other instrument against the occupancy of real property by persons of a certain class, as, for instance, those not of the Caucasian race, is valid and binding. Page 683 of said decision.

[2] The agreement, therefore, in the present action, whereby the parties thereto bound themselves not to permit their respective lots in said subdivision to be occupied by any persons other than those of the Caucasian race, and to incorporate such a restriction in all deeds of transfer of their respective lots was a valid covenant, and binding upon the parties thereto. Los Angeles Investment Co. v. Gary, supra. This agreement was of record in the office of the county recorder of Los Angeles county at the time the defendants Kichlows were negotiating for the purchase of said lot 108. They therefore had constructive notice of its contents.

[3] It is contended, however, by the respondents, that the covenant in question is merely a personal covenant, that it does not run with the land, notwithstanding the language thereof indicating a contrary intention, and therefore a court of equity will not enjoin the violation thereof. There are authorities to the effect that a court of equity will grant injunctive relief against the violation of covenants restricting the free use of land, not only as against the parties to such covenants but as against an assignee taking with notice of such covenant, even if the covenant is merely personal and does not run with the land. In 7 Cal. Jur. p. 743, the subject is treated as follows:

> "Although covenants restricting the free use of one lot or parcel of land for the benefit of another may not meet the requirements of covenants running with the land, they may nevertheless constitute personal covenants, enforceable not only against the original covenantor, but against subsequent holders with notice. The principle upon which such covenants are enforced in the last-named instance is found in the general rule of equity that a party taking with notice of an equity takes subject to that equity. Liability on the covenants results not from his being the assignee of the party who made the agreement but because he has taken the estate with notice of a valid agreement concerning it which he cannot equitably refuse to perform."

In Pomeroy's Equity Jurisprudence (4th Ed.) §§ 688 and 689, the rule is stated as follows:

> "A purchaser with notice of a prior contract to sell or to lease takes subject to such contract, and is bound in the same manner as his vendor to carry it into execution. On the same principle, if the owner of land enters into a covenant concerning the land, concerning its uses, subjecting it to covenants or personal servitudes and the like, and the land is afterwards conveyed or sold to one who has notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled in equity either to specifically execute it or will be restrained from violating it; and it makes no difference whatever, with respect to this liability in equity, whether the covenant is or is not one which 'runs with the land.'"

The same doctrine is announced in the case of Whitney v. Union Railway, 11 Gray (77 Mass.) 359, 71 Am. Dec. 715, in the following language:

> "The precise form or nature of the covenant or agreement is quite immaterial. It is not essential that it should run with the land. A personal covenant or agreement will be held valid and binding in equity on a purchaser taking the estate with notice. It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform."

These authorities were before this court in the case of Hunt v. Jones, 149 Cal. 297, 301, 86 P. 686, and were expressly approved in the opinion in said case. In that case, among other things, the court said (page 300 [86 P. 688]):

> "We do not discuss the point as to whether the covenant here in question was one running with the land so as to bind the assignee of the water company as grantee of plaintiff's covenantor, the Thermalito Colony Company, association, because we think that, treated, simply as a personal covenant or agreement under the allegations of the complaint, a court of equity would be warranted in enforcing it against the defendant. There can be no doubt of the proposition that personal covenants or agreements bestowing benefits and imposing restrictions upon the use of land may be enforced in equity, where a subsequent purchaser from the covenantor takes with notice of an existing equitable claim or interest in favor of another."

Hunt v. Jones, supra, has been expressly approved by this court in the two recent cases of McBride v. Freeman, 191 Cal. 152, 155, 215 P. 678, and Martin v. Holm, 197 Cal. 733, 747, 242 P. 718. In McBride v. Freeman the court said:

> "In Hunt v. Jones, 149 Cal. 297, 86 P. 686, the court recognized the rule that where a proper case is presented equity will enforce a personal covenant or agreement relative to land as effectually as would a court of law had the covenant been one clearly running with the land, and the covenant in that case having been made expressly for the benefit of plaintiff's land was held enforceable in equity as against an assignee of the covenantor who took with notice thereof."

In Martin v. Holm, written by the present Chief Justice and concurred in by three of the present associate justices of this court, the rule approved in McBride v. Freeman was reiterated as follows:

> "As was pointed out in McBride v. Freeman, supra, at page 155 (215 P. 678), there can be no doubt that even personal covenants or agreements bestowing benefits and imposing restrictions upon the use of land may be enforced in equity, where a subsequent purchaser from the covenantor takes with notice of an existing equitable claim or interest in favor of another."

In support of their contention, the respondents rely in the main upon Los Angeles, etc., Co. v. S. P. R. R. Co., 136 Cal. 36, 68 P. 308; Long v. Cramer Meat & Packing Co., 155 Cal. 402, 101 P. 297; Berryman v. Hotel Savoy Co., 160 Cal. 559, 117 P. 677, 37 L. R. A. (N. S.) 5, and Bresee v. Dunn, 178 Cal. 96, 172 P. 387. These cases were considered by the court in the opinion in McBride v. Freeman, supra, page 155 (215 P. 678), and were held not to be in conflict with the rule above announced. Respondents urge that the promise of the parties who signed the agreement in this case could only be effectually carried out by imposing conditions subsequent in grants to the lots of the defendants, the Stewarts. This same argument was made and ruled upon adversely to respondents' contention in the case of Werner v. Graham, 181 Cal. 174, 183 P. 945, and in McBride v. Freeman, supra. The court in the latter case, at page 154 (215 P. 679), said:

> "This precise question was answered adversely to appellants' contentions in the case of Werner v. Graham, 181 Cal. 174, 183 P. 945. Appellants contend that what was there said upon this subject was dictum, for the reason that the restrictions there under consideration were cast in the form of a condition, and that what was there decided should be held inapplicable to restrictions, as in the instant case, which are cast in the form of covenants. This contention cannot be sustained. * * * The court then proceeded to consider and decide that case upon the assumption that the restrictions therein, though in form of conditions, were, in fact, covenants, and what was there decided, in that view of the case, can in no sense be regarded as dictum."

In the present action, the agreement containing the restrictions limiting the occupancy of the lots in said tract to members of the Caucasian race was executed by the defendants Stewart, and was unquestionably binding upon them. It further provided that the parties thereto would incorporate such restrictions in any deed of transfer of said lots that they might thereafter execute, and that the covenants contained therein should run with the land. As already noted, the agreement containing these restrictions was of record in the office of the county recorder of the county in which said real property was situated at the time the defendants the Kinchlows purchased said lots. They therefore had constructive notice of the contents of said agreement. Neither in their answer nor in any affidavit filed by them do they allege or claim that they purchased said lot in ignorance of the restrictions placed thereon by their grantors. Therefore it can well be assumed that in purchasing said lot they had actual as well as constructive notice that the occupancy therof was restricted to persons of the Caucasian race. This does not invalidate the conveyances under which they acquired said lot from the Stewarts, nor does it in any manner impair their title thereto. It does, however, prevent them from occupying or residing upon said property, even though the legal title thereto is in them. Los Angeles Investment Co. v. Gary, supra.

[4] The further point made by respondents is that the respondents the Kinchlows did not have either actual or constructive notice of the restrictions contained in said agreement. In support thereof respondents rely upon section 1213 of the Civil Code, which provides that every conveyance of real property properly and legally recorded is constructive notice to subsequent purchasers of its contents. Respondents contend that the agreement signed by the plaintiffs and the defendants, the Stewarts, containing said restrictions, was not a "conveyance of real property." In this we think respondents are in error, as by section 1215 of the Civil Code the term conveyance as used in section 1213 of said Code embraces every instrument in writing by which an estate in real property is created, aliened, mortgaged, or encumbered, *or by which the title to any real property may be affected*, except wills. This definition of "a conveyance of real property" is sufficiently comprehensive to include the agreement which is the basis of the present controversy.

[5] In this case the court made findings in which it found all the facts thereinbefore set out to be true, and in addition thereto the court found that on September 2, 1925, which was before the commencement of this action, the complaint herein having been filed September 15, 1925, that Fred R. Stewart and Nellie Stewart "sold and transferred their said lot 108 of the Crestmore tract to the defendants A. D. Kinchlow and Mattie Kinchlow, his wife, and gave the said Kinchlows possession thereof." It further found, in finding 8 of the findings, that the agreement pleaded in the amended complaint, which is the agreement hereinbefore referred to as containing said restrictions, is a mere personal covenant, and was not binding upon the assigns by the signers thereof nor upon the defendants the Kinchlows. Upon these findings it dissolved the temporary injunction, which had been theretofore issued in said action restraining and enjoining the defendants A. D. Kinchlow and Mattie Kinchlow, his wife, from occupying said lot 108 of the Crestmore tract. It is apparent that finding 8 was not a finding of any fact in the case, but was a mere conclusion of law, and that

as such it may be disregarded as a finding. Upon the actual facts found, according to the views expressed herein, judgment should have been rendered in favor of plaintiffs enjoining the defendants A. D. Kinchlow and Mattie Kinchlow, his wife, from occupying said lot numbered 108 of the said Crestmore tract.

The judgment is reversed, with directions to the trial court to enter its judgment upon the facts as found by said court in favor of plaintiffs, enjoining defendants A. D. Kinchlow and Mattie Kinchlow, his wife, from occupying said lot 108 of the said Crestmore tract, or any part thereof.

We concur: PRESTON, J.; SEAWELL, J.

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93 Cal. App. 488

Ex parte MOORE. (Cr. 1709.)

District Court of Appeal, Second District, Division 2, California. Aug. 10, 1928.

1. Witnesses 🔑21—Commitment of witness for contempt in refusing to answer questions after being informed that he need not answer certain prior questions, but must answer others, which he did, held erroneous.

Commitment of witness for contempt of court in refusing to answer questions after being informed that he need not answer certain questions, which he had theretofore refused to answer, but must answer others, which he did, *held* erroneous; witness being justified in believing that court would rule as to whether or not he must answer before adjudging him guilty of contempt.

2. Contempt 🔑2—Gist of "contempt" is contumacious intent as well as conduct.

The gist of "contempt" of court, as by witness in refusing to answer questions, is contumacious intent, as well as conduct.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contempt.]

3. Witnesses 🔑21—Refusal to answer question as to witness' whereabouts since difficulty, on ground of possible incrimination, held not contempt.

Witness *held* not guilty of contempt of court in refusing to answer question as to his whereabouts since difficulty forming subject-matter of case on trial, on ground that answer might tend to incriminate him.

4. Witnesses 🔑21—Refusal to answer immaterial questions as to witness' whereabouts when subpœna was served and who served it held not contempt (Code Civ. Proc. § 2065).

Questions as to witness' whereabouts when subpœna was served on him and who served it being immaterial, he could not be held in contempt for refusing to answer them, in view of Code Civ. Proc. § 2065.

5. Contempt 🔑63(5)—Second commitment of witness for contempt in refusing to answer questions held beyond court's jurisdiction.

Issuance of second commitment of witness for contempt of court in refusing to answer questions on ground of possible incrimination *held* beyond court's jurisdiction.

Application by Joseph Moore for a writ of habeas corpus to the sheriff of Los Angeles county to secure the release of petitioner from custody under a commitment for contempt of court. Writ granted, and petitioner discharged.

Paul W. Schenck and Leo V. Silverstein, both of Los Angeles, for petitioner.

Asa Keyes, Dist. Atty., and Tracy Chatfield Becker and A. H. Van Cott, Deputy Dist. Attys., all of Los Angeles, for respondent.

CRAIG, J. [1, 2] The following statement of facts will be taken as a basis for the decision: The trial of a case entitled People v. Albori was in progress. The petitioner herein was called as a witness and was sworn to testify. As his examination progressed, he refused to answer some of the questions upon the ground that to do so might tend to incriminate him. Upon such objection being made to answering certain of the questions, the court informed the witness that he need not answer; as to others, the court directed that an answer be given. The witness in each instance complied with the ruling thus made. Finally the examination proceeded as follows:

> "Q. By the Court: Where have you been since June 27th? A. I refuse to answer. Q. Where were you when this subpœna was served on you? A. I was—I refuse to answer. Q. Who served the subpœna on you, do you know? A. I refuse to answer,"

—whereupon the court said:

> "Well, for your refusal to answer these last three questions you are judged guilty of contempt and sentenced to jail for five days. Prepare a commitment, please, Mr. Yorba. Mr. Bailiff, you take this witness into custody."

We think the court was in error. The gist of the contempt is the contumacious intent as well as the conduct of the party. The procedure which it had followed justified the witness in believing that, upon his refusal to answer any question on the ground stated by him, the court would rule as to whether or not he must answer, and that this opportunity would be given for compliance with the court's order before he would be adjudged guilty of contempt for refusing.

[3, 4] Again, we think the witness was well within his rights in refusing to answer the question, "Where have you been since June 27th?" on the ground that it might tend to incriminate him. It is easily conceivable

that, if he was a participant in the difficulty which formed the subject-matter of the case on trial, his actions subsequently thereto might tend to incriminate him. As to the other two questions, they were immaterial, and a witness may only be held in contempt for refusal to answer questions which are pertinent to the matter in issue. Code Civ. Proc. § 2065.

[5] Another issue was argued by counsel involving the question of the right of the court to issue a second commitment. This we think was beyond the jurisdiction of the court. Barry v. Superior Court, 91 Cal. 486, 27 P. 763; In re Barry, 94 Cal. 562, 29 P. 1109.

The writ is granted, and the petitioner is discharged.

We concur: WORKS, P. J.; HAZLETT, Justice pro tem.

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93 Cal. App. 455

JEDLICKA et ux. v. ATWELL LAND CO. et al. (Civ. 5820.)★

District Court of Appeal, Second District, Division 1, California. Aug. 6, 1928.

Rehearing Denied Sept. 5, 1928. Hearing Denied by Supreme Court Oct. 4, 1928.

1. Corporations 🔑429—Sellers' failure to use diligence to ascertain authority of persons actually members of corporate purchaser's board of directors to authorize contract was immaterial.

That sellers did not use diligence to ascertain authority of persons authorizing contract for purchase of land by corporation was immaterial, where they were actually members, and constituted entire membership, of board of directors, and no facts giving sellers notice of any irregularity, fraud, or agreements adverse to corporation's interests, were suggested.

2. Corporations 🔑519(3)—Evidence of majority stockholder's agreement to divide profits from corporation's purchase of land with other directors equally held not to establish interests adverse to corporation.

Testimony of directors that one of them, who owned substantially all of corporation's stock, promised to divide profits from its purchase of land with other directors equally, *held* not to establish adverse interests relieving corporation from liability on contract authorized by them; such evidence not tending to prove agreement that profit should not be primarily corporation's property.

3. Vendor and purchaser 🔑329—Evidence held sufficient to prove damage by breach of contract to purchase land in failing to pay installment due.

Evidence that plaintiffs purchased outstanding equity in land purchased by them, expended considerable sum in improvements, and occupied it under rental agreement after day fixed for final payment, and that market value thereof at time of defendants' breach of contract to purchase it from plaintiffs by failure to pay installment due before such date had fallen much below contract price, *held* sufficient to prove damage by such breach.

4. Appeal and error 🔑1048(5)—Cross-examination of defendant stockholder, as to when he learned of codefendant corporation's contract to purchase land, held not prejudicial, where he denied knowing anything about land at time mentioned.

Questions asked individual defendant on cross-examination as to when he first knew of defendant corporation's contract to purchase certain land after he had testified that he did not receive certificate of stock purchased by him until after execution of such contract, *held* not prejudicial, in view of his replies denying that he knew anything about land at time inquired about.

5. Appeal and error 🔑1050(1)—Admission of letters, referring to defendant corporation's interest in land, to show that individual defendant was stockholder when corporation contracted to purchase land, held not prejudicial.

In action for breach of corporation's contract to purchase land, admission of letters, passing between director and attorney for defendant stockholder, referring to corporation's interest in land, after such stockholder admitted that attorney spoke to him about letter from director, but denied that he read it or knew anything about land at time, *held* not prejudicial; not being of great importance on question whether he was stockholder when contract was made.

6. New trial 🔑100—Denial of new trial for newly discovered evidence that defendant purchased stock after execution of corporation's broken contract to purchase land, held not abuse of discretion.

Denial of individual defendant's motion for new trial, on ground of newly discovered evidence that he purchased stock pledged to him after execution of codefendant corporation's contract to purchase land for want of due diligence to discover and obtain documents referred to in affidavits and improbability of change in result of action for breach of contract *held* not abuse of discretion.

7. Appeal and error 🔑616(2)—Inclusion of affidavits in clerk's transcript only, without certification by judge, does not warrant review of order denying new trial.

Inclusion of affidavits supporting motion for new trial in clerk's transcript only, without making such part of record part of reporter's transcript or having it certified by judge, is not sufficient to warrant review of order denying motion.

8. Appeal and error 🔑782—Order denying new trial being nonappealable, appeal therefrom will be dismissed.

Appeal from an order denying a motion for new trial, being an attempted appeal from a nonappealable order, will be dismissed.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Leo Jedlicka and wife against the Atwell Land Company, John W. Child-

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★Rehearing denied. Hearing denied by Supreme Court.

ress, and others. From a judgment against named defendants and two other defendants, an order dismissing the action as against another defendant, and an order denying a motion for a new trial, named defendants appeal. Judgment affirmed, and appeals from such orders dismissed.

Miller & Casady, of Los Angeles, for appellants.

Robert Brennan, of Los Angeles, for respondents.

CONREY, P. J. Pursuant to verdict of the jury, judgment was entered in favor of the plaintiffs against defendant Atwell Land Company in the sum of $10,000, and against the defendant John W. Childress in the sum of $9,997, and against two other defendants in the sum of $1 each. The corporation and Childress appeal from the judgment.

The alleged contract was fully set forth by copy in the complaint. On the face of the document it purported to be executed by the sellers, plaintiffs herein, and by the corporation by its president and secretary duly authorized so to do by resolution of the board of directors. The contract as executed bore the seal of the corporation. By the terms of the writing, dated August 16, 1921, the sellers agreed to sell to the buyer certain described real property, and the buyer agreed to purchase the same and pay therefor the sum of $87,500, of which total sum the buyer was to pay on September 1, 1922, $45,000 and the remainder in two equal installments payable, respectively, on September 1, 1923, and March 1, 1924, with interest as specified; "provided, however, that no interest whatsoever shall be paid until September 1st, 1922, but during the existence of this contract prior to said September 1st, 1922, the sellers shall have and enjoy the exclusive possession of said property (subject to the oil lease to Lisle B. Tannehill hereinafter referred to) and shall deliver the same to the buyer on said 1st day of September, 1922." It was agreed that, upon payment of the purchase price, the sellers should grant said property to the buyer clear of all incumbrances, except certain taxes and rights of way and reservations, and subject to said Tannehill oil lease.

[1] The first point of appellants is stated thus:

> "The Atwell Land Company is not bound by a contract purported to be authorized by resolution of its board of directors, all of whom were personally interested adversely to the Atwell Land Company in voting for said resolution."

The board of directors consisted of three persons, R. M. Martin, E. S. Shenk, and C. B. Guittard; Martin was president, and Guittard secretary. A meeting of the board of directors was held on August 16, 1921, pursuant to written consent of all of the directors, although Martin was absent from the meeting. It was at this meeting that the resolution was adopted authorizing the execution of said contract.

The contention of appellants is that all of these directors were interested in the purchase of the land, adversely to the corporation, because of an agreement among the three that they should share equally all the profits to be derived from the purchase of the land; that the votes of the directors were and each was a nullity.

It appears that the plaintiffs had their dealings with the company through its board of directors, without any knowledge or notice of any disqualification of said directors or personal agreements between them. Nevertheless appellant contends that the company received no benefit from the contract sued upon, and that respondents suffered no prejudice in reliance upon any apparent authority of said officers; that respondents did not exercise reasonable diligence to ascertain the authority of the officers executing the contract, and therefore the company should not be deemed bound by the contract.

[2] Since it appears that the three persons named actually were members and constituted the entire membership of the board of directors, it becomes immaterial that the plaintiffs did not use diligence to ascertain their authority. No mistake was made in the personnel of the board with which plaintiffs dealt as representing the corporation. No suggestion is made of facts which gave notice to plaintiffs that there was anything irregular or fraudulent in the conduct of the directors, or that they had entered into any agreements which were adverse to the interests of the corporation. The evidence to which appellants refer as establishing such adverse interests is found in the testimony of Martin, Guittard, and Shenk, all to the effect that Martin had promised the other two that he would divide equally with them the profits to be derived from the purchase of this land by the corporation. The motive for obtaining such a promise from Martin is better understood when it is noted that at the time when it was given he was the owner of substantially all of the stock of the corporation. This agreement to split the profits would therefore have been necessary as between themselves if they wished to prevent Mr. Martin from absorbing practically all of the profits made by the corporation. As to the corporation itself, the ultimate division of profits as between its stockholders would be an indifferent matter, for such division could only be made out of dividends declared and paid. The evidence does not tend to prove any agreement that the profits should not primarily be property of the corporation.

[3] The 120 acres of land which defendant corporation agreed to purchase from the plaintiffs was part of a larger property (380 acres) conveyed to Leo Jedlicka in December, 1919. On the 31st day of that month, Jed-

licka executed to L. B. Tannehill the oil lease mentioned in the contract with defendant corporation. At the same time, Tannehill signed and delivered to Jedlicka a letter reading as follows:

> "In consideration of the fact that you and your wife sign the oil lease herewith handed to you in my favor and that you and your wife unconditionally convey your title to the 380 acres known as the Sterling ranch, Riverside county, to Edwin L. Wilhite, subject to incumbrance on same, I agree to purchase from Edwin L. Wilhite the title to the 120 acres on the east side of the road, subject to all easements and conditions now upon said 120 acres. And I further agree to pay or cause to be paid and discharged all incumbrances in the nature of trust deeds, mortgages or taxes on said one hundred and twenty acres (120), and hold same until September the 15th, 1922, during which period I will sell to you the said one hundred twenty (120) acres for the total sum of forty-five thousand ($45,000) dollars, provided, however, if you purchase said lands under this letter agreement that you will receive the title to same subject to that certain lease heretofore mentioned executed by you and your wife in my favor, you to have the use and possession for agricultural purposes until Sept. 15, 1922. Time is the essence hereof."

In accordance with the propositions contained in said letter, the plaintiffs conveyed the 380 acres to Wilhite, and delivered the oil lease to Tannehill. The plaintiffs, however, remained in actual possession of said 120 acres until some time in the year 1923. During the time of that occupancy, prior to the breach of contract by defendant company, plaintiffs purchased an outstanding equity in the property. Also, during said period of occupancy, and prior to the contract with defendants, the plaintiffs, according to their testimony, expended about $7,000 in improvements on the premises.

The plaintiffs pleaded, as a cause of special damages, that, by reason of the failure of defendants to pay the $45,000 installment which under the contract fell due on September 1, 1922, they were unable to pay the $45,000 which, under the Tannehill agreement, they were required to pay on or before the 15th of that month in order to complete their purchase of the land from Tannehill. The evidence is that the occupancy of plaintiffs thenceforth was under a rental agreement. It is obvious that, if said installment had been paid, plaintiffs would have been able to pay Tannehill. There is, on the other hand, no direct testimony that they did not have other funds with which to make such payment.

But the case for the plaintiffs does not entirely depend on proof of the alleged special damage. There is abundant evidence that, at the time of breach by defendant corporation, of its contract, the market value of the land had fallen so far below the contract price that such value was far more more than $10,000 below the contract price. Having first failed to pay in accordance with its agreement, defendant corporation admitted the nonpayment, but denied that it made the contract, and denied the resulting damage. The record, as we view it, amply proves the contract, the breach, and the damage. The judgment against the corporation should be affirmed.

[4] Appellant Childress attacks the judgment rendered against him as a stockholder in the defendant corporation. He contends that the court erred in the admission of certain evidence against him, and that these errors were prejudicial because the evidence was conflicting upon the point as to whether he was a stockholder at the time when the contract was made. In relation to this matter, appellant Childress contends that the court erroneously permitted cross-examination and impeachment of Childress, (a) "upon the irrelevant matter of when John W. Childress first knew of the contract sued upon, because such cross-examination was upon a wholly irrelevant matter"; and (b) "to permit contradiction of appellant Childress in the same respect by letters which were not relevant to the issues or binding upon him."

The liability of Childress depends upon proof of the fact that on August 16, 1921, he was the owner of 9,997 shares of stock of defendant corporation. These were shares that had belonged to Martin. According to the testimony of Childress, Martin had pledged these shares to him as security for certain contract obligations. Upon failure of Martin to perform his agreement, Childress caused the shares to be sold on the 9th day of August. Childress testified: "I had a sale and sold it at the courthouse. * * * I sold to J. W. Childress, myself." He further testified that Martin claimed that the sale was not legal, and that the new certificate was not received by him (Childress) until the 2d day of November. On the other hand, there was produced in evidence the stock book, containing the stub from which the certificate issued to Childress had been detached. The stub identified the certificate and the transfer from Martin, and contained the signature of Childress immediately below these words, "Received certificate No. 17 for 9,997 shares, this 9th day of August, 1921." C. B. Guittard, secretary of the corporation, testified that Childress made said signature in his (Guittard's) presence, on August 9, 1921, and that the certificate was delivered to Childress at that time.

[5] The errors claimed by appellant Childress, in connection with his cross-examination, relate to questions asked after he had testified that he did not receive the certificate until November. Under the first of these assignments of error, the record indicates that the questions were asked for the purpose of obtaining from Childress an admission that, in the year 1921, he knew that the Jed-

licka premises were supposed to be oil land, and that he knew of the Atwell Land Company contract. As the witness by his replies denied that he knew anything at all about the land at that time, we are unable to see anything prejudicial in the questions, even if, as claimed, the matters involved were not relevant to the issues. The letters referred to in the second of these assignments of error in the court's rulings, were a letter of date March 17, 1922, addressed to Mr. Shenk, director of Atwell Land Company as hereinbefore shown, by Mr. Follette, who was the attorney of Childress in the transactions relating to the Martin-Childress controversy, and Shenk's reply thereto. The letters refer to the company's interest in the Jedlicka property, and were introduced after Childress had admitted that Follette spoke to him "something about a letter he got from Mr. Shenk," but had denied that he read the letter or at that time knew anything about the Jedlicka property. Mr. Shenk, however, testified that late in 1921, or at the beginning of 1922, he talked with Childress about the Jedlicka property, and that Childress said, "I must see Mr. Follette." Here again we find nothing prejudicial, even if erroneous, in the admission of the evidence. It was not of great importance in relation to the principal question affecting Childress, viz. whether he was a stockholder of the Atwell Land Company on the 16th day of August, 1921. There is in evidence a letter signed by Childress, of date September 27, 1921, and addressed to Martin, in which Childress, while agreeing to the calling of a meeting of the company for certain purposes, specifically does so on condition that he does not in any way admit any irregularity or illegality whatsoever in "that certain pledgee's sale wherein the capital stock of the Atwell Land Company was sold, delivered, and transferred to John W. Childress." This is strongly confirmatory of the stub book and of the secretary's testimony showing that the stock transfer to Childress was completed on August 9, 1921; a week before the Jedlicka contract was made.

[6, 7] Finally, appellant insists that the court should have granted his motion for a new trial, upon the ground of newly discovered evidence tending to prove that the pledgee's sale (or *a* pledgee's sale) of the Martin stock, actually occurred at a date subsequent to August 16, 1921. The documents referred to in the affidavits were in the actual custody of Mr. Follette, who had been the attorney of Childress, although he ceased to be such attorney prior to the trial of this action. The court apparently was not satisfied that due diligence had been used to discover and obtain the documents for use at the trial, or that their presentation would have changed the result of the action. We do not find any abuse of discretion in the denial of the motion. Incidentally it may be noted that the affidavits are found only in the clerk's transcript, and this part of the record was not made part of the reporter's transcript, nor was it certified by the judge. This is not sufficient. Jeffords v. Young, 197 Cal. 224, 227, 228, 239 P. 1054.

[8] The judgment is affirmed. The appeal from the order dismissing the action as against defendant R. M. Martin has not been argued or presented in any way, and the same is dismissed. The appeal from the order denying motion for a new trial, being an attempted appeal from a nonappealable order, is dismissed.

We concur: HOUSER, J.; YORK, J.

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93 Cal. App. 507

GRANITE ROCK CO. v. FREEMAN et al.
(Civ. 5692.)

District Court of Appeal, First District, Division 2, California. Aug. 16, 1928.

1. Costs 🔑173(1)—Plaintiff recovering interest and costs by contest after payment of principal before trial was "prevailing party" within statute authorizing inclusion of attorney fee in costs (St. 1919, p. 487, § 2).

Plaintiff recovering interest and costs, including attorney fee, by contest, after payment of principal sum claimed before answer filed, was "prevailing party" within St. 1919, p. 487, § 2, authorizing inclusion of such fee as part of costs awarded to such party.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Prevailing Party.]

2. Costs 🔑173(1)—Statute authorizing inclusion of attorney fee in costs awarded prevailing party held not unconstitutional (St. 1919, p. 487, § 2).

St. 1919, p. 487, § 2, authorizing inclusion of attorney fee as part of costs awarded to prevailing party, *held* not unconstitutional.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the Granite Rock Company against Orville V. Freeman and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Knight, Boland & Christin, of San Francisco, for appellants.

Wyckoff & Gardner, of Watsonville, for respondent.

STURTEVANT, J. Heretofore the state highway commission awarded a contract to Freeman & Whiting to build a portion of the state highway located in San Mateo county. Pursuant to the provisions of chapter 303, Statutes of 1919, the contractors, as principals, and the American Indemnity Company, as surety, executed to the state of California a bond. The bond was in all respects as provided by the statute. Thereafter the contractors entered upon the performance of the contract. While so engaged, they obtained certain materials and supplies from the plaintiff. Later the construction was completed. The plaintiff duly filed a notice to withhold. In due time it commenced this action against the contractors and the bonding company. Later the defendants appeared and filed a demurrer. While the demurrer was pending, the contractors obtained a withdrawal of all moneys from the state of California. After they obtained possession of the moneys, they paid to the plaintiff the principal of the sum claimed by the plaintiff, but did not pay the accrued interest or costs. Later they tendered a check covering the amount of costs and interest, but not containing any sum whatever in payment of plaintiff's attorney fees. The plaintiff refused the check, and it was deposited for the plaintiff's account. Having taken the foregoing steps, the defendants prepared an answer pleading all of the foregoing facts which had occurred subsequent to the filing of the complaint. Thereafter the action proceeded to trial before the trial court sitting without a jury. The trial court made findings of fact in favor of the plaintiff, and ordered the judgment in its favor for a sum including accrued interest and costs, including, among other items, $500 as attorney fees. From a judgment entered thereon, the defendants have appealed.

[1] If that portion of the judgment awarding attorney fees was correct, it is clear that the judgment should be affirmed. In this connection, the defendants quote the record showing that, before the date of the trial, they had paid the principal sum claimed by the plaintiff; that therefore there was not and could not be a trial on that element. The defendants then argue that under such facts the plaintiff could not be, and that the defendants necessarily must be, "the prevailing party." Chapter 303, Stats. 1919. What with moneys paid to it before trial, and what with moneys obtained by virtue of the judgment, the plaintiff recovered every element it sued for. It had to fight for each element. It was "the prevailing party," within the meaning of those words as used in the statute, to the same extent and degree that it would have been if the principal sum had not been paid before answer filed but had been withheld and had been included as a part of the judgment itself. The difference between this and any other action was merely in the procedure, but nothing was obtained without a contest, in which it prevailed.

[2] The defendants cite Builders' Supply Depot v. O'Connor, 150 Cal. 265, 88 P. 982, 17 L. R. A. (N. S.) 909, 119 Am. St. Rep. 193, 11 Ann. Cas. 712, and contend that, in so far as section 2 of chapter 303, Statutes 1919, authorizes the trial court to include an attorney fee as a part of the costs to be awarded to "the prevailing party," it is unconstitutional. The authority is not in point. In the O'Connor Case the court was considering a statute which authorized the trial court to allow a reasonable attorney fee to certain lien claimants who should be successful in establishing their claims. It did not authorize the trial court to make the same order in behalf of the property owner who should successfully oppose the lien being established. A case more nearly in point is Skrocki v. Stahl, 14 Cal. App. 1, 110 P. 957. In that case the court was considering a statute (Stats. 1872, p. 533) which authorized the trial court to allow as costs $100 to the plaintiff if he was successful, or the like sum to the defendant if he was successful. While the wording is not identical with the statute of 1919, the effect was the same. "Where the reason is the same, the rule should be the same." Civ. Code, § 3511.

The judgment is affirmed.

We concur: BUCK, Presiding Justice pro tem.; NOURSE, J.

93 Cal. App. 796

William J. FITZHUGH, etc., Plaintiff and Respondent, v. Orvill V. FREEMAN et al., Defendants and Appellants. (Civ. 5692.)

District Court of Appeal, First District, Division 2, California. Aug. 16, 1928.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Knight, Boland & Christin, of San Francisco, for appellants.

Wyckoff & Gardner, of Watsonville, for respondent.

STURTEVANT, J. Except as to the amounts, the facts are parallel with the facts in the case Granite Rock Co. v. Freeman et al. (Cal. App.) 269 P. 668, this day decided.

For the reasons there stated, the judgment is affirmed.

We concur: BUCK, Presiding Justice pro tem.; NOURSE, J.

93 Cal. App. 478

PEOPLE v. GUIDO. (Cr. 1476.)★

District Court of Appeal, First District, Division 2, California. Aug. 8, 1928.

Hearing Denied by Supreme Court Oct. 4, 1928.

1. Criminal law ⚷1166(1)—Denial of motion to suppress evidence obtained by search without warrant held not prejudicial error.

Denial of defendant's motion to suppress evidence alleged to have been secured by a search without a warrant *held* not to constitute prejudicial error, since, if motion had been granted, nevertheless defendant could have been confronted by testimony of witnesses who saw articles and, in all probability, by photographs thereof.

2. Intoxicating liquors ⚷238(1)—Denial of directed verdict for failure to prove liquor was intended for beverage purposes held not error under evidence.

In prosecution for possession of still intended for manufacture of liquor for beverage purposes, denial of directed verdict for defendant for failure of proof that liquor was intended for beverage purposes *held* not error, where there was indirect evidence from which jury might infer or presume that the liquor was so intended.

3. Criminal law ⚷829(1)—Refusal of instructions on subject-matter as to which court instructed fully held not error.

Refusal of instructions on subject-matter as to which court had fully and completely instructed, by giving certain instructions so clear and pointed that jury could not have been uninformed, *held* not error.

4. Statutes ⚷35½—Law amending previous statute adopted by referendum held not unconstitutional because amendment was not also by referendum (St. 1927, p. 497, amending Wright Act; Const. art. 4, § 1).

St. 1927, p. 497, amending the Wright Act (St. 1921, p. 79), which had adopted as a law of the state penal provisions of the Volstead Act (27 USCA) by means of a referendum, *held* not unconstitutional by reason of fact that the amendment was not also by referendum, since Const. art. 4, § 1, expressly provides that act adopted under referendum may be amended by Legislature.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Frank Guido was convicted of the unlawful possession of a still intended for the manufacture of intoxicating liquor for beverage purposes, and he appeals. Affirmed.

Hearing denied by Supreme Court, SEAWELL and LANGDON, JJ., voting for a transfer.

Gilman & Harnden, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The district attorney filed an information against the defendant, charging him with having violated the provisions of chapter 277, Statutes of 1927—the unlawful possession of a still intended for the manufacture of intoxicating liquor for beverage purposes. The defendant was tried before the trial court sitting with a jury. The jury returned a verdict against the defendant, and, from a judgment entered thereon, the defendant has appealed.

[1] In his brief, the defendant calls to our attention that his premises were searched by the peace officers, and that they took from his possession numerous parts of a still and a quantity of distilled liquor, and that the officers did not have a search warrant authorizing them to do or perform any of said acts. Before the trial, the defendant made a motion to suppress, but the motion was denied. He cites and relies on the doctrine as stated in Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524, 29 L. Ed. 746, and in his brief he has made an exhaustive presentation of the doctrine stated in that case. However, his reasoning is not convincing. The doctrine of that case has never been adopted in this state. The law in this state is settled by the ruling in People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A. L. R. 1383, and the cases there cited. In the Mayen Case the court said it would not attempt to review the ruling on such a motion because said ruling was a collateral matter to the appeal before it—an appeal from a judgment of conviction of grand larceny. It is patent that the ruling complained of is, in the last analysis, almost wholly immaterial. The gravamen of the defendant's complaint is that the articles taken by an unlawful means were offered in evidence against him. But if his motion to restore had been granted, nevertheless under the ruling of the Mayen Case he could, and doubtlessly would, have been confronted by the testimony of the witnesses who saw the articles and, in all probability, by photographs of the articles. It is clear, therefore, that the denial of the defendant's motion would have been of negligible benefit to him. We are unable to say that the ruling was error, and we are unable to say that it was prejudicial to the rights of the defendant.

[2] Claiming that the plaintiff was bound to prove that the defendant had a still for the manufacture of liquor and that the plaintiff was also bound to prove that such liquor was *intended for beverage purposes*, the defendant made a motion that the trial court direct a verdict in his favor. The motion was denied. There was no error in the ruling. True it is that there was no direct evidence as to what use the defendant intended to make of the liquor after it had been distilled, but there was an abundance of indirect evidence from which the jury might infer or presume that the liquor was intended for beverage purposes.

★Hearing denied by Supreme Court.

[3] Presenting the same contention, the defendant tendered seven different instructions which the trial court refused to give. He earnestly contends the court erred. We think he is mistaken. Assuming that each and every one of the instructions was a correct statement of the law, a complete answer to the defendant's point is that the trial court instructed fully and completely on the same subject-matter by giving certain instructions which were so clear and so pointed that the jury could not have been uninformed.

[4] Finally, it is claimed that chapter 277, Statutes of 1927, is unconstitutional. The defendant makes the following argument: The Volstead Act (27 USCA) penalizes the possession of a still for manufacturing intoxicating liquor for beverage purposes. The Wright Act (Stats. 1921, p. 79) adopted as the law of this state the penal provisions of the Volstead Act. The Wright Act was adopted by the people after a referendum duly had. The act of 1927 purports to amend the Wright Act and, the defendant argues that an act adopted by a referendum may be amended only by a referendum. The error in this reasoning rests in the concluding portion. By section 1 of article 4 of the Constitution, it is provided that an act adopted by the people under the referendum provisions of the Constitution may be amended by the Legislature at any subsequent sessions thereof. It follows that the contention that the statute is unconstitutional has not been sustained.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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93 Cal. App. 259

PEOPLE v. VEJAR. (Cr. 1669.)

District Court of Appeal, Second District, Division 2, California. July 25, 1928.

1. Robbery 🔑24(1)—Conviction for first degree robbery held sustained by evidence.

Evidence *held* sufficient to sustain conviction for first degree robbery charged in connection with theft of ring.

2. Criminal law 🔑742(3), 935(1)—Whether prosecuting witness was successfully impeached is question for jury, and impeachment does not authorize granting of new trial.

Question whether prosecuting witness is successfully impeached is for jury's determination, and cannot be made the basis for disturbing the verdict or ordering new trial.

3. Criminal law 🔑942(1)—Refusal of new trial for corroborative impeaching testimony as to prosecuting witness' statement admitting bribery held not abuse of discretion.

Refusal of new trial in robbery prosecution for newly discovered evidence of statement of prosecuting witness to his employer that police officers had discovered wine in his cellar and that he had paid them money to avoid arrest *held* not abuse of discretion, since testimony merely corroborated other impeaching testimony.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Delores R. Vejar was convicted of first degree robbery, and he appeals. Affirmed.

MacDonald & Thompson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Waldamar Augustine, of San Francisco, for the People.

CRAIG, J. The appellant was charged by information with robbery by force and fear, was convicted of robbery in the first degree, and, his motion for a new trial having been denied, appeals from the judgment and order denying said motion.

[1, 2] It is conceded that on or about November 19, 1926, appellant and two other men went to the home of one Nick Zitko, in the city of Los Angeles, and unlawfully obtained from the latter a diamond ring and $45 in money. The complaining witness testified that Vejar pointed a gun at him, forcibly removed from his finger a diamond ring worth $400, and took from his pocket the money in controversy; that the defendant at the same time exhibited a police badge, demanded the witness' keys, which were handed to the other men, both of whom left the room but soon returned, and all three departed. Although Vejar testified that he was not armed, another witness, Mrs. Gallagher, said that when the defendant appeared at her home next door to Zitko's, he inquired as to the latter's place of abode, and that she saw the handle and trigger of a revolver in defendant's back pocket on the right side. This evidence is sufficient to sustain the verdict. Appellant contends that the evidence proved him guilty of extortion and not of robbery. This claim is without merit. We need not detail the testimony conflicting with that above stated, since to do so would only involve this court weighing the evidence in order to substitute its judgment for that of the jury. Also, as to whether the prosecuting witness was successfully impeached is a question whose decision by the jury the superior court properly refused to disturb or permit to be made the basis for ordering a new trial. The jury apparently believed from all of the evidence that Vejar did not obtain the money and ring as claimed by him with the consent of his victim, and that the latter parted with them through fear of bodily injury. This being true, we cannot say as a matter of law that the judgment is not sufficiently supported by the evidence.

[3] The only attempted showing of newly discovered evidence upon the motion for a new trial consisted of an affidavit wherein it

was averred that before the trial Zitko had stated to his employer that police officers had discovered wine in his cellar and that he had paid them money to avoid arrest. This would be corroborative merely of the testimony of the defendant, tending to impeach the prosecuting witness. It was not an abuse of discretion for the trial court to conclude that this was not of itself a sufficient ground for granting a new trial. People v. Staigers (Cal. App.) 268 P. 923.

The judgment and order appealed from are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

93 Cal. App. 411

LANE MORTG. CO. v. CRENSHAW et al.
(Civ. 6169.)★

District Court of Appeal, First District, Division 1, California. Aug. 3, 1928.

Rehearing Denied Sept. 1, 1928. Hearing Denied by Supreme Court Oct. 1, 1928.

1. Evidence 🔑383(7)—Conclusive presumption of truth of recitals of contract does not apply to recital of consideration (Code Civ. Proc. §§ 1962, 1963).

Recitals in written instrument are conclusively presumed to be true as between the parties under Code Civ. Proc. § 1962, though presumption does not apply to the recital of consideration, but good and sufficient consideration is presumed, under section 1963, if uncontradicted.

2. Evidence 🔑383(7)—Recital in contract that lease was procured by mortgage company, which agreed to finance construction of hotel by loaning specified sum, was conclusively presumed true (Code Civ. Proc. § 1962).

Recital in contract between hotel company and mortgage company procuring lease of property that lease was procured by the mortgage company and that it agreed to finance the construction of the building by making loan was conclusively presumed true under Code Civ. Proc. § 1962.

3. Principal and agent 🔑41—In action for breach of contract, giving plaintiff lease and agency of hotel in consideration for services and loan, failure of court to find on issue of consideration was error (Code Civ. Proc. § 1963).

In action by mortgage company for breach of agreement of lessors of hotel property to give company exclusive managing agency and leasehold in return for procuring lease and financing building of hotel, where instrument recited that services and loan by mortgage company constituted consideration for lease and agency, failure of court to find on question of consideration was error, in view of presumption of good and sufficient consideration for written contract under Code Civ. Proc. § 1963.

4. Principal and agent 🔑41—Evidence in suit by mortgage company for breach of contract giving it lease and agency in hotel building required finding that consideration was procuring lease and making loan as recited in contract (Code Civ. Proc. § 1963).

In action by mortgage company, given lease in hotel building and agency thereof, for breach of contract, evidence required finding that consideration for the contract was services rendered by mortgage company in procuring lease and company's loan to finance construction of building, as recited in instrument, in view of Code Civ. Proc. § 1963.

5. Appeal and error 🔑1122(2)—Appellate court could make finding, omitted by trial court, without necessity of new trial (Const. art. 6, § 4¾; Code Civ. Proc. § 956a, as added by St. 1927, p. 583).

In action on contract, failure of court to make finding on question of consideration did not require new trial, but appellate court could make finding under Const. art. 6, § 4¾; Code Civ. Proc. § 956a, as added by St. 1927, p. 583, in view of section 1963, under which good and sufficient consideration for written contract is presumed.

6. Principal and agent 🔑34—Exclusive agency for management of building as to part of which agent had lease free of rent for 20 years held irrevocable as "power coupled with an interest."

Contract between hotel company and mortgage company by which mortgage company was given 20-year lease in second story of building, rent free, together with exclusive agency to manage building, in return for services in procuring lease and for loan through which building was constructed, gave "power coupled with an interest," since power of agent to manage building was necessary to preservation of leasehold interest.

7. Principal and agent 🔑34—Entire instrument creating power and particular circumstances must be considered in determining whether power is "coupled with an interest."

In determining whether power given agent is "coupled with an interest," each case must be determined from its own facts and conclusions reached by considering entire instrument which creates the power.

8. Principal and agent 🔑34—"Power coupled with an interest" is power which forms part of contract and is security for money or performance of act, and such power is irrevocable.

"Power coupled with an interest" exists when the power forms part of the contract and is a security for money or for the performance of any act which is deemed valuable, and such power is irrevocable.

9. Principal and agent 🔑34—Fact that agent might sever power to manage building from his leasehold interest therein did not prevent existence of "power coupled with an interest."

Fact that agent giving leasehold interest might add to his option surrender power connected with it to manage building did not pre-

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★Rehearing denied. Hearing denied by Supreme Court.

vent power from being irrevocable as coupled with present interest.

10. Principal and agent 🔑34—Requirement that agent managing hotel building execute leases in name of lessors did not prevent existence of "power coupled with an interest."

Fact that agent given lease in hotel building and exclusive agency to manage hotel was required to execute leases in name of and subject to the approval of the lessors did not affect character of power given as power coupled with an interest.

11. Injunction 🔑59(1)—Mortgage company receiving exclusive agency of hotel and leasehold interest therein for services and loan to lessors was entitled to equitable relief as against lessor's assignees seeking to cancel agency.

Mortgage company given exclusive agency of hotel building and lease of one floor thereof rent free, in return for services and loan through which building was erected, had right to equitable relief for protection of its leasehold interest against assignors of lessors seeking to terminate its agency.

12. Injunction 🔑59(1)—Injunction lies to prevent revocation of agency coupled with interest.

Revocation of agency coupled with an interest presents proper case for remedy of injunction.

13. Injunction 🔑59(1)—Court may enjoin breach of contracts not capable of specific enforcement.

Fact that contract cannot be specifically enforced does not preclude court from decreeing injunctive relief against threatened breach.

14. Injunction 🔑59(1)—Mortgage company given lease in building rent free together with exclusive agency held entitled to injunction to restrain threatened termination of agency by lessor's assignees.

Mortgage company given leasehold interest in one floor of hotel building rent free together with exclusive agency to manage hotel, in return for loan and services in procuring lease, *held* entitled to injunctive relief to prevent termination of agency by assignees of lessors.

15. Principal and agent 🔑34—Principal has neither right nor power to revoke agency coupled with interest.

Where agency is coupled with an interest, a principal has neither power nor right to revoke, though power to do so may exist where no interest is involved.

16. Action 🔑6—Action by company, given lease in building and exclusive agency, to determine right to manage building as against assignee of lessors, presented proper case for declaratory relief (Code Civ. Proc. §§ 1060–1062).

Action by mortgage company, given leasehold interest in one story of hotel building rent free and exclusive agency to manage building, brought against lessors' assignees to determine right to management and control of building under agency, *held* to present proper case for declaratory relief under Code Civ. Proc. §§ 1060–1062.

17. Appeal and error 🔑1175(2)—In absence of necessary findings, declaratory judgment cannot be entered by appellate court.

Declaratory judgment cannot be entered on appeal in absence of findings of fact, but must be entered by trial court.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by the Lane Mortgage Company against C. R. L. Crenshaw and others. From an adverse judgment and from an order denying a motion for new trial, plaintiff appeals. Reversed, with directions.

Lloyd W. Moultrie, E. A. Lane, and Hunsaker, Britt & Cosgrove, all of Los Angeles, for appellant.

Bicksler, Smith & Parke, of Los Angeles, for respondents.

PARKER, Justice pro tem. In this action plaintiff seeks injunctive relief to secure the benefits to which it alleges itself entitled under a certain written contract. As a part of the same action plaintiff asks the court to declare the legal rights and duties of the respective parties under the said contract.

The court below denied the injunctive relief sought and declined to enter any declaratory judgment.

The plaintiff appeals from the judgment of the lower court and from the order denying its motion for a new trial.

The case presents two main points. We are called upon to determine whether or not the contract about which the controversy centers confers upon plaintiff a power coupled with an interest, and, further, to determine the application of the sections of our Code providing for declaratory judgments. Without attempting at this point to make any determination of either question it is readily apparent that the application of the law in each of the issues must depend to a large extent upon the facts as disclosed. Therefore we must in some detail recite the record.

In September, 1921, certain parties, called for convenience the Stolls, were the owners of a lot or parcel of land in the city of Los Angeles located at the corner of Spring and Eighth streets in said city. In passing it might be added that this property was then of great value and since that time the value has been greatly enhanced. On September 1, 1921, the Stolls, as the owners of said lot, entered into a certain agreement of lease with a corporation known as San Joaquin Valley Hotel Corporation. The terms of the lease, as they are material to the present controversy, are as follows: The period of the lease is 99 years from the date thereof and the rental is $1,000 per month. The lessee, hereinafter referred to as Hotel Company, agrees to pay, in addition to the rent reserved, all rates, taxes, charges for revenue or otherwise, assessments and levies, general and special, ordinary and extraordinary, including water rates, gas and electric light and power rates, lighting, street work, sanitary and safety requirements which may be charged, assessed, levied or imposed upon the land or any buildings or improvements placed thereon. It is further provided that the lands and improvements shall always be assessed in the name of the Stolls, lessors, providing such manner of assessment is permitted under the laws relating thereto. The receipts for taxes paid must be delivered to the lessors at least five days before the date whereon taxes become delinquent. The Hotel Company further agrees to commence the erection of a building on or before one year from date of possession, and to erect, furnish and complete the same with reasonable diligence at its own cost and expense, and in any event to have the same completed and ready for occupancy on or before September 1, 1926, fully paid for and free from all liens, compensation claims, or other construction claims liable to ripen into any lien on said premises; provided, however, that the obligation of the Hotel Company to complete the said building at its own cost and free from liens shall not be construed as to prevent the Hotel Company from mortgaging or otherwise hypothecating its interest in this lease or its interest in the demised premises for the purpose of obtaining money with which to pay for the erection of said building, nor shall it prevent the erection of said building in accordance with the terms of the lease by a subtenant of the Hotel Company. The building to be constructed on the property shall cover substantially the entire lot; shall be a class A reinforced concrete or steel structure, as the term "class A" is defined by the ordinances of the city of Los Angeles. It shall be a loft building with at least twelve stories and a finished basement, and shall actually cost and be reasonably worth when constructed not less than $250,000, and constructed in every respect in accordance with all laws and regulations affecting such construction in force at the time and during the construction. The Hotel Company further agrees that it will keep insured in standard solvent fire insurance companies, approved as such by the lessors, during the demised term, any and all buildings or improvements that may be built or placed upon the premises to an amount of not less than 70 per cent. of the cost of said buildings or improvements, and if the Hotel Company erects a building on said premises fully complying with the requirements of what is known as a class A fireproof building, then said insurance shall not be less than 40 per cent. of the cost of said building. All policies of insurance are to be issued to both parties, as their interest may appear, and the policies themselves deposited with the Los Angeles Trust & Savings Bank (hereby designated as trustee) for the purposes following, to wit: The same to be held by the trustee as additional security for the rent and the rebuilding, in the case of destruction. The Hotel Company agrees that in the event of the substantially total destruction of said premises by fire on or before September 1, A. D. 2017, immediately upon the payment of the insurance moneys received to the trustee, the Hotel Company will within 30 days thereafter advance and pay to the trustee the difference between the amount of insurance received and the sum of $250,000, which said latter sum is to constitute a trust fund for the payment of the rents under the lease as well as the rebuilding of the premises. All and every sum or sums of money which shall be received by the Hotel Company from insurance upon the building, except so much thereof as must be applied to the payment of rent due and to accrue, shall be laid out and expended by it in rebuilding or repairing said building, and in case the Hotel Company shall not have advanced the funds necessary to bring said insurance moneys up to $250,000, if said destruction occurs prior to September 1, A. D. 2017, or shall fail to restore or repair such building at the time and in the manner specified, then it shall be lawful for the lessors to declare such term ended, and the buildings on the premises shall at once be forfeited to the lessors, and any insurance money remaining in the hands of the trustee shall be paid to lessors. In case the Hotel Company neglects to insure and keep insured the buildings and improvements then the lessors may at their election procure the insurance and add the amount of the premiums to the installment of rent next due with interest at 7 per cent. per annum. The Hotel Company further agrees that the premises and building or buildings which may at any time be thereon shall be used by the lessee only and exclusively for proper and legitimate purposes. And it is expressly covenanted between the parties that the Hotel Company will not use or consent to the use in any manner whatsoever of the demised premises, or any buildings or improvements thereon, nor any portion thereof, for any purpose calculated to injure the said premises or the neighboring property, nor for any purpose or use in violation of federal or state laws or ordinances of the city of Los Angeles, or for any unlawful purpose whatsoever, or for any trade, business, occupation or vocation whatever which may in anywise be unlawful. And the Hotel Company will at its own costs and charges keep the buildings, sidewalks, steps and excavations under the sidewalks in good, safe and secure condition, and will from time to time at its own expense make all structural alterations, changes, or repairs which may be by law required in connection with the use, or by reason of any use to which said building is put, or by reason of its maintenance.

It is agreed that upon conditions not necessary to enumerate the lease may be assigned, and the agreement gives notice that any assignment not in strict conformity with the provisions thereof shall be null and void, and provided further that the assignee shall take subject to all conditions, covenants, agreements, and obligations to be performed by the Hotel Company. It is agreed, covenanted, and understood between the parties thereto that in case at any time default shall be made by the Hotel Company in the payment of any rent provided for upon the day the same becomes due or payable, and such default shall continue 30 days after written notice to the Hotel Company, or in case at any time default shall be made by the lessee in payment of any taxes, charges, or assessments levied or assessed against said property, and such default shall continue for 30 days after notice thereof in writing by the lessors to the Hotel Company, then in any or either event it shall be immediately lawful for the lessors at their election to declare said demised term at an end and enter into said demised premises and the buildings or improvements situated thereon or any part thereof, and, with process of law, to re-enter and remove all persons therefrom.

Thereafter follow provisions granting the right of re-entry on failure of Hotel Company to keep the buildings insured, and providing further that such default may be cured by full compliance with these terms within six months after re-entry following default.

It is mutually covenanted and agreed that the various rights, powers, options, elections, appointments, and remedies of the lessors contained in the lease shall be construed as cumulative and no one of them as exclusive of the other or exclusive of any rights or priorities allowed by law.

This agreement and lease was duly acknowledged by the parties executing the same, being all of the parties thereto, and was recorded in the official records of Los Angeles county on November 29, 1921.

It will be readily observed that the main scheme of this lease and agreement was to improve the land by the erection of a building appropriate to the location of the lot.

On December 31, 1921, the Hotel Company made and entered into a lease and agreement with Lane Mortgage Company, a corporation, plaintiff herein. For identification this corporation will hereinafter be referred to as the Lane Company. This agreement recites the execution of the lease between Stolls and the Hotel Company, and recites further the obligation of the Hotel Company to erect a building, and also that the Hotel Company is about to commence the construction of the building in accordance with the terms of the lease. The agreement then specifically states as follows:

> "Whereas, said lease is valuable to the San Joaquin Valley Hotel Company, party of the first part herein, and was procured for it by the Lane Mortgage Company, party of the second part herein, and said last named company has agreed to finance the construction of said building by loaning to the party of the first part the sum of $250,000 for the purpose of erecting said building, taking as security certain bonds secured by deed of trust thereon: Now, therefore, in consideration of the premises and the procurement of the lease aforesaid and the financing of said building as aforesaid, and as part of one and the same transaction, and in further consideration of the sum of $10, the said party of the first part does hereby lease and let to the party of the second part, its successors and assigns, the entire second floor of the building to be erected on the premises above described; to have and to hold said second floor of said building for the term of 20 years commencing on October 1, 1922, or from the date of the completion of said building if the same is not fully completed on said date, without further payment of rent for said term."

Then follow the terms and conditions upon which the lease is given, made, and executed, viz.:

(1) The second floor shall be completely finished by Hotel Company, including hall partitions, toilets, janitor rooms, lighting fixtures, etc.

(2) Hotel Company during term of lease shall furnish without charge during term of lease elevator service, water, and heat.

(3) That no part of said building shall be leased or rented for manufacturing or other purposes during said term that will be a detriment to a high-class loft building in the financial district.

(4) That tenants occupying other portions of said building during the term of this lease shall have no advertising privilege except from their names on the directory of the building and lettering on the windows, such signs and lettering to be approved by Lane Company.

(5) The Hotel Company will keep the building in first-class repair and condition at its own expense, including all plumbing.

(6) Lane Company to make any desirable changes on second floor and install vaults, fixtures, etc., with right to remove the same.

(7) Lane Company will not permit improper use of building or use that will disturb or injure other tenants.

(8) Provides for rights in case of destruction of building.

(9) Provides for month to month tenancy upon holding over after expiration of term.

The agreement and lease then further provides:

> "For the consideration aforesaid and as part of the same transaction said Hotel Company does hereby appoint and employ said Lane Mortgage Company its sole and exclusive agent

for the management of said building so to be erected from the completion of the same to the 1st day of October, 1942, with full power and authority to collect all rentals thereon and pay all operating expense, taxes, insurance, ground rental, interest on bonds and bonds as they mature out of the money collected, and procure or write all fire and earthquake insurance agreed to be carried by the Hotel Company, and the Hotel Company agrees to carry insurance of each of said classes amounting to at least $250,000 each for the protection of the Company and the bondholders, and the Hotel Company agreed to pay the Lane Company for such services a commission of 5 per cent. of gross rentals and the regular brokerage paid insurance agents, it being understood and agreed that the agency and employment aforesaid shall be irrevocable during the time aforesaid except for willful misconduct on the part of said party of the second part, and that all supervision and agency of the Lane Company shall terminate on October 1, 1942, unless any of the bonds above referred to purchased by the said Lane Company shall be outstanding and unpaid on said date, then such agency shall remain in full force and effect until all of said bonds are paid, at which time it shall terminate and end, provided, however, that at any time during the term of the lease the Lane Company may surrender its right to manage the building and to act as agent of the Hotel Company by serving a thirty-day written notice on the Hotel Company of its election to terminate at least thirty days prior to the actual termination thereof, and said agency shall terminate and end at the time designated in the notice without in anywise interfering with or modifying the leasehold interest of the party of the second part. It is further agreed as a part of the consideration aforesaid, the building to be erected shall be known as Lane Mortgage Building until October 1, 1942, and the Lane Company may maintain signs on the building displaying the name, and may at its option change the name.

"The Lane Company shall render to the Hotel Company a complete report and statement of leases made, insurance placed, rents collected and disbursements at least once each month, and account for and pay to Hotel Company all moneys due it, and all leases shall be to such tenants and upon such terms as shall first be approved in writing by the Hotel Company. The ordinary expense of collecting the rents shall be borne by Lane Company, provided that if any litigation is necessary to collect rentals or enforce payment of insurance, or any other cost or expense occurs in making any such collections, the same shall be paid by the Hotel Company."

This agreement, duly executed and acknowledged by the parties thereto, was recorded in the official records of Los Angeles county on January 13, 1922. Thereafter the Hotel Company proceeded with the construction of the building and the same was practically completed by it on December 2, 1922. On this last-mentioned date the Hotel Company by a written instrument assigned to Crenshaw and Smailes, defendants herein, the lease and the building on the property. This assignment was made pursuant to and in compliance with the provisions of the original lease from the Stolls to the Hotel Company. No question is raised concerning this assignment as far as it operates to divest the Hotel Company of all interest in the subject-matter of the present action. This assignment was expressly subject to a lease of the entire second floor in favor of Lane Mortgage Company for 20 years at a total rental of $10. It may be added that a number of other subleases were likewise included with the Lane Company lease and running to various persons, firms and corporations. On the same date as this assignment the defendants Smailes and Crenshaw addressed, signed, and delivered to the Hotel Company a writing in the following words:

"We understand that Lane Mortgage Company has an agreement with your company to manage and collect the rentals from the building on lot 11, block 51, Huber tract, and to receive a fee therefor of five (5) per cent. of the gross rental, and also the right to call said building 'The Lane Mortgage Building,' which agreement is for a period ending October 1, 1942, and we accept assignment and conveyance of the leasehold interest and said building with full knowledge of the existence of said contract and acquiesce therein."

Thereafter Smailes and Crenshaw proceeded with the completion of the building, and the same was ready for occupancy in January, 1923, at which time the various tenants, including Lane Company, entered into possession of the portions thereof leased to them. The total cost of the building was in excess of $385,000, and the court below found that the lease and buildings were of a fair market value of $1,000,000.

We have then the building completed. The defendants Smailes and Crenshaw own the building and the lease, and the plaintiff Lane Company holding the second floor under its lease from the Hotel Company, and managing the building, collecting the rents, and exercising the powers and rights granted to it under the agreement with and lease from the Hotel Company. Thus prefaced with a detail necessary to a complete understanding of the situation, we come to the present controversy.

The plaintiff Lane Company, in its complaint, sets up all of the facts as hereinbefore stated with additional allegations. Plaintiff alleges that it negotiated the lease between Stolls and the Hotel Company, and in sundry ways aided and assisted the Hotel Company in obtaining the lease and in the construction of the building, and for these and various other considerations received the lease and agreement between Lane Company and the Hotel Company. Generally, the gravamen of plaintiff's complaint is that soon after it took possession and assumed the management of the building the defendants Crenshaw and Smailes plotted and conspired to disregard, violate, and hold for naught plaintiff's contract. Many allegations of specific acts follow. Summed up, plaintiff alleges that defendants refuse plaintiff the management of the building; that they collect the rents themselves, employ janitors and other help, assume to themselves the placing of insurance and the payment of taxes and ground rent. Likewise does plaintiff complain that defendants have ignored its right to have the building known as Lane Mortgage Building. Sufficient allegations appear to charge a complete disregard of plaintiff's claim to manage the building, collect rentals, employ help, procure insurance, etc. Plaintiff further alleges acts on the part of said defendants which are an interference with its right to the enjoyment and occupancy of the second floor of said building. Plaintiff then prays that defendants be enjoined from doing any and all of the acts complained of, and then follows this prayer:

> "Plaintiff further prays that the court declare the rights and duties of plaintiff and defendants in and under said instrument and agreement of December 31, 1921, and the legal rights and duties of the respective parties to this action under that contract and in the controversy disclosed by this complaint; and determine that the proper construction of the said instrument and agreement requires the granting of the relief herein prayed for by plaintiff and that the plaintiff is entitled to the remedies it claims in this action."

The defendants Crenshaw and Smailes by way of answer admitted taking over the management of the building, paying taxes and ground rent, procuring insurance, etc.; in fact, contend that the right and power given plaintiff in this behalf is a mere naked agency revocable by the defendants at their pleasure. Defendants, however, deny any present or intended interference with the plaintiff's right to possession of the second floor for the 20-year term free of rental. They further allege that plaintiff has failed to properly manage the building and has been guilty of willful misconduct. They allege their full compliance with the terms of the original ground lease from Stolls to the Hotel Company, and deny any interference on their part with the right of plaintiff to have the building known as and called Lane Mortgage Building. They allege further that plaintiff's right to manage the building and collect rentals, etc., was solely to secure to it the payment of a bond issue on the building, and allege further the payment of all sums due under the issue. Defendants affirmatively allege that the contract between Hotel Company and plaintiff, in so far as the agency features are involved, was without consideration, and further plead that the consideration supporting the leasehold interest being wholly as payment or bonus for a loan was usurious.

After a trial upon the issues the court below made its findings of fact and entered judgment denying plaintiff any injunctive relief, and declining to enter or make any declaration of the rights of the respective parties under the Hotel Company lease to plaintiff. It will be unnecessary to detail all of the trial court's findings, but sufficient thereof may be given to amplify the respective contentions.

The court found as a fact and likewise drew its conclusion of law that the agency in favor of plaintiff set forth in said contract of December 31, 1921 (being the contract and lease agreement between the Hotel Company and Lane Company), is not coupled with any interest that plaintiff has or claims in the Lane Mortgage Building.

The trial court made another finding to the effect that the attention of the court had been called to the fact that there is another action pending in the superior court of the state of California, in and for the county of Los Angeles, by and between the same parties to the present action, wherein issue is raised as to the true consideration for said contract of December 31, 1921, and the court, decreeing a finding of fact on that issue not necessary or material for a decision herein, makes no finding of fact as to the true consideration for said contract or as to whether the consideration recited in said contract of December 31, 1921, is or was the true consideration therefor.

Still further, the court finds:

> "That the agency created in favor of plaintiff under the contract of December 31, 1921, to manage said Lane Mortgage Building was not given or entered into for the purpose of protecting any interest plaintiff now has or claims to have in said building, and was not given for any purpose other than the protection of the indebtedness evidenced by said $200,000 (two hundred thousand dollars) bond issue made by the Hotel Company and referred to in the agreement, and which said bond issue was fully paid and discharged on or about April 1, 1923; that the termination of plaintiff's agency for the management of said building does not and will not injure, depreciate or in anywise affect any interest or interests which plaintiff has or claims to have in said building."

It may be noted—of which more hereinafter—that the court likewise declined to find upon the issue as to whether or not Lane Company had been guilty of willful misconduct, upon the expressed ground that the issue was not urged—practically a finding that the issue had been abandoned. Indeed, at the trial it was stipulated as follows: That Lane Company did all the work necessary or incident to the management of the building except that which it was prevented from doing by Crenshaw and Smailes, without carrying out any question of how well it was done or that defendant (sic) was not guilty in some instances of misconduct, but the actual performance is admitted.

We think the case sufficiently outlined.

The question of consideration, in contracts of this kind, is an important matter, and a finding should have been made if issue were joined. Defendants alleged a complete lack of consideration, but offered not a single iota of evidence on the question. We think the court should have found that the consideration was as recited in the instrument. We are not holding that the defendants had the right to question the actual consideration, as that question is not before us. Defendants, as noted, offered no evidence on the subject, but base their contention upon a general argument by merely stating the claim that the instrument and agreement is unsupported by any consideration.

[1-4] The facts in support of the agreement and its consideration appear as follows: The instrument being in writing imports a consideration, even without a recital thereof. The recitals in the instrument are conclusively presumed to be true as between the parties thereto or their successors in interest by a subsequent title (Code Civ. Proc. § 1962). This conclusive presumption does not apply to the recital of the consideration. However, the presumption would apply to the recital that "said lease is valuable to the Hotel Company and was procured for it by the Lane Company, and said Lane Company has agreed to finance the construction of the building by loaning $200,000 to Hotel Company for the purpose of erecting said building." The further recital in said instrument that the said services and loan by Lane Company constituted the consideration for the lease and agency are not deemed conclusive under the Code section 1962, Code of Civil Procedure. However, section 1963, Code of Civil Procedure, provides that it is a satisfactory presumption, if uncontradicted, that there was a good and sufficient consideration for the written contract. Taking these two presumptions together, the latter being wholly uncontroverted, the inequality between the two is slight. With it being conclusive that the recital is true, and an almost equally strong presumption that the contract was supported by an adequate consideration, then a strong inference arises sufficient to constitute a prima facie showing that the presumed consideration was and is as stated in the instrument. Aside from this there is direct evidence on the subject. The president of the Hotel Company who conducted the negotiations testified that there was nothing compulsory about the deal. It was a matter of negotiation. Mr. Lane proposed doing certain things under certain conditions, and Hotel Company agreed to those conditions. It was necessary to do all those things in order to get the deal—the loan and the lease. Throughout the general negotiations between Crenshaw and Smailes and the Hotel Company the former dealt with the property conceding the lease and agreement with the Lane Company, and this was deemed an incumbrance in determining the value of the property. There were in evidence letters written by Lane Company to defendants Crenshaw and Smailes stating the consideration to be as recited in the instrument, and no evidence of denial or lack of acquiescence on the part of said defendants.

On the subject of consideration reference may be had to 6 Cal. Jur. § 132 et seq.

We conclude, therefore, that not only was it error to fail to find on the question of consideration, but also that on the face of the record the finding should have been that the true consideration was as recited in the instrument. If this were not true, nevertheless, even in the absence of a finding on what constituted the actual consideration, a presumption would still remain and stand as a fact when not controverted that there was a consideration and that it was adequate.

[5] It would be an idle and vexatious requirement that a new trial should be ordered on account of this lack of a finding which the record compels. Section 4¾, article 6, of the state Constitution, is designed to meet such a condition, and likewise the legislation adopted to effectuate the said constitutional provision, Code of Civil Procedure, § 956a (as added by St. 1927, p. 583). Pursuant thereto we do find that the consideration supporting the agreement between Hotel Company and Lane Company was the consideration recited therein.

In passing it may be noted that the reason assigned by the trial court for refusing to make a finding was the pendency of another action between the parties. There is not a scrap of testimony, nor a statement of counsel, nor a suggestion of any sort in the record before us of or concerning any other litigation between the parties.

[6-8] Summing up the entire transaction, then, between Hotel Company and Lane Company, it may be thus narrated: The Hotel Company located a lot of land in a most prominent and promising section of the city of Los Angeles which was standing unimproved. In order to get a lease on the lot the Hotel Company secures the services of the Lane Company, disclosed herein to be investment bankers. The Lane Company secured for the Hotel Company a lease for 99 years upon the condition, among others, that a building costing not less than $250,000 be erected upon the premises. As a part of the same transaction the Hotel Company agrees to give Lane Company a lease, free of rent, for 20 years on the second floor of the building to be erected, and the Lane Company agrees, in addition to its services in securing the lease, to finance the construction of the building through a bond issue of $200,000. The lease from the owners to the Hotel Company contains many conditions and restrictions. A violation cf or noncompliance with these works a forfeiture of the land lease and of the building if erected. Therefore it is most obvious that whatever value or worth attached to the Lane Company lease was conditional upon compliance with the terms of the land lease. If the Hotel Company defaulted in rental, or neglected to keep the

premises insured, or permitted through lack of management the character or repute of the building to become unsound, or allowed the building to be used for unlawful purposes, then the lease of Lane Company was valueless. Also, if the Hotel Company should tire of its bargain with Lane, and by connivance or collusion bring about an apparent forfeiture sufficient to cause even an arranged ouster, Lane Company were left with no recourse unless advised of the facts. The history of man's dealings with his fellow man, as revealed in the reported cases, indicate that the bare lease under the conditions might have lost its worth much sooner than the expiration of the fixed term. However, after negotiating for and agreeing upon a 20-year lease, weak with all of the pitfalls and possibilities incident to the tenure of the Hotel Company, it was specifically made a part of the one and same transaction that a power should be given the Lane Company whereby it could protect and render secure and valuable the lease agreed upon. The power so given was the sole and exclusive agency to manage the building to be erected, thus giving to Lane Company the ability to protect the lease against a forfeiture of the land lease by reason of the building or any portion being used for any purpose calculated to injure the premises, or by reason of any unlawful use, or through the building becoming in a state of dilapidation or unsafety. Likewise embraced within such granted power was the right to collect rentals and apply the same to the extinguishment of the various obligations resting upon the Hotel Company under the land lease, including the procuring of insurance, a compliance with which was compulsory under penalty of forfeiture. The power thus given was declared by the trial court to be a mere naked power revocable at will by the Hotel Company or its successors, and not a power coupled with an interest as the term is understood in the law relating to principal and agent. In this holding the trial court was in error.

It is most difficult to frame an all-embracing definition of a power coupled with an interest. Most of the authorities on the subject seem to concede that such a power is recognized by the law, and when found to exist in any given case it is not revocable at the will of the principal and even survives his death. The question ever present is as to when such a power exists, and what conditions must be shown to manifest its existence. Many of the authorities approach the subject as though it were a thesis, and treat it in such an academic way as to be confusing. Much is said concerning what is not a power coupled with an interest, with little attempt at exactness concerning what actually constitutes the same. Some confusion arises in applying the doctrine of the older cases for the reason that the law of agency has, like other legal doctrines, undergone some change throughout the years. This is particularly so with reference to the limitations of certain powers of agency and the erstwhile presumptions attaching. Likewise certain terms current years ago at the present writing convey meanings entirely different from the then general acceptation.

The attitude of the California courts is not doubtful. Each case is determined from its own facts and the conclusions reached by a consideration of the entire instrument creating the power in question. The law of California is most fully and carefully expounded in the case of Todd v. Superior Court, 181 Cal. 406, 184 P. 684, and the application of the law as therein announced demonstrates the error of the court below. In the Todd Case the Supreme Court adopts the reasoning of the early case of Hunt v. Rousmanier, 8 Wheat. 174, 5 L. Ed. 589. In this latter case the opinion of the United States Supreme Court was written by Chief Justice Marshall, and has come down through the years, remaining today the leading and accepted announcement of the legal doctrine of a power coupled with an interest.

Concretely, a power is said to be coupled with an interest when the power forms part of a contract, and is a security for money or for the performance of any act which is deemed valuable, and is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law. The Supreme Court in the Todd Case, supra, quotes approvingly from Hartley's Appeal, 53 Pa. 212, 91 Am. Dec. 207, as follows:

> "To impart an irrevocable quality to a power of attorney in the absence of any express stipulation, and as the result of legal principles alone, there must coexist with the power an interest in the thing or estate to be disposed of or managed under the power."

We think that there is hardly a case that can be made to which these principles could have a more direct and fitting application than the case at bar. The Lane Company has a 20-year lease in the entire second floor of the 12-story building which is the subject of the power. That this is an interest there can be no question. Union Trust Co. v. Reed, 213 Mass. 199, 99 N. E. 1093; Inyo Water Co. v. Jess, 161 Cal. 516, 119 P. 934; Walther v. Sierra Ry. Co., 141 Cal. 288, 74 P. 840; Payne v. Neuval, 155 Cal. 46, 49, 99 P. 476; Friedman v. Macy, 17 Cal. 226; Dahlberg v. Haeberle, 71 N. J. Law, 514, 59 A. 92; Brickill v. Atlas Assurance Co., 10 Cal. App. 17, 101 P. 16; 16 Am. & Eng. Ency. of Law (2d Ed.) 1102. The interest does not arise only upon the execution of the power, as was the situation in Hunt v. Rousmanier, supra, or Todd v. Superior Court, supra. It is a live active valuable interest, coupled with the power to the extent that if the power did not exist the interest would be subject to destruction or forfeiture. The lease, as hereinbefore pointed out, would be totally valueless in the absence of compliance with the provisions of the original land lease. The powers granted the Lane Company in their total amount to no more than placing in the hands of the company directly the means of preserving its said interest. This manifestly constitutes such a power as Chief Justice Marshall refers to in Hunt v. Rousmanier, namely, a power forming part of the contract and security for the performance of an act deemed valuable. The power in the present case was expressly made irrevocable and expressly tied to the entire transaction in the creation of the leasehold interest. We would concede that if the Lane Company merely held an agency to collect rents and retain 5 per cent. commission the agency would be revocable. But the mere fact that, incidental to the execution of the coupled power, an additional interest is created in the proceeds thus derived in no sense impairs the coupling of the power and interest theretofore existing.

Respondents insist that the agency is a mere naked power revocable at will. Their first contention, if sustained, would settle the dispute at once. They approach the problem of the connection between the power and the interest in much the same manner as was employed in the difficulties surrounding the untying of the Gordian knot. They contend first that by considering the power as separate and distinct from the interest, and not essential thereto, we have a simple agency. They then apply the accepted rule that such an agency is not coupled with an interest and therefore revocable. This contention is already determined.

[9] Next respondents contend that because the power may, at the option of the agent, be surrendered without affecting the leasehold interest, therefore the power and interest are not coupled sufficiently to meet the requirements of the rule. Arguendo, it could as well be determined that the insertion of this obviously cautionary provision would demonstrate the intended connection, and, recognizing the existence of the jointure, thus specified the saving of an interest which the loss of the coupled power might have destroyed. However, it is not necessary to argue the point. The security for the performance of an obligation may be voluntarily surrendered without impairing the said obligation, and the fact that the power and interest may at some time be severed by the voluntary act of Lane Company in no way alters the present connection between them as herein found to exist.

[10] Much is said by respondents on the point that the Lane Company was required to execute leases in the name of and subject to the approval of the lessors of the ground, the Hotel Company. Respondent argues that under the doctrine of the cases of Hunt v. Rousmanier, supra, and Todd v. Superior Court, supra, in order that a power may be coupled with an interest the agent must have the power to act in his own name. Such is not the doctrine of either case. As stated in the Todd Case:

> "It is well settled * * * that in order to constitute an irrevocable power of attorney there must coexist with the power a *beneficial interest* * * * which is enforceable in the name of the attorney in fact and will survive the constituent; or the power must be given as security for the * * * performance of some act of value."

Here the beneficial interest is enforceable in the name of the agent, meaning, necessarily the interest which the agent has, and likewise is the power given as security.

In many of the decisions we find language somewhat confusing, more through an oddity of grammatical construction than otherwise. But the main principle to be kept in mind is that the entire doctrine under discussion pertains to and is a part of the relationship of principal and agent. If we discard the element of agency entirely, then there is no need for any rule as to when an agency is irrevocable. The paramount essential of agency is the representative capacity of the agent. If there is no principal, disclosed or undisclosed, there is no agency. Therefore, when respondents contend that the power must be one that the agent exercises as a principal, the argument becomes self-destructive.

[11] Finally, on this subject, respondents urge the equities of the case. Little need be noted on this phase of the case. Respondents took over the property from the Hotel Company with full knowledge of the Lane Company lease and agency, and the evidence discloses that this Lane Company contract was considered and allowed for in determining the value of the Hotel Company's land lease and the price to be paid for the building. The record supports the statement that at all times the respondents had in mind the cancellation of the Lane Company agency, and from the very outset were determined to terminate the same. It seems the clearest equity to protect the interest of Lane Company bought and paid for as against one who advisedly purchased with knowledge thereof. The Lane Company is bound under its contract to refrain from willful misconduct in the execution of its agency, and the court below found that the issue of willful misconduct had been abandoned at the trial, a conclusion from the fact that no evidence had been adduced on the part of the defendants on that issue.

Conceding then the nature of the agency, the next question presented is as to the remedy of injunction asked by plaintiff.

Respondents' contention that injunction does not lie is based chiefly on the assumption that the agency is not a power coupled with an interest. If the contrary is conceded in conformity with the holding heretofore, little is left of respondents' theory on this branch of the case.

[12-14] The early case of Posten v. Rassette, 5 Cal. 467, holds squarely that injunction is a proper remedy to prevent the revocation of an agency coupled with an interest. Throughout the years following this decision has never been questioned or disturbed. While the antiquity of this authority might be an argument against its present-day application, yet it is much more recent than the case of Hunt v. Rousmanier, the leading case today on the subject of powers coupled with interest.

Respondents argue that the contract in question is not capable of specific performance for the reason that it is a contract calling for personal services. Here again the basis of respondents' contention fails. It is unnecessary to here repeat what has preceded, but the views as hereinbefore set forth likewise determine this issue. While we do not hold that the contract in question is or could be specifically enforced, deeming that unnecessary to the decision, it is a settled rule of equity that the lack of this capability does not preclude a court from decreeing injunctive relief. See California Jurisprudence, 14, § 16 et seq., with authorities there cited. We hold that the powers conferred in the contract between Hotel Company and Lane Company are actual subsisting rights so connected with the property interests transferred as to entitle plaintiff to the relief prayed for.

[15] Respondents seem to concede that if the powers granted are not coupled with an interest, even then they would have no *right* to revoke excepting with a liability to compensate appellant for any damage ensuing. Respondents lay much stress on the distinction between the *power* to revoke and the right to revoke, but the authorities cited clearly indicate that where the agency is coupled with an interest the *power* to revoke does not remain in the principal. In Boehm v. Spreckels, 183 Cal. 239, 191 P. 5, it is said:

> "There is a distinction between the *power* to revoke and the right to revoke an agency. Except where the agent's power is coupled with an interest, the power to revoke always exists, but the right to revoke without liability for damages depends upon circumstances."

Respondents contend that they are not interfering with or in anywise disturbing the leasehold interest by terminating the agency, and on that theory argue that necessarily the subject-matter of the present action is practically confined to the personal services involved in the agency. As hereinbefore pointed out, the value of the lease and the continuation of the enjoyment of the estate therein conferred are so intimately interwoven with the granted power that this contention of respondents needs no further discussion.

Finally, respondents argue that they do not intend to permit the original land lease to lapse or any forfeiture to occur thereunder, and that all of the fears of plaintiff are groundless. In other words, the Lane Company is as much protected without the power as with it, and there is therefore no need for equitable interference. It may as well be argued that the lease itself should be canceled for the reason that respondents would in no event disturb the possession of appellant Lane Company. From the very first connection of Crenshaw and Smailes with the property nothing but trouble has followed. The testimony discloses discord from the very first, characterized by the exchange of personal insult and vituperation and culminating in actual physical encounter. The evidence justifies the conclusion that these defendants are convinced that their best interests lie in ridding themselves of every burden fastened on the premises by the Hotel Company agreement with Lane Company. In this condition of affairs the fears of Lane Company cannot be said to be imaginary or groundless. The continued forbearance of appellant would but invite further aggression.

The only remaining question presented is on the scope of sections 1060 to 1062, inclusive, of the Code of Civil Procedure, dealing with declaratory relief. The court below declined to declare the rights of the parties under the contract in question, obviously deeming such declaration unnecessary. The constitutionality of those sections having been determined, there is no need to reopen that question. Blakeslee v. Wilson, 190 Cal. 484, 213 P. 495. Under the decision of the trial court that the agency was revocable and justifying the action of defendants in revoking, it was almost imperative that the rights of the parties be determined and declared. As we have held the lower court in error in this finding, there no longer remains a necessity to such a degree. As we have determined the agency irrevocable, and injunction the proper remedy to prevent acts constituting a revocation, it will result in plaintiff having the management and control of the premises, together with such other powers as are contained in the contract between Hotel Company and Lane Company.

[16, 17] As the record shows beyond question that an actual controversy remains and is being continuously waged, we deem it the duty of the trial court upon further hearing to specifically determine and declare the rights of the parties during the term of the lease. Such questions as the right of having the building retain the name of Lane Mortgage Building, the right to display signs thereon, the right to change the uniforms of attendants or the insignia thereon should be declared. This case presents a controversy to which declaratory relief peculiarly applies. Presenting, as it does, the unusual situation

of a lessee and agent in control of a valuable twelve-story building through a lease and agency covering one floor thereof, it cannot but be anticipated that the rights of the respective parties may continue to be the subject of prolonged litigation. It was just such a case that the provisions of our law regarding declaratory relief were designed to meet and accommodate. See Blakeslee v. Wilson, supra, and cases and articles cited therein. See, also, article by W. Turney Fox, professor of law, University Southern California, in Bar Association Bulletin, vol. II, No. 2, September 16, 1926, with authorities cited. Such a declaration, being determinable upon findings of fact not made, cannot be made by this court, but remains for the court below upon the evidence therein presented.

In conclusion, it may appear that the holding results in the true ownership of the building being subordinated to a lesser interest and to that extent impaired. The obvious answer is that one may burden his property as he sees fit, within the law, and that the condition as it is here results solely from the acts of the parties themselves. Defendants possibly speculated upon their ability to cancel the agency, and took the property with their eyes wide open and evidently advised. Next, no injustice is apparent in view of the fact that willful misconduct on the part of Lane Company is sufficient to avoid the contract. Further, it may be noted that the original land lease was the result of the efforts of Lane Company, and it is fair to assume from the record that without the active aid of Lane Company the Hotel Company would not have secured the lease nor would they have been able to build at all. With these things in mind, the view changes somewhat.

With reference to the issues presented as against the defendant Clarke, these have become moot and need not be determined.

The judgment is reversed, with directions to the court below to proceed in accordance with the views herein expressed.

We concur: TYLER, P. J.; CASHIN, J.

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RIEDY et al. v. BIDWELL.★

COOK v. SAME.

(Civ. 6286.)

District Court of Appeal, First District, Division 1, California. July 18, 1928.

Hearing Denied by Supreme Court Sept. 13, 1928.

1. Appeal and error 🔑1212(3)—Effect of unqualified reversal is to remand case for new trial on all issues.

Effect of unqualified reversal of judgment is to remand case for new trial on all of issues presented by the pleadings; decision upon former appeal being law of case when evidence does not warrant a different conclusion.

2. Appeal and error 🔑1195(1)—Decision of appellate court on questions of fact does not become law of case.

It is well settled that decision of appellate court on question of fact does not become the law of the case.

3. Appeal and error 🔑931(1)—Reviewing court will presume that findings are supported, where no claim of insufficiency of evidence is made.

Where no assignment is made on appeal that evidence is insufficient to support findings, and court's attention is not directed to insufficiency of evidence, court will presume that findings are supported.

4. Appeal and error 🔑1195(4)—Where evidence and findings on second trial were different, and findings were not challenged, rule of law of case did not apply, and setting case at large was not error.

Where there was some evidence introduced at second trial which was unlike evidence at first trial, and court at second trial made different findings of fact, which were not attacked on appeal as without support in evidence, action of court in setting case at large was not error, since rule of law of case had no application.

5. Evidence 🔑234—Where claim for services was assigned for purpose of bringing suit, statements against interest of assignor held admissible in suit by assignee (Code Civ. Proc. § 1870, subd. 5).

In assignee's suit on claim for services, assigned for purpose of bringing suit, permitting introduction of letter written by plaintiff's assignor containing statement, "I told him I didn't know anything to bring suit for," and permitting assignor to testify, *held* not error; assignor's statements against interest being admissible, under Code Civ. Proc. § 1870, subd. 5.

6. Evidence 🔑234—Where contract sued on involved agreement to employ three parties, admission of one as to nonexistence of contract was admissible as against assignee of another (Code Civ. Proc. § 1870).

Where contract sued on involved agreement for employment of three persons to receive monthly wage and excess of net profits of business, admissions against interest by one of the three parties, by which existence of contract was denied, were admissible in suit on contract as against the assignee of one of the other parties, under Code Civ. Proc. § 1870.

7. Trial 🔑296(10)—Parenthetical remarks of court withdrawing part of instruction as to witnesses, whose character for truth has been impeached, held not erroneous, in view of other instructions.

Instruction that presumption that truth of witness' testimony may be repelled by manner in which he testifies, by character of testimony, "or by evidence affecting his character for truth, honesty, or integrity (by the way, that portion of the instruction should be omitted because there has been no attack against any of the witnesses in that regard)," *held* not er-

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★Hearing denied by Supreme Court.

roneous, on ground that remarks parenthetically made destroyed instruction or withdrew question of credibility from jury, in view of other instructions, where no witness' veracity was impeached, though witnesses were contradicted.

Appeals from Superior Court, San Diego County; Frank C. Collier, Judge.

Actions by Elizabeth Riedy and husband and by Charles Cook against George M. Bidwell. Judgments for defendant, and plaintiffs appeal. Affirmed.

L. E. Dadmun, of Los Angeles, for appellants.

Adam Thompson and Renwick Thompson, both of San Diego, for respondent.

CAMPBELL, Justice pro tem. Two actions were brought, one by Elizabeth Riedy and Tom Riedy, husband and wife, against George M. Bidwell, and the other by Charles Cook against George M. Bidwell. The former is to recover $12,250.92, based upon two causes of action, one for services alleged to have been rendered by plaintiff Elizabeth Riedy, and the other on an assigned claim of E. M. Tinney; both causes of action being based upon the same ground. The latter action is brought to recover $6,125.46 upon the same theory as is set forth in the action of Elizabeth and Tom Riedy against George M. Bidwell.

The contract alleged is the same in the case of Elizabeth and Tom Riedy against Bidwell; in the assigned cause of action by Tinney to Elizabeth Riedy, and in the action of Cook against Bidwell, the contract alleged being that, on or about February 1, 1919, defendant entered into an agreement of employment with Elizabeth Riedy, Charles Cook, and E. M. Tinney that, if they would stay and help him run and manage the business, he would pay and give to each of them the amount they were then receiving monthly, and in addition thereto he would pay and give to them all net profits which they would earn in the business over and above 6 per cent. on the investment, after deducting all the expenses connected with the running of the business. The cases were not consolidated, but were by stipulation tried together, and both appeals are presented under one record in conformity with the trial of the case and pursuant to stipulation.

This is the second trial of the actions. In the first trial, the court found in favor of plaintiffs upon the contract, but held the contract void. On appeal, however, the appellate court held the contract valid, and reversed the judgment. At this trial, and before any evidence was introduced, the plaintiffs contended that the only issue the court had a right to try was the amount due under the contract; that the other issues had been determined by the former trial court, and the only issue undetermined was the amount due, and the court could not under the law of the case determine whether or not there was any contract, as that had already been determined in favor of plaintiffs. The court overruled plaintiffs' contention, denied their motion to limit the issues to the amount due, and ordered the issues at large to be tried. The second trial was before a jury, which rendered a special verdict in favor of defendant George M. Bidwell in each case, and which special verdicts were adopted by the court in its findings, and judgments were rendered thereon in favor of defendant.

There was a stipulation entered into between counsel for the respective parties that, so far as the jury was concerned, there was only one issue to be presented to them, and that whether or not any contract was entered into, that the question whether or not anything is due under the contract, and, if so, how much, would be directed to the court entirely and by the court decided; and by consent the two special verdicts, which were answered in favor of the defendant, were submitted to the jury.

Appellants urge that the court erred in setting the case at large and permitting evidence to be received on the question as to the existence of a contract; that there was no evidence so as to materially change the issue to entitle the court to put the case at large; the court erred in instructions to the jury; the court erred in holding the contract sued on one entire contract; the court erred in permitting the introduction of the letter written by E. M. Tinney and permitting Tinney to testify over objections of plaintiffs; the testimony of Woodruff was inadmissible against appellant Riedy; and that the motion of appellants for directed verdict should have been granted.

[1-4] The first two contentions, regarding setting the case at large and that there was no evidence to materially change the issue so as to entitle the court to put the case at large, are without merit. In reversing the case (Riedy v. Bidwell, 70 Cal. App. 552, 233 P. 995), the court merely ordered, "The judgment is reversed." The effect of this unqualified reversal was to remand the case for a new trial on all the issues presented by the pleadings (Falkner v. Hendy, 107 Cal. 54, 40 P. 21, 386); the decision upon the former appeal being the law of the case when the evidence does not warrant a different conclusion (McGraw v. Friend & Terry Co., 133 Cal. 589, 65 P. 1051; Adams v. Thornton, 5 Cal. App. 455, 90 P. 713). The rule of law of the case has no application to facts, and it is settled beyond controversy that the decision of an appellate court on questions of fact does not become the law of the case. Mattingly v. Pennie, 105 Cal. 517, 39 P. 200, 45 Am. St. Rep. 87; Moore v. Trott, 162 Cal. 273, 122 P. 462. Here, however, it cannot be contended that the findings of the trial court are the same as the findings of the court on the former trial, and, no assignment being made that the evidence is insufficient to support the findings and our attention not being directed to the fact of the insufficiency of the evidence, this court will presume that such findings find support in the evidence. "The facts of this case must control the findings, and the court found the facts to be different in the second trial from the facts at the first trial; and by the facts as now found must we be guided." Stockton, etc., Wks. v. Glens, etc., I Co., 121 Cal. 174, 53 P. 569. There was unquestionably some evidence introduced at the second trial which was lacking at the first, particularly the testimony of Jess Woodruff as to a conversation he had with plaintiff, Charles Cook, about a week before the second trial and which could not therefore have been given at the first trial, in which Cook stated to him:

> " 'Well, Mrs. Riedy wanted me to see you and see if you could not help us out.' It is pretty hard to remember—there was something, I think about Jim Young came up—'Jim had gone the limit to help us put over the contract, but of course, there was not any contract, but we put it over just the same' or something to that effect.
>
> "Q. Do you remember anything else that was said by either you or Cook? A. I said I could not do anything like that; my evidence had already gone in in the last trial.
>
> "Q. Did he reply to that? A. He says, 'Couldn't you change your evidence and be mistaken in some of it in regard to this bonus and say there was a contract,' and I says, 'No; I couldn't do that.' "

There was also a letter written by E. M. Tinney, who assigned his claim to plaintiff Elizabeth Riedy, to defendant, which was not offered in evidence at the first trial. This letter had reference to the meeting of Riedy and his wife and Cook and Tinney at the office of Attorney Dadmun, when they were all present and consulting regarding bringing suit. In the letter appears this statement: "I told him I didn't know anything to bring suit for."

As to appellants' contention that the court erred in holding the contract sued on one entire contract and not divisible, it may be said that from a reading of the contract alleged it appears that there is in fact only one contract. They bear the same date—February 1, 1919—and each alleges that, if Elizabeth Riedy, together with Charles Cook and E. M. Tinney, would stay and help defendant run and manage his business, he would pay and give to Elizabeth Riedy, Charles Cook, and E. M. Tinney the amount which they were then receiving, and in addition thereto he would give them all the net profits which they could earn in the business over and above 6 per cent. on the investment. The court, adopting the special verdicts of the jury, found that no contract of any character was entered into, and, there being no contract, it is immaterial whether the contract as alleged is entire or divisible.

[5] It may likewise be said that there is no merit in appellants' contention next set forth that the court erred in permitting the introduction of the letter written by E. M. Tinney and permitting Tinney to testify over the objection of plaintiffs. Tinney was an assignor of plaintiff Elizabeth Riedy, having assigned his claim to her for the purpose of bringing suit, and therefore his statements against his interest are admissible in a suit by the assignee on his assigned claim. In Bollinger v. Bollinger, 153 Cal. 190, 195, 94 P. 770, 772, in a case similar to the one presented here, the court says:

> "This testimony, if true, amounts to an admission by David that he had no contract or agreement with George, and thus drags down the very foundation of the cause of action here pleaded," and the "evidence was material and important."

And section 1870 of the Code of Civil Procedure provides:

> "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts. * * * [Subdivision] 5. After proof of a partnership or agency, the act or declaration of a partner or agent of the party, within the scope of the partnership or agency, and during its existence. The same rule applies to the act or declaration of a joint owner, joint debtor, or *other person jointly interested with the party.*"

[6] The court did not err in admitting the testimony of the witness Woodruff against appellant Riedy above quoted, for, as has been said, the allegations of the complaint show that there existed a community of interest in the contract alleged, between appellants Riedy and Cook, and Tinney, the assignor of appellant Elizabeth Riedy. Tracy v. Colby, 55 Cal. 67, 70,; 1 Greenleaf on Evidence, 172; Code Civ. Proc. § 1870.

[7] Appellants complain that the court erred in instructing the jury. The instruction complained of is:

> "You are further instructed that a witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he or she testifies, by the character of his or her testimony, or by evidence affecting his or her character for truth, honesty, or integrity (by the way, that portion of the instruction should be omitted because there has been no attack on any of the witnesses in this case in that regard), or his motives, or by contradictory evidence, or by his interest in the matter, if any, and the jury is the exclusive judge of his or her credibility."

Appellants urge that the remarks of the court made parenthetically destroy the entire instruction, and that the further vice of the instruction is to take away the right of the jury to determine the testimony for themselves and arrive at the facts. All that the court eliminated from the instruction by its parenthetical remark was, "or by evidence affecting his or her character for truth, honesty, or integrity," and, as there was no evidence introduced that the character of any witness for truth, honesty, or integrity is bad, it was not the duty of the court to instruct the jury on this question.

Appellants contend that, as evidence was offered to contradict the statements made by the witnesses Tinney and Woodruff, the effect of withdrawing from the jury that portion of the instruction stating that the presumption that a witness speaks the truth may be repelled "by evidence affecting his or her character for truth, honesty, or integrity," had the effect of stamping the testimony of Tinney and Woodruff with truth and verity. We do not agree with this contention. Furthermore, the court instructed the jury:

> "A witness may also be impeached by evidence that he has made at other times statements inconsistent with his present testimony as to any matter material to the cause on trial."

And also:

> "The jury are the sole and exclusive judges of the effect and value of evidence addressed to them, and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence should be taken into consideration for the purpose of determining their credibility, and the fact as to whether they have spoken the truth, and the jury may scrutinize, not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence."

From what has been said, it follows that there is likewise no merit in appellants' final contention that the motion for a directed verdict should have been granted.

The judgments are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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93 Cal. App. 196

LOPEZ et al. v. PACIFIC ELECTRIC RY. CO.
(Civ. 3547.)

District Court of Appeal, Third District, California. July 17, 1928.

1. Limitation of actions 🔑130(11)—Master and servant 🔑389—Compensation insurance carrier, joining in widow's action for death under stipulation, could proceed independently after nonsuit, notwithstanding limitation statute (Workmen's Compensation Insurance and Safety Act 1917, §§ 26, 69; Code Civ. Proc. § 340).

Compensation insurance carrier of deceased's employer, joining in widow's action for death as party plaintiff under Workmen's Compensation Insurance and Safety Act 1917 (St. 1917, p. 831) § 26, and under stipulation giving it first lien on any amount awarded to widow to reimburse it for expenditures, was entitled to proceed with action independently, notwithstanding failure of widow to appeal after nonsuit, and permitting insurance company to proceed with the action alone did not violate one-year limitation provided by Code Civ. Proc. § 340, insurance company having usual rights incident to a party, and Compensation Act being liberally construed under section 69 thereof.

2. Parties 🔑51(4)—Refusal to permit employer's insurance carrier, joining as plaintiff in widow's death action, to amend pleading to bring in as plaintiffs heirs unknown before trial, held error (Workmen's Compensation Insurance and Safety Act 1917, §§ 26, 69; Code Civ. Proc. §§ 377, 340).

In action for death by widow, in which compensation insurance carrier of deceased's employer was joined as party plaintiff under stipulation and Workmen's Compensation Insurance and Safety Act 1917 (St. 1917, p. 831) § 26, insurance carrier, on court's exclusion of evidence on ground that some of the heirs were not included as plaintiffs, as required by Code Civ. Proc. § 377, was entitled to amend complaint by bringing in any omitted heirs, and refusal of such amendment was error, where it was not shown that the insurance carrier previously knew of the existence of other heirs, since the Compensation Act under section 69 is to be liberally construed, and the one-year limitation provided by Code Civ. Proc. § 340, was not violated.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Maria de Los Angeles Lopez and the American Mutual Liability Insurance Company against the Pacific Electric Railway Company. From an order of nonsuit, the last-named plaintiff appeals. Order reversed, in so far as it relates to appellant, with directions.

Willis I. Morrison, of Los Angeles, for appellant.

Frank Karr, E. E. Morris, and C. W. Cornell, all of Los Angeles, for respondent.

Walter C. Durst, of Los Angeles, for Lopez.

WEYAND, Justice pro tem. On May 19, 1923, one Estanislao Martinez was killed at Wilmington, Los Angeles County, Cal., by the alleged negligence of the defendant Pacific Electric Railway Company. Within one year thereafter, and on May 7, 1924, Maria de Los Angeles Lopez filed her complaint in the superior court of Los Angeles county for damages in the sum of $15,000; she claiming to be the widow and the sole heir at law of the deceased Martinez.

This action did not come to trial until September 18, 1925, more than one year after the death of Martinez. Upon the last-named date, pursuant to a written stipulation of the attorneys representing both the plaintiff and the defendant company, an order was made permitting the American Mutual Liability Insurance Company to join as a plaintiff. As much discussion follows with regard to the wording of this stipulation and order, we will give them in full. The stipulation was worded as follows:

> "It is hereby stipulated between the above-named parties and the American Mutual Liability Insurance Company, a corporation, through their respective counsel, that the last-named corporation was the compensation insurance carrier of the Banning Company, the employer of Estanislao Martinez, deceased, at the time of the injury and death for which recovery is sought, and may be joined as a party plaintiff in the above-entitled action, and that it shall have a first lien on any amount awarded to the above-named plaintiff, such lien, however, to be limited in extent to the amount of such expenditures as it may have made for compensation under the Workmen's Compensation Act of 1917 as amended."

The order of the court permitting the insurance company to join in the action as a plaintiff was worded as follows:

> "Pursuant to the written stipulation of the parties to this action, the order is now made that the American Mutual Liability Insurance Company, a corporation, be joined as a party plaintiff along with Maria de Los Angeles Lopez, the present plaintiff."

After the making of this order, a jury was regularly impaneled, and the trial begun. Mrs. Lopez was called as a witness in her own behalf, and it developed from her testimony that the deceased had brothers and sisters living who were not made parties to the action. It appeared that the deceased left surviving him neither parents nor offspring.

A witness was then introduced, who was proceeding to testify as to the details of the alleged accident, whereupon a motion was made by the attorney for the defendant railway company to exclude further evidence in the case, "on the ground that the parties plaintiff are not all the heirs, as provided for under section 377 (Code Civ. Proc.) as has been shown by the testimony of the plaintiff herself that the deceased left several brothers and sisters." This motion was granted by the trial court.

Immediately thereupon the attorney for the insurance company asked for permission to amend the complaint, to set up the fact that at the time of the alleged accident the deceased was an employee of the Banning Company, that the Banning Company was insured with the American Mutual Liability Insurance Company, that this insurance company paid compensation under the Workmen's Compensation Insurance Law, and that there were other heirs as shown by the testimony, and that none of these heirs sustained any pecuniary loss by reason of the death of the deceased Martinez; and to amend the prayer to the complaint, praying, first, for the total damages sustained by the widow and the insurance carrier, and, secondly, for the amount of compensation paid out by the insurance carrier. The original plaintiff made no request for permission to amend.

Counsel for the railway company then objected to the granting of this permission to amend, upon the following grounds:

> "That this is an attempt to set up a new cause of action, setting up a subrogation of the insurance company for and on behalf and on account of money expended by reason of the death of the deceased, which would be a new cause of action. The second reason is that under the stipulation it came in as a party plaintiff merely for the purpose of participating in any judgment that might be rendered in favor of the plaintiff Maria de Los Angeles Lopez, and to that extent only in which they could possibly recover from the Pacific Electric Railway Company in all other actions or in any other amended complaint which they might attempt to set up. That would be under section 340 of the Code of Civil Procedure."

The language of counsel is far from lucid. We take it to mean that, because the year within which such an action could be brought had elapsed, the insurance company could not amend, to state a new cause of action.

The record discloses no formal ruling, either on the request to amend or upon the objection to the offer so to do; but immediately thereupon counsel for the railway company moved the court for a nonsuit, upon the following grounds:

> "On the ground that the complaint does not state facts sufficient to constitute a cause of action, after the examination of the plaintiff herself, which developed that there were heirs existing who should have been made parties plaintiff or defendant, and it being fatally defective under section 377 of the Code of Civil Procedure."

This motion for nonsuit was granted. The original plaintiff, Mrs. Lopez, did not appeal. This appeal is by the insurance company alone.

As this matter is presented, it resolves itself into the question as to whether the stipulation and order of the court limited the plaintiff insurance company so as to share in any judgment Mrs. Lopez would obtain, or whether, by making the order admitting the company as a party plaintiff, this company became a party plaintiff in its own right, to the end that it could enforce its rights independent of and even adversely to the original claimant.

[1] The right of the insurance company to join as a plaintiff is given by section 26 of the Workmen's Compensation Insurance and Safety Act of 1917 (St. 1917, p. 831). This law is to be liberally construed. Section 69 of the above statute.

At the time the nonsuit was granted, Rabe v. Western Union Telegraph Co., 47 Cal. App. Dec. 521, had just been decided by the appellate court. That case decided that heirs omitted from the original complaint could not be joined after the one-year limitation provided for by section 340, Code of Civil Procedure. That case, however, was reheard by the Supreme Court, and the contrary doctrine was announced. See Rabe v. Western Union, etc., Co., 198 Cal. 290, 244 P. 1077.

The plaintiff insurance company was in court and made request that the complaint be amended. The Workmen's Compensation Law, § 26, supra, provided that such an insurer may join as a party at any time before trial and have a lien upon any judgment the heir may recover, to the extent of the loss paid by it. If this provision of the act is to be liberally construed, it should be taken to mean that, if upon proper application, at any time before trial, a party is admitted, it entitles such person to be an independent party to the cause.

It is true the stipulation was worded so as to permit participation in any judgment the original plaintiff might obtain. We cannot, however, construe that stipulation and order as meaning that the appellant here did not have the usual rights of a plaintiff to control its own case. Respondent contends, in effect, that, because the plaintiff Lopez failed to appeal, the judgment against her has become final, and that as she cannot now obtain a judgment against defendant railway company, to now allow the insurance company to proceed with the action, after the one-year limitation provided for by section 340, Code of Civil Procedure, is to allow the insurance company to bring its action, although the year has expired.

The original parties, by stipulation, allowed the insurance company to join as a plaintiff. If any objection is to be urged on that ground, it should have been made upon the presentation of their motion to be joined as such plaintiff. Again, the cause of action for the death of Martinez was already brought within the limitation provided for by section 340, Code of Civil Procedure. See Rabe v. Western Union, etc., Co., supra. Quoting from the Rabe Case: "Defendants would have suffered no prejudice by bringing in the absent heirs as no issue would have been changed thereby." Still, again, the Workmen's Compensation Insurance Act gives to an insurer who has paid an indemnity the right to enter his appearance at any time before trial.

We are of the opinion that there is nothing in the language of the stipulation that limits a recovery by the insurance company, and makes a recovery by them dependent solely upon a recovery by the original plaintiff. It is true that in a certain sense the measure of recovery by the widow would limit the recovery by the insurer, but, giving the stipulation and order a fair construction, they should mean that the insurer, when admitted, becomes a party with all the usual rights incident to being a party.

[2] Then we come to the sole question: "Was the request to amend a reasonable and proper request under the circumstances?" The original plaintiff was a Mexican woman. Her testimony was elicited through an interpreter. There was nothing to indicate that she omitted the heirs for a fraudulent purpose. The insurance company had a right to rely upon her verified complaint as filed. As far as shown by the record, the first intimation that any of the attorneys, either for the widow or the insurer, had, as to there being other heirs, was upon the trial. Under such circumstances as here shown, we believe it was error to refuse the request to amend. Rabe v. Western Union Telegraph Co., 198 Cal. 290, 299, 244 P. 1077.

For the foregoing reasons the order granting the nonsuit, in so far as it relates to the appellant American Mutual Liability Insurance Company, is reversed, with directions that it be allowed to amend the complaint on file by bringing in the omitted heirs, either as plaintiffs or defendants, as it may be advised.

We concur: FINCH, P. J.; HART, J.

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93 Cal. App. 435

PEOPLE v. GREEN. (Cr. 1671.)

District Court of Appeal, Second District, Division 1, California. Aug. 3, 1928.

1. Criminal law 🔑742(1), 1159(4)—Inconsistencies in testimony are for jury's determination, which is not disturbed unless verdict is without substantial foundation.

Inconsistencies in testimony merely affect its weight or credibility, and determination of the truth of the testimony is solely for the jury, and is not interfered with on appeal, unless jury's verdict is without substantial foundation.

2. Robbery 🔑24(3)—Verdict of guilty held not contrary to evidence, notwithstanding inconsistencies in identification of defendant.

Inconsistencies in testimony identifying defendant as perpetrator of alleged robbery did not make the verdict of guilty contrary to the evidence, so as to require reversal.

3. Robbery 🔑24(1)—Evidence held sufficient to sustain conviction for first degree robbery (Pen. Code, § 211a).

Evidence *held* sufficient to sustain verdict of defendant's guilt of robbery in first degree as sufficiently showing defendant was armed under Pen. Code, § 211a, and as sufficiently proving identification.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Johnnie Green was convicted of robbery, and she appeals. Affirmed.

S. S. Hahn and Thomas E. Parke, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime of robbery and from an order denying her motion for a new trial.

[1, 2] The first point advanced by appellant is that the verdict is contrary to the evidence. In that connection it is contended that the testimony by which the identification of defendant as the robber was established was so weak and unsatisfactory that "there is no evidence worthy of the name to identify the defendant, Johnnie Green, as one of the perpetrators of the offense." Condensing the testimony relating to the commission of the crime of which defendant was charged, it appears that defendant was positively identified by the complaining witness as one of the robbers. However, on cross-examination, the attention of the witness was directed to the fact that on a former trial of defendant, in giving a description of defendant, the witness had stated that the color of her eyes was blue, whereas, as a matter of fact, they were black; also that, although the defendant had a somewhat prominent scar on her nose, "the complaining witness did not notice it" on the occasion when the robbery occurred. The evidence further showed that at the time in question "the lady * * * was quite painted up * * * with powder and rouge."

It is well settled that inconsistencies of the nature of those to which attention has been directed to do no more than affect the weight or the credibility which is to attach to the testimony in question. The evidence was sufficient in itself, and the determination of the truth lay entirely with the jury. As was said in People v. McKelvey (Cal. App.) 267 P. 390:

> "To the jury, as the sole judges of the credibility of a witness, is assigned the duty of determining the weight to be given to the testimony of a witness, and, when the jury has performed this function and entered its decision, neither the trial court nor this court on review will interfere with that decision unless it appears that the verdict was without substantial foundation."

To the same effect see People v. Kelly, 146 Cal. 119, 121, 79 P. 846; People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389; People v. Logan, 123 Cal. 414, 415, 56 P. 56; People v. Rolfe, 61 Cal. 540, 543; People v. Booth, 72 Cal. App. 160, 164, 236 P. 987; People v. Bigelow, 64 Cal. App. 731, 732, 222 P. 622; People v. Franklin, 46 Cal. App. 1, 4, 188 P. 607. It must therefore be concluded that the point suggested by appellant cannot be sustained.

[3] It is also urged by appellant that the evidence was insufficient to justify the verdict that defendant was guilty of robbery in the first degree. With reference thereto, the evidence showed that at the time the robbery occurred appellant and her codefendant "walked into the station," and her codefendant demanded that the prosecuting witness open the cash register. "He had his right hand in his right-hand coat pocket," and * * * "he just held it up like he had a gun in it." The witness also testified that at that time he "saw a nickel-plated gun in the bottom of the purse" in the possession of this appellant.

Section 211a of the Penal Code provides that "all robbery which is perpetrated by * * * being armed with a dangerous or deadly weapon is robbery in the first degree."

The claim of appellant is that the evidence shows only that the complaining witness was frightened; that he thought the companion of appellant had a "gun" in his pocket; also in his fright, what the complaining witness took for a "gun" in the purse of appellant might have been a "plated vanity" case, and would not overcome the presumption of innocence to which defendant is entitled. Such a suggestion might have constituted a basis for argument to the jury, but it is of no avail on appeal from the judgment. The testimony of the complaining witness was positive. It must therefore be assumed that, as expressed in its verdict, the jury believed from the evidence that appellant was "armed" at the time the offense was perpetrated, which is all that the statute requires.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

93 Cal. App. 404

In re ARKLE'S ESTATE.★

DRAKE v. ARKLE.

(Civ. 6292.)

District Court of Appeal, First District, Division 1, California. Aug. 2, 1928.

Rehearing Denied Sept. 1, 1928. Hearing Denied by Supreme Court Oct. 1, 1928.

1. Guardian and ward 🔑13(3)—Order appointing guardian held void for failure to notify minor's father, where petitioner knew father's address and failed to show why notice could not be given (Code Civ. Proc. § 1747).

Where residence of father of the minor was known to petitioner for letters of guardianship, and no notice of hearing was given father and no proof made to the court by way of excuse for not giving notice, order appointing guardian was void under Code Civ. Proc. § 1747, requiring that notice be given parents or proof made to court that notice could not be given.

2. Guardian and ward 🔑10—Father, where competent, had prior right to guardianship of minor child as against maternal grandmother (Code Civ. Proc. § 1751).

As between father of minor and maternal grandmother, father, under Code Civ. Proc. § 1751, was entitled to letters of guardianship where competent, competency being presumed.

3. Guardian and ward 🔑10—Agreement of father that on death of himself or his wife maternal grandmother should have custody and control of child held not to prevent father's appointment as guardian after mother's death (Code Civ. Proc. § 1751).

Agreement of father that on death of himself or his wife the maternal grandmother should have custody of the minor child and the direction and control of his education *held* not to prevent court's appointment of father as guardian after mother's death, under Code Civ. Proc. § 1751, since right of parties to stipulate as to custody and control of their offspring is subject to court's determination.

4. Parent and child 🔑2(2)—Court is not required to award custody of child in accordance with stipulation of parents.

Right of parents to contract with each other as to custody and control of their offspring is subject to control of court in matters affecting the child, and the court is not required to award its custody in accordance with such stipulation.

5. Guardian and ward 🔑10—Divorce decree awarding child to maternal grandmother and mother's nomination of grandmother as guardian held not to prevent appointment of father as guardian after mother's death (Code Civ. Proc. § 1751; Civ. Code, §§ 138, 241).

Decree of divorce awarding care and custody of minor child to maternal grandmother and will of mother nominating grandmother as guardian, without father's consent, *held* not to prevent court's appointment of father as guardian of child after mother's death in preference to maternal grandmother, under Code Civ. Proc. § 1751, and Civ. Code, § 241, permitting appointment of guardian by one parent alone only in case other is dead or incapable of consenting, and in view of Civ. Code, § 138, under which divorce decree merely determines custody of child until some further disposition is made.

6. Guardian and ward 🔑10—Divorce decree awarding custody of child to mother does not permit mother to appoint guardian without father's consent (Civ. Code, §§ 138, 241).

Decree of divorce awarding custody of child to mother under Civ. Code, § 138, does not render father incapable of consenting to disposition of child or end father's rights, so as to permit mother's appointment of guardian by will without father's consent under section 241, permitting either parent to appoint guardian "if the other be dead or incapable of consent."

7. Parent and child 🔑2(2)—On death of parent awarded custody of child under divorce decree, other parent becomes entitled to its custody (Civ. Code, § 138).

Decree of divorce determining custody of child under Civ. Code, § 138, merely applies until some other disposition is made, and upon death of parent to whom custody of minor child is awarded the other parent becomes entitled to its custody.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Proceedings by Alwyn W. Arkle against Maggiebelle Drake for revocation of letters of guardianship of the person and estate of Thomas Dudley Arkle, issued to defendant. From a judgment for petitioner revoking defendant's letters of guardianship, and from an order appointing petitioner as guardian, defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.
Jones, Wilson & Stephenson and Leonard Wilson, all of Los Angeles, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from a judgment revoking letters of guardianship of the person and estate of Thomas Dudley Arkle, a minor, issued to Maggiebelle Drake, the maternal grandmother of such minor, and also from the order of the court appointing Alwyn W. Arkle, the father, as guardian.

Respondent Alwyn W. Arkle and Whitney Lee Arkle intermarried October 14, 1920, at Paris, Ky., and a son, Thomas Dudley Arkle, was born of this marriage August 8, 1921. Respondent and the daughter of appellant lived together as husband and wife at Lexington, Ky., from March, 1922, till November 19, 1922, when respondent and his wife separated, respondent going to live with his parents. Prior to the date of separation respondent and his wife entered into an agreement regarding the future care, custody, and control of their minor child, Thomas Dudley Arkle, and provided in the agreement that the care, custody and control of such minor, in the event of the death of either respondent or his

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★Rehearing denied. Hearing denied by Supreme Court.

wife, should be in the maternal grandmother, Maggiebelle Drake. In January, subsequent to the separation between respondent and his wife, appellant herein and respondent's wife came to Los Angeles, arriving about January 16, 1923, bringing with them the minor child. Respondent received two letters and one postcard from his wife en route and received about a dozen letters from her after she arrived in California and wrote to her every day after she arrived in California. Respondent arrived in Los Angeles in March, 1923, and went to where his wife and appellant were living in the Kentucky Apartments in that city. He asked appellant if he could see his wife, and appellant replied that he could see neither his wife, who was ill and the shock might kill her, nor his minor son, who was sleeping at the time. Respondent then returned to Lexington, Ky., and wrote several letters to his wife and received no answer. Some of the letters were sent by registered mail and return receipt demanded. Respondent did get cards in return, which were lost. The name of Maggiebelle Drake was on most of the cards. These letters were sent for the purpose of trying to locate his wife. The first that respondent learned of the death of his wife was the date her ashes arrived in Lexington about September 1, 1924.

On March 15, 1923, appellant's daughter made her will, in which, aside from personal effects, she devised and bequeathed all of her property to her mother, appellant herein, and in said will nominated and appointed appellant to be guardian of the person and estate of Thomas Dudley Arkle. On January 21, 1924, appellant's daughter instituted an action for divorce and respondent defaulted, and an interlocutory decree was entered on May 29, 1924. On February 5, 1924, respondent instituted an action for divorce against his wife in the state of Kentucky, but judgment therein was not offered in evidence. Respondent's wife died August 24, 1924, at Van Nuys, Los Angeles county, Cal. Upon the death of the minor's mother and about August 24, 1924, appellant Maggiebelle Drake, the maternal grandmother, filed her petition for the appointment of herself as the guardian of the person and estate of the minor, Thomas Dudley Arkle, and was on September 24, 1924, appointed guardian. On July 28, 1925, respondent, as the father of the child, filed a petition to revoke the letters of guardianship issued to Maggiebelle Drake. In respondent's petition for the revocation of the letters of guardianship he claimed, among other grounds, failure of the statutory notice to him of such petition. Appellant replied to respondent's petition, and among other defenses, and in support of her appointment as guardian set up the agreement entered into between respondent and his wife wherein the father and mother of the minor child had agreed that she—the maternal grandmother—in the event of the death of either of its parents, should have the actual custody of such child and should have the direction and control of his education and become the advisor of any guardian or trustee that might be appointed for the holding or management of the estate of such minor. Upon the trial of the issue of guardianship the court rendered judgment in favor of respondent and revoked the letters of guardianship issued to Maggiebelle Drake.

[1] The original petition for letters of guardianship filed by appellant among other things stated that Alwyn W. Arkle is the father of the minor child and resides in Lexington, Ky. It is therefore apparent that the residence of respondent, the father of the minor, was known to the petitioner for letters of guardianship, and no notice of the hearing was given him, and no proof was made to the court that for some reason notice of the hearing could not be given. The petition was filed in August, 1924, and therefore subsequent to the amendment of section 1747 of the Code of Civil Procedure, adopted in 1921, providing:

> "*Notice of Proceeding.*—Before making such appointment, the court must cause such notice as such court deems reasonable to be given to any person having the care of such minor, and to such relatives of the minor residing in the county as the court may deem proper. *In all cases notice must be given to the parents* of the minor or proof made to the court *that their addresses are unknown*, or that, *for other reason*, such notice cannot be given."

This amendment was before the court in Re Esther Dahnke, 64 Cal. App. 555, 559, 222 P. 381, 383, wherein the court says:

> "If, as the order of revocation recites, no notice of the hearing of appellant's petition for letters of guardianship was given to the mother and no proof was made to the court either that her address was unknown or that for some other reason notice could not be given her, then the court was without jurisdiction to make the order appointing appellant guardian of his daughter's person and estate. Section 1747 of the Code of Civil Procedure, as amended in 1921, provides: 'In all cases notice must be given to the parents of the minor or proof made to the court that their addresses are unknown, or that, for other reason, such notice can not be given.' Obviously this means that, if the parents' addresses be known, and no reason exists why notice cannot be given them, notice of the petition for letters of guardianship must be given to both parents. So that, if both parents be living, and if one of them be the petitioner for the letters of guardianship, notice must be given to the other if his or her address be known and no reason exists why it cannot be given. A fortiori must this be so where, as here, the parents are living separate and apart from each other. By the express terms of the statute it is made mandatory that notice be given to the nonpetitioning parent, or that, if such notice be not given, proof be made either that such parent's address was unknown or that there was some valid reason why the notice could not or

should not be given. The power of the court to appoint the guardian is a special power conferred by statute, and the provisions of the statute as to notice must be substantially followed in order to make valid the exercise of the power; for compliance with the statute is a condition precedent to the valid exercise of the power, and is jurisdictional. Any attempt to exercise the power of appointment without compliance with such express requirement is a nullity. See Estate of [Eikerenkotter], 126 Cal. 54, 58 Pac. 370; In the Matter of Lundberg, 143 Cal. 407, 77 Pac. 158."

[2] In the present case the court found that each of the parties to the contest was a fit and proper person and properly qualified to act as guardian, and therefore respondent, being the father of the minor, has priority of right over appellant, the maternal grandmother, unless this right is lost to him by reason of the agreement made with his wife respecting the custody of the child in the event of the death of either of them. In the Matter of Forrester, 162 Cal. 493, 123 P. 283, the court says:

> "The minor was of the age of 19 months when this proceeding was instituted. Under the provisions of section 1751 of the Code of Civil Procedure, it is made the duty of the court to appoint the father or mother of a minor child under the age of 14 years, if such parent is 'found by the court competent to discharge the duties of guardianship.' Inasmuch as the presumption of law is in favor of competency, 'the section is to be construed as if it read that the father or mother is to be appointed if not found by the court incompetent.' In re Campbell, 130 Cal. 380, 62 P. 613. Accordingly, where the father is competent, he is entitled to letters of guardianship in preference to the grandmother, even though the court may find that the child's health and welfare would be promoted by granting guardianship to the grandmother. Guardianship of Salter, 142 Cal. 412, 76 P. 51. In a case like this, the primary subject of inquiry is, then, the competency of the parent applying to act as guardian. If found competent, he or she must be appointed as against a more distant relative or a stranger."

[3, 4] Appellant contends that the father has irrevocably waived his right to be appointed guardian by reason of his agreement with his wife whereby he agreed that in the event of the death of either, the maternal grandmother should have the custody of their minor child and the direction and control of his education, etc., and further that by a decree of divorce entered in Los Angeles county the mother—who by her will nominated appellant guardian—was awarded the care and custody of the minor child. While parents have a right to contract with each other as to the custody and control of their offspring and to stipulate away their respective parental rights (Sargent v. Sargent, 106 Cal. 541, 39 P. 931), this right so to stipulate is subject to the control of the court in which the matter affecting the child is pending, and the court is not required to award the custody in conformity with such stipulation (9 Cal. Jur. 794; Anderson v. Anderson, 56 Cal. App. 87, 204 P. 426).

[5-7] As to the decree of divorce and the nomination of appellant as guardian of the minor child by the last will of the deceased mother as affecting the father's right to letters of guardianship, the court in the Matter of Allen, 162 Cal. 625, 627, 124 P. 237, 239, says:

> "The right to appoint a guardian by will or deed is statutory. Under the law of this state (Civ. Code, § 241), a guardian of a legitimate child may be so appointed 'by the father, with the written consent of the mother; or by either parent, if the other be dead or incapable of consent.' The father, in this case, was not dead when the will took effect. Nor was he 'incapable of consent.' It is argued that the decree of divorce, whereby the custody of the child was awarded to the mother, terminated the father's claims to the control of the child, and made him incapable of objecting or consenting to any disposition that the mother might see fit to make. The contention attributes a very broad meaning to the term 'incapable of consent.' But, even if this interpretation be adopted, the argument fails for the reason that the father's right was not absolutely ended by the decree of divorce. The decree dealt with the situation as it stood, and merely determined that, as between the husband and the wife, the child should be placed in the custody of the latter until some other disposition should be made. Civ. Code, § 138. It did not undertake to provide for the custody of the child after the mother's death. In line with this view, it is almost universally held that, upon the death of the parent to whom is awarded the custody of a minor child by the decree divorcing the parents, the other parent becomes entitled to the custody."

Appellant's claim that the trial court failed to find upon the issue raised by the proceeding regarding the agreement introduced in evidence is without merit. The court found that the agreement was entered into on the 1st day of November, 1922, and that the same was prepared by the attorney for Mrs. Maggiebelle Drake at the instance and request of Whitney Lee Arkle, the mother of the minor, without any knowledge whatsoever upon the part of respondent; that the preparation of such paper had at no time been discussed or its contents revealed to respondent; that at the time of the signing the mother was very ill and confined to her bed, and specifically requested respondent to sign the writing; that solely because of her request and of her illness and because of a desire to please his wife, and particularly not to do anything to do her harm, respondent signed the document. This finding, if requisite to sustain the judgment, finds support in the testimony of respondent.

We have examined the cases cited, and find none from this state at variance with the views here expressed. The judgment and order are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

93 Cal. App. 261

DE GARMO v. PETITFILS CONFISERIE. (Civ. 6319.)★

District Court of Appeal, First District, Division 2, California. July 26, 1928.

Hearing Denied by Supreme Court Sept. 24, 1928.

1. Contracts 🔑94(5)—For rescission, false representations must have been relied on.

To entitle one to rescission because of false representations, it is not sufficient to show that the representations were false and made with intent to deceive, but it must also be shown that party seeking rescission relied thereon and was actually misled.

2. Corporations 🔑80(11)—It is presumed purchaser of stock relied upon seller's false representations, calculated to induce purchase.

Where representations made to purchaser of stock were false and were calculated to induce him to make the purchase, the presumption is that the representations induced the purchase, and, in suit for rescission, seller must show that purchaser did not rely upon the representations.

3. Corporations 🔑80(11)—Evidence in suit for rescission of sale of stock held not to support finding that purchaser did not rely on seller's misrepresentations.

In action against corporation to rescind purchase of stock of corporation, based on false representations relative to payment of dividends on the stock and the financial condition of the company and its properties, evidence *held* not to support findings of trial court that plaintiff did not rely on misrepresentations in making purchase.

4. Corporations 🔑80(11)—Evidence sustained findings in suit to rescind sale of stock for fraud that representations by seller were false.

In action to rescind purchase and sale of stock in corporation leasing and managing store properties, evidence *held* to sustain findings that representations of seller concerning payment of dividends on stock from net profits were false.

5. Corporations 🔑80(10)—Purchaser's suit to rescind sale of corporate stock for fraud held not barred by laches, where notice of rescission was given several days after discovering fraud.

Suit by purchaser of stock against corporation to rescind sale of stock *held* not barred by laches, where notice of rescission was given within one year from time of purchase and within several days after plaintiff discovered that defendant's representations were fraudulent.

6. Corporations 🔑80(12)—Where purchaser of stock suing to rescind sale alleged tender of stock and every other thing of value received, which allegation was admitted, no issue of failure to return dividend was raised.

In suit by purchaser against corporation to rescind sale of corporate stock for fraud, no issue of plaintiff's failure to return dividend was raised, where complaint alleged that plaintiff tendered shares of stock purchased and "every other thing of value received by him in connection with the sale," and such allegation was admitted by the answer.

7. Corporations 🔑80(12)—Tender of dividend received held not condition precedent to stockholder's maintenance against corporation of action to rescind sale of stock for fraud (Civ. Code, § 3532).

In suit by stockholder against corporation to rescind sale of stock for fraud, plaintiff's offer to return sum of money received as dividend on the stock was not condition precedent to rescission, since in any event plaintiff would be entitled to retain such sum either as dividend or as partial restoration of purchase price of stock, and tender thereof would be mere idle act, which law does not require, under Civ. Code, § 3532.

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by G. C. De Garmo against Petitfils Confiserie. Judgment for defendant, and plaintiff appeals. Reversed.

G. P. Adams, W. W. Orme, G. C. De Garmo, and H. B. Cornell, all of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, and H. F. Prince, all of Los Angeles, for respondent.

PRESTON, Presiding Justice pro tem. The plaintiff, G. C. De Garmo, purchased from defendant corporation 200 shares of its capital stock, for which he paid $20,000. This is an action by plaintiff to rescind that purchase on the ground of fraud and misrepresentations.

The case was tried before the court sitting without a jury, and findings and judgment were in favor of defendant, from which judgment plaintiff prosecutes this appeal.

Appellant strenuously contends that the findings on all material issues are contrary to the uncontradicted evidence. We think that this contention must be sustained.

The complaint alleges, among other things, that defendant, for the purpose of inducing plaintiff to purchase its stock, stated and represented to him: (1) That the company had already paid two quarterly dividends of 5 per cent. each; (2) that the then present earnings of the company were sufficient to enable it to pay regular 5 per cent. quarterly dividends thereafter; (3) that nothing had been paid to W. M. Petitfils for the good will of his business; (4) that the company had been offered $400,000 for the lease on store No. 1, which was the original store of Petitfils; (5) that W. M. Petitfils would continue to manage and devote his entire time to the business, and that he would retain his stock in the company.

The complaint further alleges that the foregoing statements and representations

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★Hearing denied by Supreme Court.

were false, untrue, and misleading in the following particulars: (1) That said dividends were not paid out of the net earnings of defendant, but only as the result of changing and falsifying its books, and for the sole purpose of defrauding, deceiving, and misleading prospective purchasers of its stock, etc.; (2) that the net earnings of the company were not at any time sufficient to pay any dividends, and that defendant knew this at the time of making the foregoing statements and representations; (3) that W. M. Petitfils received $180,000 for the good will of his business; (4) that the lease on store No. 1 was not of the value represented by defendant; (5) that, prior to soliciting plaintiff to purchase stock, W. M. Petitfils had entered into a secret agreement with one Beecher Laswell to sell his personal stock in the company.

The answer traverses practically all of the allegations of the complaint, and alleges the following special defenses: (1) That, if any misrepresentations or false statements were made by defendant concerning the stock, they were made by Beecher Laswell, who was an independent contractor for the sale of defendant's capital stock, and that defendant believed that the net earnings of the company were sufficient to warrant the payment of said dividends and each of them; (2) that plaintiff was guilty of laches in not attempting to rescind promptly.

The court found, among other things, that Beecher Laswell was the agent of defendant corporation, and that one R. J. Leavitt was an employee of Laswell, and that the said Leavitt solicited plaintiff to purchase stock, and made the following representations for the purpose of inducing plaintiff to purchase stock in the defendant corporation: (1) That the average daily receipts from store No. 1 were slightly under $2,000; (2) that the daily receipts from store No. 2 were about $1,100; (3) that the daily receipts from store No. 3 were about $900; (4) that the company had been offered $400,000 for a cancellation of the lease on store No. 1; (5) that Rowan & Co. had said that, although it was difficult to appraise the lease on the Flower street property, owned by the company, because of the fact that it was increasing so rapidly in value, that it was worth about $1,000,000; (6) that it was the intention of the company to open another store on or near Seventh street in the city of Los Angeles; (7) that the company had paid two dividends of 5 per cent. each; (8) that Petitfils expected to stay with the business and to stay in charge of it and to keep his stock in the company.

The court also found that said R. J. Leavitt delivered to plaintiff certain circular letters referring to said company, prepared by Beecher Laswell, with the approval of the company.

The court further found that representations designated above as Nos. 1, 2, 3, 6, and 8 were true, and that the representation designated as No. 7 was true, except that one dividend only was paid to the stockholders of Petitfils Confiserie, and that the representations designated as Nos. 4 and 5 were not true.

The court also made findings in effect as follows: (1) Plaintiff did not believe or rely upon the statements made to him by R. J. Leavitt; (2) that these representations were not the proximate or any cause of plaintiff purchasing his stock in defendant corporation; (3) that plaintiff relied solely upon the fact that he was acquainted with the success of W. M. Petitfils' business, and the profits made by him prior to incorporation; (4) that plaintiff did not believe or rely upon any of the statements or representations set out in the complaint in purchasing stock in the company, and that plaintiff made an independent investigation.

[1] The law is well established that, to entitle one to recover in rescission because of false representations, it is not sufficient to show merely that the representations were false and made with intent to deceive, *but it must also be shown that the false representations actually misled and deceived the party seeking rescission and that they were relied upon by such party.* Maxon-Nowlin Co. v. Norswing, 166 Cal. 509, 137 P. 240; Hallidie v. First Federal Trust Co., 177 Cal. 600, 171 P. 431; Hackleman v. Lyman, 50 Cal. App. 323, 195 P. 263; Spinks v. Clark, 147 Cal. 444, 82 P. 45; Maggini v. McBain, 65 Cal. App. 133, 223 P. 428; Sherlock v. Gerlach, 68 Cal. App. 341, 229 P. 65.

Therefore, if there is sufficient evidence in the record to support the last-mentioned findings that appellant did not rely upon the representations made by defendant and its agents, and was not induced thereby to purchase the stock in question, but, on the other hand, in making the purchase he relied solely upon the fact that he was acquainted with W. M. Petitfils' business and the profits made by him prior to incorporation, then this appeal must fall, and the judgment be affirmed, for these findings cover an essential element of appellant's right of action.

We have, however, searched the record carefully, and we are unable to find any evidence that will support the findings of the trial court that appellant "did not rely upon the alleged misrepresentations and did not believe them to be true," or that he made an independent investigation.

Plaintiff testified: That in October, 1923, R. J. Leavitt called upon him at his office in Los Angeles, and, after introducing himself, said that he was connected with Beecher Laswell's office, a stockbroker having his offices in Los Angeles, and that they were selling stock of Petitfils Confiserie. He thereupon handed plaintiff his card, reading, "Petitfils Confiserie, Fiscal Offices, 610 Mortgage Guarantee Building, 626 South Spring St., Los Angeles, R. J. Leavitt, Personal Representative." That was the first of a series of conversations with Leavitt, extending up to the time the plaintiff purchased his stock in November, 1923.

Plaintiff further testified:

That "Leavitt said that Petitfils had incorporated the company with a capital stock of $2,000,000, and that Petitfils had taken part of the stock; and he told me the number of shares, 3,150 shares, I think it was, and $250,000 cash for his business. He said the company had also taken over the business of the Brown Candy Company that was operating two chocolate shops, one on Sixth street between Spring and Broadway, and the other one on Broadway between Seventh and Eighth. He told me the number of shares that had been paid to the Brown Candy Company for that business; he said it was 5,000 shares. He then told me what the income from the three stores was. At this time Petitfils Confiserie was operating a store on Sixth street between Spring and Broadway, and that store has been very frequently since then referred to as store No. 3. There was another store on Broadway between Sixth and Seventh, the main store, which we all referred to as No. 1; and another one on Broadway between Seventh and Eighth, which was referred to as No. 2. I asked him if anything had been paid to Mr. Petitfils for the good will of his business, and he said that nothing was paid him for that. He next took up the matter of the leases. He said that in taking over the business of Brown Candy Company, the company had acquired a very valuable lease on property on Flower street between Seventh and Eighth; that it was a 99-year lease; that they were paying a rent of only between—of either four or four hundred and fifty dollars a month. I can't be quite sure which he said. He said that the Rowan Company had appraised the lease. He said that it was difficult—that the property was increasing so in value that it was really difficult to appraise, but that it was worth about a million dollars. He also said that the lease on store No. 1 had about six years yet to run, and that they had been offered $400,000 for the lease, for the reason that the owner, operating through Blumenthal & Co., was very anxious to erect a large building, a modern building, on the property. He also told me that the lease on store No. 2 had about 17 years yet to run, and that it was a very advantageous lease, and he also told me how long the lease on store No. 3 ran, but I can't remember the figures. I can only recall this, that, when he had given me the values of those leases, it aggregated the capital stock of the company. * * * He also said that they would probably not use the building they had acquired from Brown Candy Company under this 99-year lease for the reason that it would be too valuable for their purposes. We then discussed the matter of dividends. He told me that the company had paid two dividends of 5 per cent. each. * * * That was his statement that the earnings—I can only give it to you substantially, but in effect it was that, that the earnings of the company were sufficient to enable them to pay 5 per cent. dividends regularly from that time on quarterly."

Plaintiff then stated that Leavitt handed him some literature concerning the company, including a statement showing the profits Petitfils had derived from the business up to the time of the incorporation of the defendant company. In the literature given to plaintiff at that time was a circular letter signed, "Petitfils Confiserie, W. M. Petitfils, President," containing this clause:

"On May 18, 1923, Petitfils Confiserie was incorporated under the management of Mr. W. M. Petitfils. On July 10th, a dividend of 5 per cent. was paid to all stockholders as of record on June 30th, and on October 15th, another 5 per cent. dividend was distributed to all stockholders as of record on August 31, 1923, the checks ranging in size from $5 to $14,500. This investment is now open to you for two reasons: First, it is a decided commercial asset to have a large number of stockholders; the second, now is the strategic time for expansion and development because of the remarkable success of the three established stores and the general healthy condition of Los Angeles."

Other circular letters of a similar character, but more alluring, were given plaintiff, signed, "Petitfils Confiserie, E. A. Harter, Vice President." One of the paragraphs in one of these last-mentioned circular letters is as follows:

"At one time you expressed a desire to learn the details regarding an investment in the securities of this *soundly managed, dividend producing company.* This final effort is made, before the books are closed, to induce you to share in our investment and profits."

Plaintiff further testified:

"When Mr. Leavitt explained why he was there and told me of the business they were doing, the money they were making, and dividends they had paid, I said, 'Mr. Leavitt, this is essentially a one-man concern;' and I said, 'I know that Mr. Petitfils is one of the best restaurant men in Southern California.' Parenthetically, I had known Mr. Petitfils practically ever since he had been in business. I said, 'If he should leave the company or anything should happen to him, it would very materially affect the business.' He said, 'We have provided for that; his life has been insured for $250,000. At one time Petitfils was tired, and he wanted to quit the business,' but he said, 'he has finally made up his mind that he is going to devote his life to it, and he had promised to stay with the business, stay in charge of it, and to keep his interest, his stock in the company.' He had previously told me that Petitfils had 3,150 shares of stock."

After these conversations with Leavitt, plaintiff went to the Merchants' National Bank in Los Angeles to verify Leavitt's statement that Petitfils had attempted to borrow money from that bank and had been refused the loan, and that he later got it from the Security Trust & Savings Bank. Plaintiff found that this statement was true. Plaintiff then sought and obtained an introduction to Mr. Sugars, another vice president of defendant corporation, and informed Mr. Sugars that he was thinking of buying some stock in Petitfils and wanted to get some additional information. Sugars replied, "All the stores are making money." They then had a conversation about the dividends, and Sugars stated, "That he saw no reason why they could not continue paying their dividends they had started." Other conversations were had between them about the receipts and other details of the business, and Mr. Sugars referred plaintiff to Mr. Long, the secretary, for further information. Later plaintiff called upon Mr. Long, introduced himself, and told him that he was thinking of buying some stock in the company, and that he had been referred to him by Mr. Sugars to get information concerning the business of the company. During this conversation, Mr. Petitfils and Mr. Harter came into the office, and Mr. Harter was introduced to plaintiff. A short conversation was held with Mr. Harter and Mr. Petitfils, in which plaintiff told them that he was thinking of buying some stock, and wanted to get some information about the business. Nothing definite was discussed by plaintiff with Mr. Petitfils and Mr. Harter, but, after their departure, Mr. Long and the plaintiff had a conversation, in which Mr. Long stated: "This business carries a very large profit—60 per cent. of the receipts is net profit." Just what was said at this conversation can best be related by quoting a portion of the testimony of the plaintiff on this subject:

> "I then asked him about the leases. I said, 'I understand that the lease on this store'—we were then at store No. 1—'runs for six years yet.' He said, 'Yes.' And I said, 'I understand that you have been offered $400,000 for this lease for canceling it.' He says, 'that is correct.' We next talked about the lease on the store on South Flower street. He told me substantially what Mr. Leavitt had told me, that the company had had that lease appraised, and that Rowan & Co. had said it was worth about $1,000,000. * * * We then talked about the dividends. I asked him about those; he said they had paid two dividends of 5 per cent. each, and he said, 'Whether we open another store or not, the present earnings of the company are sufficient to enable us to pay 5 per cent. quarterly dividends.' I said, 'Mr. Long, can you do that and write off the leases?' He says, 'Yes, sir, we can, and we have also provided for depreciation and contingent expense.' * * *"

After this conversation with Mr. Long, plaintiff had another conversation with Mr. Leavitt and purchased the stock.

The foregoing is all the evidence showing what plaintiff said and did, and the information he sought and received before purchasing his stock, and this evidence is uncontradicted, except that Long testified that he told plaintiff the gross receipts were between 50 and 60 per cent. and that all the leases were valued at $1,000,000.

Plaintiff made no independent investigation; all the investigation that he made was with officers and agents of the defendant. He only asked one question on the outside, and that was from the bank, which was concerning a wholly immaterial matter.

[2, 3] Plaintiff testified positively that he believed and relied upon the representations made to him, and would not have purchased the stock had it not been for those representations, and that he made no further investigation other than that above stated, and there is not a fact or circumstance revealed by the record to rebut this statement. Furthermore, the representations made to appellant were ones calculated to induce him to buy the stock, and he did, in fact, make the purchase; therefore the presumption is that the representations induced him to do so, and, in order to take away his right to relief on the ground of fraud, it must be shown that he *did not rely upon said representations*. Troy, etc., Co. v. Drivers' etc., Co., 14 Cal. App. 152–155, 111 P. 121; 12 Cal. Jur. 827. See, also, Dow v. Swain, 125 Cal. 674–681, 58 P. 271. We have, therefore, in the case at bar, a well-established legal presumption, which is evidence, plus the direct and positive evidence of appellant himself, that he believed and relied upon said representations made by defendant in purchasing the stock, and there is nothing in the record to rebut this evidence. The findings of nonreliance and disbelief in said representations must fall in the face of this uncontradicted evidence.

[4] Having determined that certain representations were in fact made, and that they did induce appellant to purchase the stock, the next question arises, Does the evidence show these representations to be true or false? As above stated, the court found that the representation to the effect that the defendant had been offered $400,000 for the cancellation of the lease on store No. 1 was false, and also that the statement that the lease on Flower street was worth $1,000,000 was also false. The evidence amply supports both of these findings.

The complaint alleges, that neither the July nor October dividend was paid out of the *net profits*, but merely as the result of falsifying the books and for the sole purpose of defrauding prospective purchasers of stock in the company. The court found that only one dividend was paid, and "that this was not paid merely as a result of altering the books or for the sole purpose of defrauding prospective purchasers." No finding as to whether it was paid out of the profits of the company was made by the court.

The uncontradicted evidence shows that, at the time appellant was being solicited by defendant to purchase the stock, he was told by Leavitt and Long that the company had paid two dividends of 5 per cent. each. Appellant was also given several mimeographed letters, bearing the signature of defendant, in which the same statement was made. The evidence shows that *no dividend* was paid in July, 1923.

The facts regarding the July dividend are, briefly, these: The property and assets of the Brown Candy Company, at the time it was transferred to defendant, was inventoried at $525,000; a dividend of 5 per cent. was first paid to the stockholders of the *Brown Candy Company*, which reduced the assets of the Brown Candy Company to $500,000, and then the defendant corporation gave the Brown Candy Company 5,000 shares of the capital stock of defendant corporation at $100 per share for the remaining $500,000 worth of assets of the Brown Candy Company. The $25,000 was distributed to the *stockholders of the Brown Candy Company by the defendant corporation, but it was in no sense a dividend to the stockholders of the defendant corporation, and was not earned by them;* it was simply a 5 per cent. dividend paid by the Brown Candy Company to *its own stockholders* at the time it sold out to defendant corporation.

The October dividend, which was the only one paid, was not paid out of the *net earnings or profits of the defendant*. Defendant had only been operating since June 15, 1923. The stock salesman had represented to plaintiff and other prospective purchasers that a 5 per cent. dividend was paid on October 15, 1923, and was paid to all stockholders of record on August 31, 1923. The literature of defendant also contained this same statement. On August 31, 1923, there was outstanding 11,592 shares and a 5 per cent. dividend which amounted to $57,910. From June 15, 1923, to October 1, 1923, the defendant had been charging off monthly on its books for depreciation, breakage, bad debts, etc., $10,000 per month. By this method of bookkeeping, the business was being operated at a loss, and there were no funds from which a dividend could be paid. Those who had purchased stock were inquiring daily at the stores and of the officers of the company as to when the dividend would be forthcoming and, as Mr. Harter, the vice president, expressed it, "They were haunting us night and day, morning and noon, to know if we would not declare a dividend." Harter further testified as follows:

> "Q. How did it happen that Petitfils Confiserie paid a dividend on October 15, 1923? A. That happened merely to take care of Mr. Beecher Laswell's office to cover up the remarks and statements that his men had been making from time to time. * * * Q. The company knew what those remarks were, didn't it? A. It had been fighting that all the time. Q. They knew what they were, however? A. Well, not all of them. * * * Q. Well, what one? A. Well, in regard to quarterly dividends and guaranteeing 20 per cent. the first year, 28 per cent., following on down the line; that is what they were bucking on from the start."

One of the guarantees of dividends was contained in a pamphlet entitled "Profits in Sweets," reading in part as follows:

> "It is the expectation of Petitfils Confiserie to continue the regular 5 per cent. cash dividends quarterly (20 per cent. per annum). Based on the estimated earnings of the new corporation, as shown below, the annual profits on the capitalization of $2,000,000 should be at least 28 per cent."

Therefore, in order to satisfy the present stockholders and to allure new ones into purchasing stock, a scheme was worked out by the secretary of the defendant and its stockholders, by which the books were changed and all amounts that had been set aside for depreciation, breakage, bad debts, etc., were ordered placed back on the books. By so doing, the books showed there were profits enough to pay a dividend and, therefore, out of this the October 15th dividend was declared.

It is clear, therefore, that no July dividend was paid to the stockholders of the defendant corporation, and that the October dividend was not paid out of the *net earnings*, but out of the *gross earnings* of the company. No dividend should have been paid, or could have rightfully been paid, in October, and the defendant changed its books to show a false profit in order to pay this dividend. It is clear from the undisputed evidence that the October dividend was not paid in good faith, and was not paid from the net earnings of defendant, but paid out of its reserve fund. The representations made to appellant that from the earnings of defendant a 5 per cent. dividend had been paid in July and October were false.

The complaint further alleges that defendant, as an additional inducement to plaintiff, stated to plaintiff that Petitfils was paid nothing for the good will of his business, and that this statement was untrue. The findings of the court do not refer to this allegation of the complaint, but find that "nothing was paid W. M. Petitfils by the defendant corporation." The undisputed testimony shows that Petitfils was paid $180,000 for good will, and that it was paid in money and stock in the corporation. This was also a misrepresentation of a material fact.

The evidence shows, without conflict, that other misrepresentations of material facts were made to plaintiff, but we deem it unnecessary to go into detail relative to them.

We have reviewed the entire record carefully, and we are fully convinced that the findings of the trial court favorable to defendant cannot be sustained by the evidence. In reaching this conclusion, we are not unmindful of the fact that some of the representations made to appellant, especially those relating to the future earnings of the defendant corporation, are merely to be considered "expressions of opinion," and not fraudulent representations, although positively made and afterwards proven to be untrue. However, excluding entirely all statements that could be termed "expressions of opinion," there remains in the record abundant uncontradicted evidence of many false representations made to appellant by defendant concerning past and existing facts, which defendant knew to be false and made for the purpose of inducing appellant to purchase the stock, and said false representations did, in fact, lead him to invest $20,000 in stock of Petitfils Confiserie Corporation, which he would not have done had the *true financial condition of defendant corporation been revealed to him.* Neither are we unmindful of the well-settled rule that this court cannot reverse a judgment for insufficiency of the evidence if there is a conflict in the testimony, or if there is any substantial evidence to support the findings and judgment of the trial court. But in this case there is absolutely no evidence that we are able to discover, that will support the findings and judgment of the trial court. The only witness produced by defendant was Mr. Long, the former secretary of the defendant corporation, and there were only two points of conflict in his testimony with that of the appellant. Appellant testified that Long told him that the defendant was making a *net profit* of 60 per cent.; Long denied this, and stated it was possible that he told plaintiff the *gross profits* would be between 50 and 60 per cent. Again, plaintiff testified that Long stated to him that the lease on the Broadway store No. 1 had been appraised at $1,000,000, but this was also denied by Long, who testified that he told plaintiff that *all of the leases of defendant were valued at $1,000,000.* The court found for defendant on both of these points, and nowhere in appellant's brief is there to be found any suggestion that appellant is seeking to have the findings on these two points set aside or disturbed.

[5] There is no merit in the contention of defendant, or the finding of the trial court, that appellant was guilty of laches in rescinding the purchase. The following facts are uncontradicted: Appellant purchased the stock in November, 1923. In February, 1924, he inquired concerning the dividend. Defendant stated that payment of the dividend had been delayed by order of the corporation commissioner until a reserve had been set aside to cover depreciation in defendant's leases. On May 2, 1924, appellant received a $500 check and at that time was notified that another dividend would be paid in July. That about July 1st appellant was advised by defendant that the additional dividend would be sent out within a few days. On July 4th, plaintiff left on a trip to Europe and was absent from California until October 15, 1924. During appellant's absence he did not know that the promised dividend had not been paid, and did not learn this until he returned to Los Angeles on or about October 15, 1924. While absent from California, appellant did not receive any information regarding the defendant or his stock. Appellant testified that between October 15th and October 20th he discovered the fraud, and on October 21, 1924, served the notice of rescission. It appears that appellant gave notice of rescission promptly after discovering the fraud.

[6, 7] Defendant contends that appellant cannot maintain this action because he did not offer to return the $500 dividend before suit. There is no merit in this contention. The complaint alleges:

> "That, at the time plaintiff rescinded the contract, he tendered to the defendant and offered to return * * * said 200 shares of stock so purchased by him and *every other thing of value received by him in connection with said sale.*"

This allegation is admitted by the answer. The question of the actual physical tender of the $500 is not, therefore, an issue by the pleadings. Furthermore, under the circumstances of the instant case, it was not necessary to offer to return the $500 received as a dividend on the stock as a condition precedent to recission. If appellant fails in the present action, he would be entitled to retain the $500 dividend; if he succeeds in this action, he will be entitled to retain the $500 as a partial restoration of the $20,000 and have judgment against defendant for the balance. In no event, therefore, could the defendant possibly be injured. The law does not require idle acts, and nothing would seem more idle than to require appellant, as a mere formal prerequisite to trial, to offer to return to the defendant the $500 which defendant would in no event be entitled to keep. See section 3532, Civ. Code; Matteson v. Wagoner, 147 Cal. 739, 82 P. 436; Haserot v. Keller, 67 Cal. App. 659–673, 228 P. 383; Richards v. Farmers' & Merchants' Bank, 7 Cal. App. 387–393, 94 P 393; Garcia v. California Truck Co., 183 Cal. 767, 192 P. 708.

Judgment reversed.

We concur: STURTEVANT, J.; NOURSE, J.

93 Cal. App. 241

PEOPLE v. PRUDENCIO. (Cr. 1455.)

District Court of Appeal, First District, Division 1, California. July 24, 1928.

1. Criminal law ⚷912—Court is without power to entertain motion for new trial after previous denial of similar motion interposed within time allowed by law.

Where defendant has previously within the time allowed by law interposed a motion for a new trial which is duly heard and denied, he has exercised and exhausted the right as afforded him by law, and thereafter court is without power to entertain another similar motion.

2. Criminal law ⚷912—Defendant held entitled to hearing on motion for new trial, after trial court's action in passing sentence contrary to verdict had been overruled (Pen. Code, § 1181).

Where court, in hearing on defendant's motion for new trial on grounds set forth in Pen. Code, § 1181, held that evidence was insufficient to sustain verdict of first degree murder, and imposed a sentence for murder in second degree, thereby purporting to pass on a motion which defendant had not made as for a new trial based on conviction of second degree murder, defendant, after subsequent reversal of trial court's action thereon, was entitled to renew his motion for new trial and to have the same considered and determined.

3. Criminal law ⚷905—Every person convicted of crime has right to have motion for new trial heard and determined by trial judge.

Every person convicted of crime is afforded the right under law of state to make a motion for a new trial based on the verdict which has been rendered against him, and, if presented in the manner and time provided by law without similar motion having been previously ruled on, has a right to have such motion determined and heard by trial judge.

4. Criminal law ⚷1156(1)—Order granting new trial will not be disturbed except for manifest abuse of discretion.

Where a new trial is granted on the ground of insufficiency of evidence or on other various grounds on which trial court might base order, its action will not be disturbed except in a case where there is manifest unmistakable abuse of discretion.

5. Criminal law ⚷935(1)—Evidence held to sustain order granting new trial after conviction for first degree murder.

Evidence in prosecution for murder *held* such as to sustain order of trial judge granting a new trial after a conviction for murder in the first degree.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Jesus Prudencio was convicted of murder in the first degree, and, from an order granting a new trial after conviction, the State appeals. Affirmed.

U. S. Webb, Atty. Gen., Wm. F. Cleary, Deputy Atty. Gen., Earle Warren, Dist. Atty., and J. Paul St. Sure, Asst. Dist. Atty., both of Oakland, for the People.

Myron Harris, L. A. Sullivan, J. J. Rose, Jr., and John Jewett Earle, all of Oakland, for respondent.

KNIGHT, J. This is an appeal by the people from an order granting defendant's motion for a new trial. The grounds urged for reversal are that, at the time the motion was granted, the trial court was without jurisdiction to hear or determine the same, and that, even though jurisdiction did exist to entertain the motion, the granting of the same constituted an abuse of discretion.

The facts are as follows: The defendant was charged with murder by an information alleging that he did "unlawfully, willfully, feloneously, and of his malice aforethought kill and murder one Antonio Garcia." He entered a plea of not guilty, and upon trial the cause was submitted to the jury by the court under customary instructions to the effect that, if it found that the defendant was guilty, it should declare the degree of murder, and that, if it found that he was guilty of murder in the first degree, it should also determine and indicate by its verdict whether he should suffer death as a penalty therefor or be imprisoned in the state prison for life. Several forms of verdict were prepared and given to the jury by the court, and on January 12, 1927, the jury rendered its verdict finding defendant guilty of murder in the first degree without making recommendation as to penalty, which, under the law, was a determination that the defendant should suffer the penalty of death. Pursuant to said verdict, the defendant was brought before the court on January 15, 1927, for the pronouncement of judgment, at which time he moved for a new trial on all the grounds set forth in section 1181 of the Penal Code, including the ground that the verdict was contrary to the evidence; he also made a motion in arrest of judgment. The motions were regularly continued until January 22, 1927, on which date they were argued and submitted; whereupon the trial judge declared that the evidence, in his opinion, did not establish a case of murder in the first degree, but was sufficient to prove murder in the second degree, and, ignoring the effect of the verdict rendered by the jury, imposed a sentence for second degree murder.

Thereafter the people applied for and obtained from the Supreme Court an alternative writ of mandate commanding the trial judge to show cause why the judgment pronounced by him should not be annulled and set aside as being in excess of his jurisdiction, and to show cause also why judgment imposing the death sentence should not be pronounced in accordance with the verdict rendered by the jury. After hearing upon the merits, the Supreme Court held that no substantial ground existed upon which the judgment as entered could be sustained, that it was clearly without authority of law and did not purport to respond to any verdict rendered by the jury; and, in ordering a peremptory writ of mandate to issue, the Supreme Court said:

> "The defendant in the instant case has not been arraigned for sentence upon the verdict rendered by the jury convicting him. Neither has sentence nor judgment been pronounced by the court upon said verdict. The court positively refuses to recognize the verdict received by it or to pronounce judgment thereon or take any steps whatever upon the verdict rendered, as shown by the return herein. The court was without jurisdiction to pronounce judgment upon an assumed verdict of murder in the second degree and the judgment so pronounced must be annulled. We are of the opinion that petitioner has no plain, speedy, or adequate relief in the premises. Section 1068, Code Civ. Proc. It appearing that the court without any lawful cause refuses to pronounce judgment upon the verdict of the jury as rendered, or to take other legal or appropriate action thereunder or perform acts which the law specially enjoins upon said judge and court as a duty resulting from the office which said judge occupies, it is ordered that a writ of mandate issue out of this court commanding said Hon. Fred V. Wood, as judge of the superior court of the county of Alameda, to arraign said Jesus Prudencio, defendant in said action pending in said court, for judgment under and by virtue of the verdict returned against him, to-wit, conviction of murder in the first degree as charged in the information, and to hear and determine such motions as may properly come before him and to take such proceedings therein as are meet and proper in the premises and as by law provided." People v. Superior Court of Alameda County (Cal. Sup.) 259 P. 943.

In obedience to said writ, the defendant was again brought before the trial court on November 10, 1927, at which time he was arraigned for judgment upon the verdict rendered by the jury, and he again urged his motion for a new trial, which the court granted; and, from the order made in that behalf, the people have taken this appeal.

[1] It appears to be well settled in this state that, where a defendant has previously and within the time allowed by law interposed a motion for a new trial which is duly heard and denied, he has exercised and exhausted the right afforded him by the law, and thereafter the court is without power to entertain another similar motion (People v. Walker, 142 Cal. 90, 75 P. 658; People v. Ingersoll, 21 Cal. App. 763, 132 P. 1052), and in view of the foregoing rule of law appellant in the present case contends that the proceedings which took place before the trial court on January 22, 1927, amounted to a denial of the defendant's motion for a new trial, and that therefore "the trial court exercised and exhausted its power to pass upon such motion, and that the said court was thereafter without jurisdiction (on November 10, 1927) to hear and determine a similar motion in said cause."

[2] The record discloses, however, that the motion defendant made on January 22, 1927, and which he was entitled to have determined, was not at that time ruled upon. With reference thereto, the record shows that, when defendant's motion for a new trial was submitted in January, 1927, the trial court reviewed what it claimed was the evidence in the case, and in the course of its remarks said:

> "The evidence does not satisfy my mind that this man is guilty of first degree murder. * * * I feel it is a case that there was no intent to kill. I have deep convictions on that matter. He was guilty of an assault with a deadly weapon. That is a felony, and it makes it murder of the second degree. * * * This defendant is guilty of murder of the second degree. I am convinced in my mind it is not murder of the first degree. * * * My own feeling is, it is murder of the second degree. * * * I do not believe he is guilty of the first degree. I do not feel it was a willful intent to kill. I am not going to sentence a man for a crime when I have heard the evidence and don't believe he is guilty. * * * I hold that there is no evidence whatever to sustain a verdict of murder in the first degree in this case, and that the verdict does find the defendant guilty of murder of the second degree, and I am going to act accordingly. * * * *The defendant's motion for a new trial for murder of the second degree is denied.* Let him be arraigned for sentence."

Thereupon the trial court made the following order, which it caused to be entered upon its minutes:

> "* * * The court finds and decides that there is no evidence to sustain a verdict of and the defendant is not guilty of murder in the first degree, *but that the evidence does sustain and the verdict does find the defendant guilty of murder in the second degree as charged in the information, and that a new trial upon said charge of murder in the second degree be and the same is hereby denied*, and that the defendant be arraigned for judgment." (All italics ours.)

The clerk then proceeded to arraign the defendant for judgment, by informing him, among other things, as the judgment recites, "of the decision of the court that the evidence sustains and that the defendant is guilty of murder in the second degree in the commission of a felony, to wit, an assault with a deadly weapon by means likely to produce death or other bodily injury as charged in the information, and that his motion for a new trial for murder in the second degree was denied"; following which the defendant was asked whether he had any cause to show why judgment should not be pronounced against him, and, no sufficient cause being shown, the court rendered judgment as follows:

"* * * That whereas the defendant, Jesus Prudencio, had been duly convicted in this court of felony, to wit, murder of the second degree, that he therefore be confined in the state prison at San Quentin as prescribed by law. * * *"

It appears, therefore, as indicated, that, when the defendant was arraigned for judgment in January, 1927, the trial court did not attempt to decide the motion which the defendant at that time made, namely, a motion for a new trial based upon the degree of murder of which he had been found guilty by the jury, but purported to pass upon a motion which the defendant had not made and which was not before the court, namely, a motion for a new trial based upon a conviction of second degree murder. That being so, we are of the opinion that on November 10, 1927, when the matter again came before the court, the defendant was entitled to renew his motion and to have the same considered and determined.

That the Supreme Court was also of the opinion that defendant's motion for a new trial based upon the verdict as rendered by the jury had not theretofore been disposed of is clearly indicated by its decision in the mandamus proceeding, because its mandate to the trial judge was to arraign the defendant "for judgment, under and by virtue of the verdict rendered against him, to wit, conviction of murder in the first degree as charged in the information, *and to hear and determine such motions as may properly come before him,* and to take such proceedings therein as are meet and proper in the premises and as by law provided" (italics ours); and the only motions authorized by statute which could thereafter properly come before the trial court for determination were motions for a new trial and in arrest of judgment.

[3] The delay in ruling upon the motion which ensued as a result of the trial court's action on January 22, 1927, cannot be held to have nullified defendant's motion, for the reason that every person convicted of crime, and certainly one who has been found guilty of first degree murder and adjudged to suffer death as a penalty therefor, is afforded the right under the law of this state to make a motion for a new trial based upon the verdict which has been rendered against him, and, if presented in the manner and within the time provided by law, and no similar motion has been previously ruled upon, has the right to have such motion heard and determined by the trial judge. Under some circumstances the refusal of the trial court to hear defendant's motion for a new trial or to determine the same within the statutory period entitles the defendant to a new trial. Pen. Code, § 1202; Rankin v. Superior Court, 157 Cal. 189, 106 P. 718; People v. Boling, 32 Cal. App. 42, 161 P. 1169; People v. Winner, 31 Cal. App. 352, 160 P. 689. But manifestly the failure, neglect, or refusal on the part of the trial judge to perform a duty thus imposed upon him by the law, whether resulting from inadvertence or error, cannot operate to the prejudice of such person and thereby deprive him of the right to a new trial, if otherwise he is legally entitled to the same.

[4, 5] The remaining question is whether the granting of the motion herein constituted an abuse of discretion on the part of the trial judge. The rules which shall govern the trial court in dealing with such motions and the courts of appellate jurisdiction in reviewing the decisions of the trial courts thereon are well established and clearly defined, and in the case of People v. Knutte, 111 Cal. 453, 44 P. 166, are stated as follows:

"It has been so repeatedly held here as to become axiomatic that where a new trial is granted upon this ground, or where it is one of various grounds upon which the trial court may have based the order, its action will not be disturbed, except in a case showing a manifest and unmistakable abuse of discretion. This discretion is, of course, not arbitrary, but like any other judicial function, is to be exercised under the sanction of the judicial oath; and the strong presumption being always that it was so exercised, it will require in any case a very clear showing to the contrary to overcome such presumption and enable us to say that the power of the court in that respect was abused. While it is the exclusive province of the jury to find the facts, it is nevertheless one of the most important requirements of the trial judge to see to it that this function of the jury is intelligently and justly exercised. In this respect, while he cannot competently interfere with or control the jury in passing upon the evidence, he nevertheless exercises a very salutary supervisory power over their verdict; in the exercise of that power he should always satisfy himself that the evidence as a whole is sufficient to sustain the verdict found, and, if in his sound judgment it is not, he should unhesitatingly say so, and set the verdict aside. People v. Lum Yit, 83 Cal. 130 [23 P. 228]."

The rules are restated in People v. Petros, 25 Cal. App. 236, 143 P. 246, in the following language:

"The rule is thoroughly settled that 'the granting or denying a new trial on the ground that the evidence is insufficient to justify the verdict, where there is a substantial conflict in the evidence, rests so fully in the discretion of the trial court that its action is conclusive upon this court, unless it appears that there has been an abuse of discretion.' Domico v. Casassa, 101 Cal. 413 [35 P. 1024]; Warner v. Thomas, etc., Works, 105 Cal. 411 [38 P. 960]; [Eidinger] Edinger v. Sigwart, 13 Cal. App. 667, 676 [110 P. 521, 524], and cases therein cited. 'Indeed, it has repeatedly been said in the cases that the action of a trial court in granting a new trial upon the ground of the insufficiency of the evidence to justify the decision "is so far a matter within its discretion that, if there is *any appreciable conflict* in the evidence it is not open to review."' Newman v. Overland Pac. Ry. Co., 132 Cal. 74 [64 P. 110]; Otten v. Spreckels, 24 Cal. App. 251 [141 P. 224]. * * * While a trial court will not be allowed to trespass upon the functions of the jury, it is nevertheless true that it is invested with a supervisory control over a trial before a jury and is legally authorized to grant a new trial where it entertains a well-founded opinion, or one which appears to be sufficiently well-founded to preclude a reviewing court from declaring it not to be, that the result reached by the jury is not justified by the evidence. And, in determining this question upon a motion for a new trial, the trial court may, of course, pass upon the probative value of the testimony submitted in proof of the charge against the accused. In other words, such court may consider, examine, and scrutinize the testimony by the aid of those tests by which the jury are required to measure the worth and weight of the proofs adduced in substantiation of the charge, and if it thus reaches the conclusion that the jury, to reach its conclusion, must have accorded to such testimony undue weight and credit—that is to say, if it be persuaded by a just and fair consideration of the testimony that it is insufficient to establish guilt beyond a reasonable doubt, and that the jury formed an erroneous judgment on the probative power of the evidence—and, accordingly, in the exercise of the discretion committed to it as to such matters, grants a new trial, the order granting the motion must then be held to stand free from disturbance by a court of review."

To the same effect are People v. Chew Wing Gow, 120 Cal. 298, 52 P. 657; People v. Lum Yit, 83 Cal. 130, 23 P. 228; In re Bainbridge's Estate, 169 Cal. 166, 146 P. 427; People v. Washington (Cal. App.) 260 P. 806; People v. Dewar, 49 Cal. App. 263, 193 P. 156; People v. Canfield, 173 Cal. 309, 159 P. 1046. In the case last cited, the court goes on to say:

> "We can hardly manufacture in fancy a hypothetical situation in which a reviewing court would be justified in questioning the discretion of a trial court who should grant a new trial in a case involving a criminal charge."

And in this connection Mr. Justice Temple, the author of the opinion in the case of People v. Chew Wing Gow, supra, declares that "no case [in this state] can be found in which an order granting a new trial in a criminal case for insufficiency of the evidence was reversed," to which statement counsel for defendant add, without challenge on the part of appellant, that, since the case last above cited was decided, no such judgment of reversal has been rendered.

Turning, then, to the evidence in the case at bar, it is found to be in serious conflict as to the circumstances attending the homicide. Defendant admitted that he shot the deceased with a rifle, but claimed that he did so in self-defense. The shooting occurred on the night of October 14, 1927, in a public street or alley in the rear of defendant's residence, the defendant at the time being some distance from the deceased; and, although disinterested witnesses saw defendant firing the shots, they were unable to observe the conduct of the deceased, on account of the darkness. Earlier in the evening both men had been in a pool room where the deceased, in the presence and hearing of defendant, as the prosecution claims, received change for a $50 bill. Shortly thereafter, according to the dying statement of the deceased, who had been drinking, defendant invited him to his home to have some wine; and, on the way there, defendant attempted, with the aid of a pistol, to rob him of his money, but was finally persuaded by the deceased not to do so. A pistol was afterwards found on the defendant's person, but it proved to be a toy pistol. The deceased further stated that, following the attempted robbery, defendant proceeded on toward his home, and that he followed him there for the purpose of obtaining the wine which the defendant had promised him; that, when he arrived at the door of the defendant's house, defendant appeared with a rifle, ordered him away from the premises; and that, as he was proceeding down the alley away from the house, defendant shot him. The evidence shows without dispute that defendant fired several shots, but that only one took effect, the bullet having entered the deceased's back and passed through his body. Just about that time two officers who had been previously summoned to the scene drove into the alley, and in the glare of the lights from their automobile saw the wounded man and also the defendant, who was retreating toward his house with his rifle in hand.

In his own behalf, defendant testified that he had not invited the deceased to his home, but that, after he arrived there, the deceased, being partially intoxicated at the time, forced his way into the home, threatening violence to defendant and his wife with a knife which the deceased was exhibiting; that he then procured his rifle and drove the deceased from the house into the street, where the deceased continued his menacing attitude; that meanwhile he stood on the porch of his house, and, in order to frighten the deceased away, fired several shots in the air, the bullets going through the roof of the porch; that suddenly he saw the deceased turn and come toward him with knife in hand; and that thereupon he fired directly at the deceased. The evidence further shows that when the officers appeared immediately following the shooting the defendant told them to "look out," that the deceased had a knife; whereupon the officers searched the deceased and found upon his person an open knife such as is used in cannaries, wrapped in a piece of newspaper. Defendant's testimony as to the deceased invading his home was corroborated by the testimony of his wife; and his statements about ordering the deceased away from the premises were partially supported by the testimony of a neighbor, who stated that after hearing the first shot he went to the rear of his house to ascertain the cause of it, and that while there saw the defendant holding a rifle in his hand ordering some one away from the house; but in direct contradiction of the defendant's story the neighbor stated that the defendant did not remain on the porch, as defendant claimed, but that he followed the man out into the street, stopping every few steps to take deliberate aim and fire. Defendant's testimony was further contradicted by evidence showing that no bullet holes were to be found in the roof of his porch.

It would seem unnecessary to narrate any additional evidence adduced at the trial, for the reason that the portions already set forth are sufficient to show that substantial conflict existed on essential points bearing upon the question of the defendant's guilt or innocence; and in that state of the record we are not permitted, under the authorities quoted, to interfere with the decision of the trial judge in the granting of said motion. "Whatever may be our view of the sufficiency of the evidence constituting respondent's defense to the charge, it is not the function of this court to substitute its discretion for that which is vested in the trial court." People v. Claiborne, 63 Cal. App. 598, 219 P. 72. As said in People v. Ostrander, 23 Cal. App. 241, 137 P. 619:

> "The trial judge was called upon to review the testimony in determining whether the verdict was sustained by the evidence, and he evidently gave credit to the statement made by the defendant. It may be remarked that as the testimony appears in the cold record, the explanation made by defendant is hardly worthy of credence; * * * still, having seen and heard the witnesses, the trial judge was authorized and required to draw his conclusions as to the sufficiency of the evidence to sustain the conviction, and in such a case this court cannot interfere with his determination of that matter. There was a conflict of evidence, and therefore on this appeal a question of law is not presented."

In further support of the trial court's order granting a new trial defendant contends that he was entitled to the order as a matter of statutory right because his motion for a new trial had not been determined by the trial court within the statutory period. Pen. Code, §§ 1191 and 1202; Rankin v. Superior Court, supra; People v. Boling, supra; People v. Winner, supra. But, in view of the conclusions we have reached upon the other phase of the case, we deem discussion and determination of the point last mentioned unnecessary.

For the reasons given, the order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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93 Cal. App. 497

PEOPLE v. GARVEY et al. (Cr. 1632.)

District Court of Appeal, Second District, Division 2, California. Aug. 15, 1928.

1. Burglary 🔑41(1)—Homicide 🔑250—Conviction of defendants for murder of proprietor and burglary of drug store held sustained by evidence.

In prosecution for murder and burglary, evidence showing deceased was found in rear of his drug store with concussions on his head, which might have been caused by blunt instrument or fall, that deceased was bound hand and foot, and that cash register had been emptied, together with evidence identifying defendants and admission of killing by one defendant, was sufficient to justify verdict of guilty.

2. Criminal law 🔑1159(3)—District Court of Appeal will not weigh conflicting evidence.

Evidence will not be weighed by District Court of Appeal, where there is substantial conflict.

3. Criminal law 🔑958(6)—Denial of new trial, under affidavit that witness was not certain whether defendant admitted crime as testified, disputed by affidavits for state, and under affidavits not showing new evidence, held not abuse of discretion.

In prosecution for murder and burglary, affidavit by witness that he was not sure that defendant had stated he killed deceased, as testified to at trial, but not alleging defendant did not make other incriminating statements, which affidavit was disputed by affidavits showing defendant made statements, and other affidavits regarding defendant's whereabouts at time of crime, which were merely cumulative and did not show new testimony unknown to defendants at trial, *held* not to show abuse of discretion in denying new trial.

4. Criminal law 🔑935(1), 1156(2)—Denial of new trial, claimed because of insufficiency of evidence, is within trial court's discretion, not to be disturbed, in absence of abuse.

Denial of motion for new trial, made on ground of insufficiency of evidence, supported by affidavits, rests largely in discretion of trial court, which will not be disturbed, unless there was abuse of discretion.

5. Criminal law 🔑1169(11)—Admission of evidence of theft of automobile, such as used in committing murder and burglary, held not error, though prosecution failed to prove defendants' connection with theft.

In prosecution for murder and burglary, in which testimony showed that Hudson automobile was used in committing crime, evidence that Hudson automobile was stolen, and that defendant was seen near place of theft, would have been material, as connecting defendants with commission of crimes, and admission thereof was not error, though prosecution failed to connect defendants with theft of automobile.

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6. Criminal law 🔑1171(1)—Defendants could not deny their counsel's right to stipulate for admission of evidence not to be disputed, where defendants were not prejudiced, and nothing in evidence was untrue.

Where court permitted counsel for defendants to stipulate that district attorney might state what father of deceased would testify, if present, with understanding that it would not be disputed, and counsel was aware of what testimony would be, and it was not shown that defendants were prejudiced thereby, or anything therein was not true, defendants could not contend that their counsel had no right to so stipulate.

7. Attorney and client 🔑86—Counsel may stipulate relative to any steps of action.

Generally, counsel have right to stipulate relative to any steps of action or proceeding.

8. Criminal law 🔑829(18)—Refusal of instructions to acquit, if testimony on alibi raised reasonable doubt, held not error, in view of instructions given on reasonable doubt and alibi.

Where court, in prosecution for murder and burglary, extensively instructed jury on subject of reasonable doubt, and that defense need not prove alibi beyond reasonable doubt, it was not error to refuse instructions that, if testimony of defendants on question of alibi was sufficient to raise reasonable doubt concerning presence at scene of crime, it was duty of jury to acquit; trial judge not being required to make any comment on any particular line of evidence.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Mike Garvey and others were convicted of murder and burglary, and they appeal. Affirmed.

W. T. Kendrick, Jr., of Los Angeles (W. T. Kendrick, of Los Angeles, of counsel), for appellants.

U. S. Webb, Atty. Gen., James S. Howie and John D. Richer, Deputy Attys. Gen., for the People.

THOMPSON, J. The defendants were indicted by the grand jury of Los Angeles county, charged in count I with the crime of murder, and in count II with burglary. They were all found guilty of both offenses, and prosecute this appeal from the judgments pronounced upon the verdict, and also from the order denying their motion for a new trial.

The principal contention advanced by appellants is that the evidence is insufficient to sustain the verdict of guilty, and their argument in this regard is pointed particularly to the verdict on the first count, for which the defendants were sentenced to San Quentin for life. The testimony adduced shows that A. R. Miles, the proprietor of a drug store at the corner of Fourth avenue and Jefferson street in the city of Los Angeles, was found dead in the rear room of that store on the evening of November 1, 1927, at about 10:30 p. m. The autopsy surgeon found an extensive contusion behind the left ear, and underneath this contusion an extensive internal hemorrhage, covering the entire surface of the brain and extending downward into the spinal canal. He could not say whether this injury was caused by a blunt instrument striking the head or by a fall. He also found an abrasion on the right side of the forehead and a contusion in the center of the left side of the forehead. The record discloses that during the course of the trial it was made to appear that A. H. Miles, the father of the deceased, was ill in bed, and when it was suggested that the court attend his bedside for the purpose of taking his testimony, defense counsel, who is not now representing appellants, stipulated in open court, after being warned by the district attorney, and after the latter had stated to counsel and the trial judge in chambers what his statement would be, that the district attorney might state what the witness would testify to, if sworn and examined, and that he would not controvert the testimony, whereupon the district attorney stated that, if Mr. Miles were called, he would testify that he was the father of deceased; that he went to his son's store on the evening in question, and, not finding him in the front portion thereof, went into the room in the rear, where he found his son lying on the floor, covered with blood and bound with wire, hand and foot; that there were abrasions on his head; that he examined the cash register, and although the tape which records the amount of money rung up indicated $36, there was no money therein; that he then accompanied his son to the receiving hospital, where he died somewhere between 10 and 11 o'clock.

An 11 year old boy living in the neighborhood visited the store about 10 p. m., after returning from a picture show, and while standing outside, near the entrance, saw three men drive up in a Hudson coach automobile, which they parked on Fourth avenue, without stopping the motor. These three men went inside, one of them stating that he wanted a cigar and "asked for them free." When Miles refused, he walked back into the rear room, and two of the men followed. After being there about five minutes, the three men "walked out fast, * * * hopped in their car," threw a bag or something into the rear seat, and drove away. After visiting the Central Station the fourth time and seeing other prisoners, the witness picked out from a group of eight and identified two of the appellants. He did not identify the third at the time, but soon afterward. After the three men left the store, the boy ran some distance away, but came back when the ambulance arrived, at which time he saw Miles "lying there all tied up." This witness also testified that he saw Roberta Scriver come in a little after the appellants left, and "yoohoo," and knock on the counter, to which no one responded.

Roberta Scriver, the young lady just mentioned, testified that she lived two blocks from the drug store; that she left home at exactly 10:15 o'clock on the evening in question, and drove with friends to the drug store; that when she went to go in she saw three men in a Hudson coach, and saw them drive away; that one of the men came out of the store "kind of on a trot," threw a bundle into the car, got into the car, and they all drove away. She was not positive in her identification of this man, but thought that appellant Lesher looked something like him. She also testified that she waited around the store about three minutes, and thought it was funny that nobody was there. Later she saw Miles lying on the floor, and that just above his left eye there was a "kind of a red mark, like there was blood spurting out of his head." She also testified that she saw a gun lying on the table in the back room.

A witness by the name of Walton testified that about November 7th or 8th all of the appellants and some other people were at his home drinking bootleg and wine; that the appellant Lesher became so badly intoxicated that he had to put him to bed; that about 2:30 in the morning, as Lesher was coming out of his stupor, he said, "Why did I kill him;" that later Lesher came into the outer room, and Walton, in the presence only of Lesher, asked him what he meant by the remark, whereupon appellant Lesher said, "I might as well tell about it," "I committed the Jefferson street job," and added that he hit the deceased over the head, and after he had fallen, he opened his eyes and said "Heinie"; that then "I knew he knew me, and I finished him with my feet." This witness admitted that he was so intoxicated that about all he was able to do was to get around. The court admonished the jury, at the time the witness related this admission of the appellant Lesher, that the testimony was not applicable to the appellants Garvey and Rohan.

The appellants all took the stand, and denied any knowledge of the crime, and maintained that they were at home on the evening in question.

[1, 2] It is apparent from the testimony introduced that the jury were fully justified in returning a verdict of guilty. There is nothing incredible in the testimony of Eddie Yates, the boy who identified the appellants. This same witness testified that Miles was all tied up, which, if believed, would dispel the idea of an accident, as would also a similar remark, contained in the district attorney's statement of what the father would testify to, to the effect that his son was bound with wire, hand and foot. It has so often been asserted, and is so well understood, that it is not the province of this court to weigh the evidence, where there is a substantial conflict, that we deliberately decline to cite authorities to that effect.

[3, 4] We will next consider the asserted error of the court in denying the motion of appellants for a new trial, which they argue seriously and with apparent sincerity. In aid of that motion there was presented an affidavit signed by H. S. Walton, a witness at the trial, in which he says that on the evening of November 7th or 8th, at which time he testified that Lesher cried out, as he was coming out of a drunken stupor, "I am sorry I killed him," that he (Walton) was so intoxicated that he was incapable of registering intelligent impressions, and so "he never was certain whether *that statement* was actually made to him by Harvey Lesher," and that "he honestly believes that he might have imagined that *such a statement* was made by Lesher." He further avers that he was threatened with arrest by police officers, and, being fearful of such action by them, testified to the statement. Nowhere in the affidavit does Walton say that he did not have the conversation which he testified took place after Lesher had come into the outer room. The affidavit is skillfully drawn, but nevertheless limited in effect to saying that he may have been mistaken when he testified to this one statement. On the other hand, there were submitted on behalf of the prosecution six affidavits of various police officers to the general efect that Walton had repeatedly and freely stated that Lesher had made the statement and had held the conversation which has been detailed.

The remaining affidavits of appellants, five in number, state in general that H. S. Walton, the witness, was at the home of the appellant Lesher on the night of November 1st, somewhere between 9:20 and 9:45 p. m., some of them stating that they talked to him at that place between 9:30 and 10 o'clock; that he went from there to the home of Mrs. Adelaide Logan, arriving there between 9:30 and 10 o'clock. None of these affidavits state, nor does any affidavit disclose, that this fact was not known to the appellants at the time of trial, nor that they did not know that the affiants would so testify, if called. Furthermore, we fail to attach any great significance to the fact that Walton was present at Lesher's home at the time indicated. If intended to be in aid of the proof of an alibi, they would not only be merely cumulative, but also it may be observed that the offense was committed, as near as it may be fixed, at 10:15 p. m. (the time when Roberta Scriver left her home), and at a distance, as counsel state in their brief, of about three miles from the home of Lesher. The denial of a motion for a new trial, made on the ground of insufficiency of the evidence, supported by affidavits of the character we have just classified, rests largely in the discretion of the trial court, and the ruling will not be disturbed, unless it can be shown that there was an abuse of that discretion. We are of the opinion that there was nothing in the affidavits to warrant the granting of the motion in this case.

[5] Appellants also complain because, during the trial of the action, testimony by one Stopp was permitted to the effect that, some time between midnight of October 28, 1927, and 10 p. m. of October 29, his light green Hudson sedan was stolen from a garage on Mariposa avenue. The night man at this garage also testified that, about 9 o'clock in the evening of the day the Hudson was stolen, he saw the appellant Lesher come out on the side of the garage between some signboards, get into a roadster, and drive away with two other men whose faces he did not see. It is obvious that, had the prosecution been able to prove that Lesher and his companions stole the Hudson sedan, it would have been material, as tending to connect them with the commission of the offenses with which they were charged, in view of the testimony that it was a Hudson automobile in which the criminals came and departed the scene of the crime. It is also apparent that the prosecution failed in their effort to make this proof, but because they did fail we cannot see that the testimony was of any effect one way or the other.

[6, 7] Appellants strenuously object to the stipulation already mentioned, which the court permitted counsel who was representing the defendants at the trial to make, which permitted the district attorney to state what Mr. Miles would testify to, if present, with the understanding that it would not be disputed. Counsel was fully advised of what that testimony would be, and presumably the defendants, who were present, were likewise fully aware of its import. At least there is no showing that they were not aware of what it would be, nor is there any showing that they were prejudiced by the statement, or that anything contained in the statement was untrue. It is merely insisted that counsel had no right to enter into the stipulation. The general rule is that counsel have the right to stipulate relative to any of the steps of an action or proceeding. 23 Cal. Jur. p. 814. In fact, the situation here, when we bear in mind that counsel probably had in mind the effect which might possibly have been exerted upon the jury by an invalid father, is not unlike the one presented in the case of People v. Schoon, 177 Cal. 678, 684, 171 P. 680. Akin to this reasoning is that found in the case of People v. Bird, 132 Cal. 261, 64 P. 259, where the court, after discussing the right of the defendant to be confronted with the witnesses, discloses that the defendant "may waive his right of confrontation, if he so desires, and introduce in evidence the testimony of such dead or absent witnesses, whether that testimony was given at the preliminary examination or upon a former trial of the cause." The action of the trial court in refusing the defendant permission to waive his rights in this case was held to be error and the cause was reversed.

[8] Appellants also assert that the court erred in its refusal to give three instructions requested by them upon the subject of their attempted proof of an alibi. These instructions would have told the jury that, if the testimony of the defendants in this regard was sufficient to raise a reasonable doubt in their minds concerning the presence of appellants at the scene of the crime, it was their duty to acquit. In view of the fact that the trial court extensively instructed the jury upon the subject of reasonable doubt, and told them that it was not necessary for the defense to prove an alibi beyond a reasonable doubt, and also that, if the evidence was equally susceptible to the interpretation that defendants were guilty, with the interpretation that they were not guilty, giving in all seven instructions bearing upon the question, we feel that appellants' argument is effectually concluded by the authorities—People v. Perrin, 67 Cal. App. 612, 227 P. 924, and People v. Powell (Cal. App.) 256 P. 561—wherein it is held not to be the duty of the trial judge to make any comment on any particular line of evidence.

Judgments and order affirmed.

We concur: CRAIG, Acting P. J.; HAZLETT, Justice pro tem.

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WILKINSON v. BOOR SINGH. (Civ. 5608.)★

District Court of Appeal, First District, Division 2, California. July 28, 1928.

Hearing Denied by Supreme Court Sept. 27, 1928.

Supplemental Opinion, Aug. 17, 1928.

1. Landlord and tenant 🔑180(3)—Verdict awarding damages in forcible eviction action for destruction and loss of furniture, in absence of testimony as to value, held unsupported by evidence.

In action to recover damages for forcible eviction, verdict awarding damages for destruction and loss of furniture occasioned thereby, where there was no testimony of value of furniture, either before or after it was thrown out of building, *held* unsupported by evidence.

2. Landlord and tenant 🔑180(4)—Measure of damages for loss of dogs, caused by forcible eviction, is price for which other dogs equal in value could be bought in open market (Civ. Code, § 3354).

In action to recover damages for forcible eviction, whereby plaintiff lost two dogs, measure of damages for loss of dogs, under Civ. Code, § 3354, is price for which two other dogs, equal in value to those lost, could be bought in open market.

★Hearing denied by Supreme Court.

3. Landlord and tenant 🔑180(1)—Action to recover for forcible eviction could be maintained, without first resorting to separate suit to regain possession.

An action to recover damages for forcible eviction, where plaintiff did not seek to regain possession of premises under a summary proceeding provided for in cases of forcible entry and detainer, *held* properly instituted, without first resorting to separate suit to regain possession of property.

4. Appeal and error 🔑1170(9)—Instruction that measure of damages for loss of property having no market value was its particular value to owner, though not supported by evidence, held harmless error (Code Civ. Proc. § 475).

Instruction that measure of damages for loss or destruction of personal property, if it had no market value, and was more particularly valuable to the owner than any one else, was its particular value to the owner, though erroneous, as not supported by evidence, *held* harmless, in view of Code Civ. Proc. § 475, where lost dogs, sought to be recovered for, did have a market value.

5. Damages 🔑208(8)—Discretion of jury and trial court in awarding exemplary damages is not unlimited.

Discretion of jury and trial court in awarding exemplary damages, out of proportion to actual damages, is not unlimited.

6. Landlord and tenant 🔑180(4)—Verdict for exemplary damages, out of proportion to actual damages allowed, could be set aside by court, the same as any excessive verdict.

Where exemplary damages of $1,500 were out of all proportion to actual damages of $70 awarded plaintiff in an action to recover for damages caused by wanton and malicious eviction from property, *held*, that court had power to set aside verdict for exemplary damages, the same as for any excessive verdict.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Richard Wilkinson against Boor Singh for damages for forcible entry. Judgment for plaintiff, and defendant appeals. Reversed and remanded, unless remittitur filed.

John S. De Lancey and Clarence De Lancey, both of Oakland, for appellant.

Joseph L. Fainer, of Oakland, and Leo Collins, of San Francisco, for respondent.

PRESTON, Presiding Justice pro tem. This is an appeal by the defendant Boor Singh from a judgment entered against him upon a verdict of a jury in the sum of $2,500, and reduced to $1,500. This case is between a canine breeder and a Hindu fortune teller.

The record in this case establishes beyond question the truth of the old adage that it is impossible for two families to live under the same roof in peace and harmony, especially when one insists upon having their dogs reside with them. In September, 1924, Ernest Lum, a Chinaman, owned a building at 2290 East Fourteenth street, in San Leandro, Cal., used as a dance hall. The respondent, Richard Wilkinson, and his 27 dogs lived in a small building adjoining the Lum property. The appellant, Boor Singh, called at respondent's dog kennel some time about the last of September or the 1st of October, 1924, and asked respondent who owned the building at 2290 East Fourteenth street. Thereupon appellant and respondent went to see Mr. Lum, who resides in Oakland, and on this visit appellant claims to have rented the property from Lum for $60 a month, beginning November 1, 1924; but, according to the testimony of respondent, Lum gave the keys to him, and told him that he was to look after the property and also to look after the appellant while he occupied the building. Respondent also claims to have had before this time permission from Lum to occupy the kitchen and rear portion of the building.

On or about November 1, 1924, appellant and his wife moved their furniture and paraphernalia into the dance hall, or front room of said building, cleaned up the room, placed their alluring and attractive signs on the front of the building, and otherwise put the place in order to reap a rich harvest from the gullible public by reading their palms. On the next day after appellant and his wife moved into the front part of the building respondent and his 27 dogs took possession of the kitchen, rear end of the building, back yard, garage, etc. There is nothing in the record to show that appellant made any objection to respondent and his dogs occupying the kitchen, etc., when respondent first moved in; but, on the contrary, appellant and respondent seem to have been on friendly terms, for appellant gave a "grand opening dance," and respondent assisted in receiving the guests and in serving them "hot dogs" and coffee.

Appellant and his wife continued to conduct their business in the front room, and respondent continued to live and breed dogs in the kitchen and back yard, until December 12, 1924. Respondent never paid any rent, either to appellant or to Lum. On December 12, 1924, at about the hour of 2 o'clock p. m., and while respondent and about 7 of his dogs were living contentedly in the kitchen of the building, appellant entered the kitchen in a very angry mood, with a large hammer in his hand, and told respondent that he and his dogs must immediately vacate the premises. Respondent refused to accede to this request, whereupon appellant immediately flew into a violent rage, and knocked down the small partition in the kitchen, and threw the partition, together with all of respondent's furniture, into the back yard. The furniture included a piano, which appellant's wife assisted in removing into the back yard. After appellant had removed all of respondent's belongings from the kitchen, he then proceeded to the garage in the back yard, and there knocked off the hinges of the door and released about 20 more dogs, which were confined in the garage; then appellant proceeded to the fence surrounding the back yard, and knocked off several boards, and the dogs made hasty departures in all directions. Appellant consumed about two hours in raising havoc with respondent's furniture and dogs, during which time respondent made little or no resistance, but contented himself by running to and fro through the building, tearing his hair, and calling upon the Lord and the law for assistance. After the turmoil had subsided, and the dogs had taken refuge in nearby alleys and back yards, respondent succeeded in getting the constable to the scene of the trouble, and the constable, in company with the respondent, interviewed the appellant, and he admitted doing all of the things hereinabove related, but contended that he had leased the entire building and that respondent had no right or authority in said building or in any portion thereof. Respondent, after considerable search and inquiry, finally recovered all the dogs except two—one male dog weighing about 2½ pounds named "Tip," and another small female dog named "Fay."

On February 10, 1925, the respondent commenced this action for damages, alleging that he was entitled to the possession of the kitchen and rear portion of said premises, and that the entry of defendant was forcible, unlawful, malicious, and without consent of plaintiff, etc.; that by reason of said eviction he was forced to, and did, sleep in an out building used as a dog kennel, situate in the rear of said premises, and was thereby greatly humiliated, and was caused great and grievous mental suffering and anguish, by reason of which he was damaged in the sum of $1,000. The complaint also alleged that by the removal of the furniture plaintiff was damaged in the further sum of $175, and further alleged that by reason of the acts of defendant the two dogs above mentioned, "Tip" and "Fay," were lost, and were of the value of $4,000. The complaint further alleged that said two dogs were irreplaceable, and that by reason of the deprivation of being able to enter them in contests the reputation of plaintiff as a breeder of dogs has been injured and damaged in the sum of $1,000, and further alleged that by reason of said defendant's malicious, unlawful, and willful acts, said plaintiff has suffered damage in the further sum of $5,000, and prayed for a total judgment in the sum of $11,175.

The defendant answered, denying all the material allegations of the complaint, and also filed a cross-complaint, asking for rent at the rate of $25 per month from December 12, 1924, for the premises occupied by plaintiff and his dogs. The jury did not separate the damages, but returned a general verdict assessing plaintiff's damages at $2,500.

[1] The appellant first contends that the verdict is not supported by the evidence. It will therefore be necessary to make a brief reference to the evidence on the question of damages. The only evidence in the record relative to the value of the furniture is that given by the respondent himself, which is as follows:

> "Q. I will ask you what damage was done to your furniture by the removal by Mr. Boor Singh? A. Well, the piano was broke up, and all the other things were stolen. They was not put quietly down in the back yard; they was thrown right out violently in the back yard at 2 o'clock. * * *
>
> "Q. Did you lose any articles by this throwing out? A. No; I didn't lose only what was broken up. * * *
>
> "Q. You allege you were damaged in the sum of $175, because of the removal of this furniture; is that right?
>
> "Mr. De Lancey: Object to the question as incompetent, irrelevant, and immaterial, and no way proving damages, and as calling for the conclusion of the witness.
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> "The Court: You have not told us what furniture was put outside. A. All the carpet was ripped up, it was not pulled up proper; it was just ripped up and thrown outside. The piano was thrown outside, and the chairs and the pictures, and all of that. All the canned stuff I was going to use for the lunch counter, and all that, all wasted away."

From this testimony it is clear that there is no evidence whatever as to the value of the furniture, either before or after it was thrown out into the back yard, and no evidence of any damage to it. No evidence was offered in support of plaintiff's claim that his reputation as a breeder of dogs had been impaired.

The evidence does not show, nor can it be inferred from any testimony in the record, that plaintiff was compelled to sleep in the kennel with the dogs, or that he suffered any humiliation by so doing, but, on the contrary, it appears that he slept with the dogs from choice. Before the eviction he was sleeping with the dogs in the kitchen. We fail to see why it would be any more humiliating to sleep in the kennel with the dogs than to sleep in the kitchen with them.

[2] The only testimony in the record as to the market value of "Tip" and "Fay," the two dogs that were not recovered, was offered by appellant, which was that "Tip" could be easily replaced for $35. There is no direct evidence that the dog "Fay" had any market value, but it could probably be inferred from all the testimony in the case that she also had a market value of $35. Respondent offered no evidence as to their market or reasonable value, but only introduced testimony as to the earning ability of the dog "Tip," which was that during the breeding season of 1924, he received for the services of "Tip" approximately $25 per

week. Under this evidence, the measure of damages is the price for which two other dogs, equal in value to "Tip" and "Fay," could be bought for in the market in Oakland or San Leandro, Cal., which would be not exceeding $70. Section 3354, Civ. Code.

[3] Appellant contends that no damages can be awarded respondent for being violently ejected from the building, for the reason that respondent never attempted to regain possession of the premises. It is true, as contended by appellant, that the cases of Brawley v. Risdon Iron Works, 38 Cal. 676, and Edwards v. Bodkin, 43 Cal. App. 405, 185 P. 423, hold that, in an action of forcible entry or forcible detainer, the substance of the recovery, when the plaintiff is successful in the action, is the possession of the premises, and that damages for forcible entry or detainer are not awarded, unless the plaintiff recovers the possession of the premises in controversy; but it must be remembered that this is an action, among other things, for *damages for forcible eviction*, and respondent has not sought to gain possession of the premises under a summary proceeding provided for in cases of forcible entry and detainer. *The implied finding of the jury is to the effect that respondent was entitled to the possession of the premises at the time of the forcible eviction, and, as we have seen, the evidence is sufficient to sustain this impled finding of the jury.* Of course, if the jury had found that respondent was not entitled to any damages by reason of the eviction, then it would have been an implied finding that *he was not entitled to the possession of the property.* We think there is a clear distinction between the rule laid down in the two cases cited by appellant and the case at bar. Certainly, respondent would not have to resort to a separate suit and have the court award him possession of the premises before he could maintain this action for damages for this unlawful and malicious eviction.

[4] It is next contended by appellant that the court erred in giving certain instructions on the measure of damages. A careful examination of all the instructions given satisfies us that the trial court fully and correctly instructed the jury upon all phases of the law applicable to the case, with one possible exception, and that is this: The court instructed the jury that the measure of damages for the loss or destruction of personal property, if it had no market value and was more particularly valuable to the owner than any one else, was its particular value to the owner. This instruction was, no doubt, intended to apply to the value of the dogs; but, as we have seen, the evidence shows that said dogs did have a market value. Therefore there was no evidence in the record upon which this instruction could have been based, and should not have been given. The giving of this instruction, however, did not, in our opinion, affect any of the substantial rights of appellant. It was harmless error. This court is required by section 475 of the Code of Civil Procedure to disregard any improper instruction which, in our opinion, did not affect the substantial rights of the parties, and not to reverse any judgment by reason of any instruction, error, or ruling, unless it shall appear to us that by such instruction, error, or ruling the appellant sustained or suffered substantial injury, and that a different result would have been probable if such instruction, error, or ruling had not occurred. It is also provided that there shall be no presumption that error is prejudicial, or that injury is done if error is shown.

[5] Lastly, appellant contends that the damages are excessive. As above stated, the jury rendered a general verdict, assessing the damages at $2,500. A motion for a new trial was made upon several grounds, among them being excessive damages appearing to have been given under the influence of passion or prejudice (subd. 5, § 657, Code Civ. Proc.), and the trial court made the following order:

> "The motion for a new trial in the above-entitled cause having been heretofore argued and submitted to the court for decision, comes now the court and orders that a new trial be granted, unless plaintiff shall within five days in writing remit all the judgment in excess of $1,500, but if plaintiff shall remit the sum of $1,000 from the judgment within five days, then and in that event the said motion for a new trial will be denied."

This order was complied with, and the judgment reduced to $1,500. The evidence shows respondent's damage to be $70 for loss of the two dogs, "Tip" and "Fay"; no other actual damage was proved. Therefore, if the judgment of $1,500 can be sustained at all, it must be upon the theory that $1,430 of said judgment was for exemplary or punitive damages. The respondent, in the prayer of his complaint, did not expressly ask for exemplary damages, but he did allege in the body of his complaint that all the acts charged against appellant were *unlawfully, willfully, and maliciously committed.* There was no demurrer of any kind interposed to the complaint. The court instructed the jury on exemplary damages, and the evidence is ample to sustain the implied finding of the jury that appellant's acts were extremely wanton and malicious.

Under all these facts and circumstances, we think the jury was fully warranted in rendering a judgment, including punitive damages (section 3294, Civ. Code; 8 Cal. Juris. 892), but the amount allowed for punitive damages is about 20 times the amount of the actual damages proved. We fully appreciate the fact that there is no hard and fast rule fixing the proportion between actual and exemplary damages, in cases where exemplary damages are recoverable. It has, however, been repeatedly held that exemplary damages should bear a reasonable proportion to the actual damages sustained, and the discretion of the jury and trial court are not unlimited in this matter. Flannery v. Wood, 32 Tex. Civ. App. 250, 73 S. W. 1072; Plotnik v. Rosenberg, 55 Cal. App. 408, 203 P. 438.

[6] We think the judgment in the case at bar, even after being reduced to $1,500 by the trial court, is still greatly excessive. To award $1,430 punitive damages, when only $70 actual damages is proved, is, in our judgment, out of all proportion to the actual damages sustained, and should not be permitted to stand. The power of this court to set aside a verdict for exemplary damages is the same power, and exercised upon the same principle, as in any case of excessive verdict. Plotnik v. Rosenberg, supra.

We have concluded that the judgment in this case should be reversed, and the case remanded for a new trial. unless the respondent shall, within 20 days from the date of the filing of this opinion, file in this court a remittitur of all damages in excess of $370, plus costs, if the said remittitur be filed; the judgment then to be modified in accordance therewith, and, as so modified, affirmed. It is so ordered.

We concur: NOURSE, J.; STURTEVANT, J.

Supplemental Opinion.

PER CURIAM. The opinion and decision of this court in the above-entitled cause having been rendered on July 28, 1928, the final paragraph thereof reading as follows: "We have concluded that the judgment in this case should be reversed, and the case remanded for a new trial, unless the respondent shall, within 20 days from the date of the filing of this opinion, file in this court a *remittitur* of all damages in excess of $370, plus costs; if the said *remittitur* be filed, the judgment then to be modified in accordance therewith, and, as so modified, affirmed. It is so ordered,"—and it appearing that respondent filed herein on August 16, 1928, *remittitur* of damages in excess of $370, plus costs, the judgment is modified in accordance therewith, and, as so modified, is affirmed, respondent to recover his costs on this appeal.

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93 Cal. App. 526

HOLLINGSWORTH v. LEWIS et al.★
(Civ. 6308.)

District Court of Appeal, First District, Division 2, California. Aug. 17, 1928.

Rehearing Denied Sept. 15, 1928.

1. Appeal and error 🔑714(5)—Matters not on face of record, though appearing in briefs, cannot be considered on appeal.

Matters appearing in briefs, but not appearing on face of record, cannot be passed on by Court of Appeals.

2. Attorney and client 🔑144—Ambiguity in contract between attorney and client should be resolved against attorney and in favor of client.

In construing contract made between attorney and client, ambiguity should be resolved against attorney and in favor of client.

3. Contracts 🔑159—Word "refund" in contract to secure refunds on shipments means to repay (Civ. Code, § 1644).

Word "refund" in contract for services in securing refunds on shipments means to repay in its ordinary and popular meaning, which must be considered in interpreting meaning of words used in contract, under Civ. Code, § 1644.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Refund.]

4. Attorney and client 🔑148(3)—Attorney contracting to secure refunds on shipments compensated by one-half thereof could not participate in interest ordered paid to defendant which was not a refund.

Under contract whereby attorney undertook burden of securing refunds on shipments and was to be paid one-half of refunds secured as compensation for services, attorney was not authorized to receive 50 per cent. of all moneys collected, and was not entitled to share in money received as interest, which was never paid by defendant to railroad, and which could not be said to be repaid by railroad by virtue of order of Interstate Commerce Commission.

Appeal from Superior Court, City and County of San Francisco; Merle J. Rogers, Judge.

Action by E. W. Hollingsworth against M. G. Lewis and others, copartners doing business under the fictitious name of the Pacific Manure & Fertilizer Company. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

Fred L. Dreher and J. Ed. McClellan, both of San Francisco, for appellants.

A. W. Hollingsworth, of Santa Rosa, for respondent.

STURTEVANT, J. The plaintiff commenced an action to recover compensation for services as an attorney at law, rendered in behalf of the defendants before the Interstate Commerce Commission. The defendants appeared and answered. The plaintiff interposed a demurrer to the answer; it was sustained, and the defendants were given permission to amend within 10 days. They did not amend, and thereafter a judgment was entered in favor of the plaintiff for $5,963.40, with interest thereon from the date of the filing of the complaint, and for costs. From that judgment, the defendants have appealed, and have brought up the judgment roll.

In his complaint, the plaintiff set forth his cause of action in four separate counts. In the fourth count, he pleaded a written contract in hæc verba. That portion of the contract material to a determination of the questions presented to us is as follows:

> "It is further agreed by and between the parties hereto that, in the event that aforementioned reductions are secured, the said party of the second part shall turn over to the said party of the first part freight bills covering shipments made prior to the date on which such reductions became effective and on which freight charges shall have been paid by the said party of the second part, for the purpose of enabling the said party of the first part to secure refunds on such shipments to whatever basis shall be found

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★Rehearing denied.

just and reasonable by the Interstate Commerce Commission, and fifty per cent. (50%) of the refunds so secured shall accrue to the said party of the first part, and the remaining fifty per cent. (50%) shall accrue to the said party of the second part."

In their answer, by certain admissions, allegations, and denials, the defendants pleaded that of the moneys paid to them by order of the Interstate Commerce Commission $4,945.08 is principal—that is, moneys theretofore illegally collected from the defendants—and that the difference between the sum last stated and the amount claimed by the plaintiff represents a part of the moneys ordered paid to defendants as interest. In other words, it was the contention of the defendants in the lower court, and it is their sole point on appeal, that the plaintiff under the terms of his contract was not entitled to share in the moneys received by the defendants as interest on the principal sums illegally collected from the defendants by certain transportation companies. If this contention is a correct interpretation of the contract, the judgment as rendered should be modified.

[1, 2] In their briefs, counsel call to our attention some matters which we think do not appear on the face of the record; therefore we pass such matters by. They call our attention to certain passages contained in the contract which have not been quoted by us. We have examined the entire contract, and do not find any portion that throws any additional light on the particular paragraph which we have quoted. Turning to that particular paragraph, it will be noted that the plaintiff undertook the burden of securing "*refunds* on such shipments," and that the defendants undertook to pay the plaintiff "50 per cent. of the refunds so secured." In very short, we are asked to determine the length and breadth of the meaning of the word "refunds" as used in the contract executed by the parties. As to whether that word included both freight moneys and interest on freight moneys, or merely included freight moneys, is slightly ambiguous. As the contract was made between an attorney and his client, the ambiguity should be resolved against the attorney and in favor of the client. Boardman v. Christin, 65 Cal. App. 413, 224 P. 97.

[3, 4] If we turn to any of the dictionaries, we find that one of "the ordinary and popular" meanings of the word "refund" is to repay. See New Standard, Webster's New International, and Century. When interpreting the meaning of words used in a contract the court should give to the words used "their ordinary and popular" meaning. Civ. Code, § 1644. As the defendants never paid any interest to any railroad company, in no proper sense can it be said that any railroad company, by virtue of the order of the Interstate Commerce Commission, or otherwise, *repaid* (that is *refunded*) any interest money. By the terms of the contract executed by the parties, the plaintiff was never authorized to receive 50 per cent. of all moneys collected. We are therefore of the opinion that the interpretation placed on the contract by the defendants is the correct interpretation.

It follows that the judgment appealed from should be modified by striking out the words "five thousand nine hundred sixty-three and 40/100 ($5,963.40) dollars" and that there should be inserted in lieu thereof "four thousand nine hundred forty-five and 08/100 ($4,945.08) dollars," and, as so modified, that the judgment should be affirmed. It is so ordered. And it is further ordered that the defendants recover their costs on appeal.

We concur: BUCK, Presiding Justice pro tem.; NOURSE, J.

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93 Cal. App. 370

TODD v. MESERVE et al. (Civ. 6290.)

District Court of Appeal, First District, Division 1, California. July 31, 1928.

1. Mines and minerals 🔑109—Paragraph of contract dealing with contractor's obligations during first stage of drilling oil well cannot be considered in interpreting subsequent paragraph dealing with drilling thereafter (Civ. Code, § 1641).

Where one paragraph of contract for drilling of oil well dealt with obligation of contractor during the first stage of drilling only, such paragraph was not proper for consideration in determining meaning of a subsequent paragraph dealing with drilling thereafter and defining obligations of contractor during such stage, notwithstanding Civ. Code, § 1641, requiring that the whole of the contract be taken together so as to give effect to every part if reasonably practicable.

2. Evidence 🔑448—Extrinsic evidence is admissible to determine intention of parties to ambiguous written contract.

Where the language of a written contract is ambiguous, extrinsic evidence is admissible for the purpose of disclosing intention of parties.

3. Customs and usages 🔑13—Party to contract is presumed, in dealing with individual in particular profession or business, to have contracted according to usage thereof.

Party to a contract is presumed, in dealing with any individual in particular profession or business, to have dealt and contracted with such individual according to the usage of that business.

4. Customs and usages 🔑15(1)—Usage concerning business to which contract relates will be availed of to shed light on meaning so far as terms are ambiguous.

When a contract is made with a man concerning the business of his craft, it is presumed to have been framed on the basis of such usage, which will be availed of to shed light on the meaning of contract in so far as its terms are ambiguous.

5. Customs and usages 🔑18—Evidence that term "necessary supplies" had particular meaning according to usage of oil business held admissible under circumstances without pleading usage.

In action to recover on a written contract to drill an oil well requiring owners during certain stage of drilling to pay for necessary supplies among other items, evidence *held* to sustain finding that term "necessary supplies" had particular meaning according to usage of oil business, known to owners at time of entering into drilling contract, so as to authorize admission of evidence of usage, in spite of fact that such usage had not been pleaded.

6. Mines and minerals 🔑109—Evidence in action on oil well drilling contract held to sustain finding that owners were obligated for payment of foreman's salary.

Evidence in action to recover on oil well drilling contract *held* to sustain finding that salary of foreman was included as part of labor which owners agreed to pay during certain stage of drilling operations by virtue of agreement obligating owners to pay for all of labor and drilling crews.

7. Trial 🔑140(1)—Witness' credibility is for jury.

Credibility of witness is entirely a question for the jury or trial court.

8. Mines and minerals 🔑109—Negligence of oil well driller in landing oil string held for jury.

In action to recover on oil well drilling contract, evidence relative to driller's negligence in landing oil string *held* for jury under evidence.

9. Mines and minerals 🔑109—Evidence in action on oil well drilling contract held insufficient to establish that owners were wrongfully charged for labor while men were playing cards.

In action on oil well drilling contract, where owners during certain stage of proceedings agreed to pay for labor and necessary supplies, evidence *held* insufficient to establish wrongful charge for labor while men were playing cards.

10. Appeal and error 🔑1067—Refusal of immaterial instruction held not reversible error.

Refusal of instruction which, by reason of evidence supporting certain finding, has become immaterial, does not constitute reversible error.

11. Mines and minerals 🔑109—Damage for loss of oil by reason of delay in completion of well held too remote and speculative.

Damage to owners on account of loss of oil by reason of delay in completion of oil well *held* too remote and speculative to justify recovery thereof.

12. Appeal and error 🔑928(1)—Refusal of requested instruction, merely covering certain of defendants' contentions, held not error, in view of presumption that jury was fully advised.

It will be assumed in support of judgment that jury was fully advised of defendants' contentions in the argument to the jury, in the absence of showing of reversible error, hence refusal of requested instruction merely covering certain contentions is not error.

13. Trial 🔑234(3)—Refusal of instruction directing jury to disallow claim if disbelieving certain testimony held properly refused as tending to confuse or mislead jury.

Refusal of instruction directing jury to disallow claim in event they disbelieved plaintiff's testimony concerning certain conversation *held* properly refused, as tending to confuse or mislead jury by diverting their attention from a portion of the evidence.

14. Trial 🔑203(1)—Refusal of pertinent instruction is proper, if issue could be determined in only one way.

Even where requested instruction is pertinent to an issue, the refusal of the instruction is proper, if under the evidence the issue could be determined in only one way.

15. Trial 🔑260(1)—Cumulative instructions held properly refused.

Instructions which were merely cumulative *held* properly refused.

16. Mines and minerals 🔑109—Evidence held to sustain verdict granting recovery on oil well drilling contract.

Evidence in action on oil well drilling contract *held* sufficient to sustain verdict granting recovery thereon.

17. Appeal and error 🔑1078(1)—Objections not argued in brief or supported by authorities will not be considered.

Objections which were not argued in brief or as to which no authorities are cited will not be considered by appellate court.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by W. O. Todd against Edwin A. Meserve, Lawrence N. Wagner, and others, wherein Shirley E. Meserve and others, individually and as trustees of an express trust, filed a cross-complaint. Judgment for plaintiff, and defendants, with exception of Lawrence N. Wagner, appeal. Affirmed.

Meserve & Meserve and Timon E. Owens, all of Los Angeles, for appellants.

McComb & Hall, of Los Angeles, for respondent.

CAMPBELL, Justice pro tem. In this action plaintiff prays judgment against defendants in the sum of $20,302.28, and defendants Shirley E. Meserve, Robert B. Moran, and T. Howard Knight, individually and as trustees of an express trust, by way of cross-complaint, pray judgment against plaintiff in the sum of $100,000.

About July 27, 1923, plaintiff, W. O. Todd, and defendants Shirley E. Meserve, T. Howard Knight, and Robert B. Moran, as trustees of an express trust, entered into a written contract by the terms of which W. O. Todd agreed to drill an oil well by the rotary method to be known as "Meserve-Knight-Moran No. 1," upon property in the so-called Signal Hill oil field. This contract provided, among other things, that the trustees should furnish at the location of the well a complete derrick, boilers (to be set up and connected and steam line carried to the derrick floor), water, fuel, lights sufficient for the boilers and for drilling and for lighting of the derrick, and all casing; that Todd should furnish all the necessary and proper rotary machinery, drill pipe, tool joints, drilling engines, pumps, and other necessary rotary equipment and tools, and all labor necessary to drill the well to a depth of approximately 3500 feet. By the terms of this contract, Todd also agreed to drill the well and land casing in such size and dimensions as should be directed by the trustees and to set approximately 3,500 feet of 8¼-inch casing. By the terms of this contract, Todd was to be entitled to no compensation unless he landed this 8¼-inch casing at or approximately at the 3,500-foot level. The contract further provided that the trustees should pay Todd for the drilling of the well and the landing of this casing at or approximately at the 3,500-foot level $22,500, and that Todd should, in addition to this sum, upon landing of the water string at or approximately at the 3,500-foot level, be entitled to receive from the trustees an assignment of 12½ per cent. interest of the net proceeds of all oil or gas produced from the well over and above the cost of maintenance and deduction on account of taxes and royalties. The contract further provided that upon Todd's landing the water string at or approximately at the 3,500-foot level he should turn over and deliver the hole to the trustees with casing properly set and open to the full diameter for the full length.

For the completion of the well below the approximate depth of 3,500 feet, the contract provided that Todd "furnish all of his equipment, tools, and appliances to the trustees, until said well is completed, for the rental of twenty-five ($25.00) dollars per day, and shall perform the necessary labor for drilling said well, and said trustees agree to pay for all of contractor's (Todd's) labor and drilling crews, until such well is completed, at the rate of $——— per day, together with the necessary supplies and the cost of the proper and necessary insurance, compensation, or otherwise, after the drilling in of said well after the landing of the water string."

The contract further provided that the depths mentioned therein were approximate only, and that drilling was to be stopped or continued as directed by the trustees, and casing landed at points designated by the trustees as changes in formation might make advisable. By written indorsement at the end of the contract, defendants T. Howard Knight, Robert B. Moran, Lawrence N. Wagner, Shirley E. Meserve, L. J. Fleming Bremner, and Edwin A. Meserve guaranteed the performance of all of the terms and conditions thereof to be performed on the part of the trustees and the payment of all moneys that might become due to Todd in accordance with the terms of the contract.

The work of rigging up the well was started on July 15 or 16, 1923, and the well was spudded in and drilling operations commenced on July 31, 1923. On September 11, 1923, a depth of 3,456 feet had been reached, and the 8¼-inch water string was landed and cemented at that depth on September 13, 1923. This completed the first stage of the work under the contract. There is no contention that the landing of the water string at the depth of 3,456 feet instead of at the depth of 3,500 feet as provided in the contract was not a satisfactory performance by Todd of his obligations under the contract with respect to the landing of this string, or that Todd was upon the landing of the water string at that depth not entitled to the consideration which it was provided in the contract he should be entitled to receive upon the landing of the water string. The complaint alleges—and it is not denied in the answer—that Todd landed the water string at approximately 3,456 feet, "which was the depth then and there designated by the first parties to said drilling contract."

Upon the landing of the water string, the drilling of the well proceeded, and a 6¼-inch casing was landed at a depth of 4,165 feet. On February 17, 1924, the well had been drilled to a depth of 4,761 feet, and on that day an attempt was made to run a 4¾-inch oil string into the hole. This oil string stuck at a depth of 230 feet from the bottom of the hole. The following day, and while an effort was being made to work this oil string loose, the oil string parted, leaving approximately 194 feet of the oil string in the bottom of the hole. This necessitated the drilling of a new hole past the portion of the oil string lost in the bottom of the first hole. This work of side-tracking was immediately undertaken, and a new hole drilled to a depth of 4,705 feet. Into this hole another oil string was run and cemented, and about April 23, 1924, the well was placed on production at approximately 1,200 barrels per day. Todd was paid the consideration which by the terms of the contract it was agreed should be paid him upon the landing of the 8¼-inch water string, i. e., $22,500 in cash and an assignment of a 12½ per cent. interest in the net proceeds of oil or gas produced from the well. Concerning this there was no dispute.

For the drilling of the well below the depth of 3,456 feet, plaintiff claims the following amounts: (1) Amounts paid by him for labor and drilling crews, $31,644.11; (2) rental of his equipment, tools, and appliances at the contract rate of $25 per day for 223 days, $5,570; (3) amounts paid by him for necessary supplies, $447.92; (4) amounts paid by him for workmen's compensation insurance, $1,469.82—making a total of $39,131.85.

Appellants urge that respondent under the contract was required to furnish equipment; that the salary of J. P. Evans (foreman or "tool pusher") is not included in the contract as part of the labor appellants had agreed to pay; respondent was negligent in landing the oil string; appellants were wrongfully charged for labor while men were playing cards; refusal of instructions; the evidence is insufficient to sustain the verdict, and errors in admission of evidence.

The first two assignments may be considered together. Paragraph eighth, which has to do with the completion of the well below the 3,500-foot depth, is as follows:

> "That it shall be particularly understood between the parties hereto that for the completion of said well below the approximate depth of 3,500 feet, contractor shall furnish all of his equipment, tools, and appliances to trustees, until said well is completed, for the rental of twenty-five dollars ($25.00) per day, and shall perform the necessary labor for drilling said well, and said trustees agree to pay for all of contractor's labor and drilling crews, until such well is completed, at the rate of $—— per day, together with the necessary supplies and the cost of proper and necessary insurance, compensation, or otherwise, after the drilling in of said well after the landing of the water string."

It is the interpretation put upon this paragraph of the contract, together with such other parts as may shed light on the intention of the parties, that determines the main questions in controversy.

Appellants urge that Todd was under paragraph eighth of the drilling contract obligated to furnish for the drilling of the well below the depth of 3,456 feet all of the machinery, equipment, and tools which he was under paragraph fourth of the contract required at any time to furnish for the drilling of the well down to a depth of 3,456 feet, and cite section 1641 of the Civil Code and other authorities upon the proposition that the whole of a contract is to be taken together so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. No exception, of course, can be taken to this fundamental rule. An application of this rule does not in this case, however, obtain the result contended for by appellants.

The drilling contract relates to two distinct operations: First, to the drilling of the well to a depth of 3,500 feet (by mutual agreement fixed at 3,456 feet), and, second, to the drilling of the well below that depth. The consideration which Todd was to receive is separately apportioned to these two distinct operations. For the drilling of the well to a depth of 3,456 feet, the contract provided that Todd should receive $22,500 in cash and a 12½ per cent. interest in the net proceeds of all oil and gas produced from the well. The contract expressly provided that, should Todd fail to reach this depth and land the water string at this level, he should not receive any compensation whatever, and that, upon reaching such depth, he should turn over and deliver the hole to the trustees with casing properly set and open to the full diameter for the full length. For the drilling of the well below the depth of 3,456 feet, the contract provided for an entirely different scheme of compensation. Todd was to "furnish all of *his* equipment, tools, and appliances * * * for the rental of $25.00 per day," and perform the necessary labor for the drilling of the well, and the trustees were to pay for all of Todd's labor and drilling crews and for all necessary supplies and for the cost of proper and necessary insurance. It would seem to be beyond dispute that the parties to the drilling contract intended that the work to be done under the contract should include two distinct operations. Two distinct methods of compensation were provided for, and it follows that Todd's obligations, the performance of which entitled him to compensation, were also distinct.

The distinction between the two methods of compensation so clearly stated in the contract of itself indicates that the parties must have intended that Todd's obligations for the drilling of the well down to the depth of 3,456 feet would be different from his obligations for the drilling of the well below that depth. The first stage of the work was to be accomplished by Todd for a lump sum. He was to be entitled to the sum of $22,500 and to an assignment of a 12½ per cent. interest in the net proceeds of all oil and gas produced *only in the event* that he drilled the well to the depth stated and landed the 8¼-inch casing at that depth. There can be no dispute that Todd was obligated to provide his own means for accomplishing this portion of the work with the exception of those things which it was expressly provided the trustees should furnish; that is, the derrick, boilers, steam line connections, water, fuel, lights, and casing. Whatever tools, materials, equipment, and supplies were required for this portion of the drilling, Todd was himself, with the exceptions noted, bound to procure and pay for. With respect to the second stage of the drilling, however, the method of determining Todd's compensation itself indicates that the obligations of the parties to the contract were entirely different. It is clear that under the contract Todd was during this second stage of the work to be entitled to compensation at a given rate and upon a stated basis, irrespective of the depth drilled below 3,500 feet. Below that depth he did not in effect guarantee to reach any given level as a condition precedent to his right to compensation.

[1] It follows, therefore, that appellants' endeavor to interpret paragraph eighth of

the contract in the light of paragraph fourth of the contract is not proper, if the contract is to be taken as a whole and effect given to its every part. Paragraph fourth deals with Todd's obligations during the first stage of the drilling; paragraph eighth deals with Todd's obligations during the second stage of the drilling. Interpretation of the language used in the contract defining the obligations of the contractor during the first stage of the drilling can throw no light upon the meaning of the language used to define the obligations of the contractor during the second stage of the drilling.

It is not difficult to arrive at a fair and reasonable interpretation of the language of paragraph eighth declaring that the contractor shall "furnish all of his equipment, tools, and appliances" to the trustees. This paragraph of the contract became effective for the first time when the well had been drilled to a depth of 3,456 feet. The situation of the parties was then altogether different from the situation of the parties at the commencement of drilling operations. It must be assumed that the parties, when they entered into the contract, knew that when this depth was reached Todd would have at the location of the well or at his immediate command certain equipment, tools, and appliances, the greater part of which he had been using in the drilling operations to that point. The fair and reasonable meaning of this language is that it was only such equipment, tools, and appliances which Todd was to be obligated to furnish in the prosecution of future drilling operations. The use of the word "his" is significant in this connection. Had the construction contended for by appellants been contemplated, this clause would have read "all equipment, tools, and appliances necessary at any time thereafter for the drilling of said well," instead of the clause which was in fact used, viz. "all of *his* equipment, tools, and appliances."

It appears that frequently casings are lost and the drill pipe or drill stem breaks in the hole and special equipment is required to remove it; that certain accidents in well drilling happen which might reasonably be anticipated to require the use of special implements not ordinarily owned by the drilling contractor. The Baash Ross cutter is an example of this. It appears that this device cannot be purchased, but must be obtained upon a rental basis. It is used in cutting off and removing from the hole portions of a drill pipe broken off and lost in the hole. It appears from the testimony of plaintiff that between September 13, 1923, and November 28, 1923, he employed such a cutter at a rental of $3,420. During the same period he was entitled under his contract to receive for all his equipment, tools, and appliances but $1,900. It is not fair to assume under the wording of the contract that Todd, while renting his equipment, tools, and appliances, which he had at the well and which he used to complete the first part of his contract, assumed the obligation of furnishing for future drilling of the well any and all equipment, tools, and appliances as common mischance might require, no matter how costly.

That Todd drilled the well to the depth of 3,456 feet—a depth which is admitted by the pleadings to be the depth agreed upon by the trustees as the equivalent of the depth of the 3,500 feet mentioned in the contract—in a manner entirely satisfactory to the trustees, and that for this portion of the work the trustees voluntarily paid him the full compensation which they had agreed to pay for this stage of the work, is not disputed. Todd testified that at the depth of 3,456 feet he had at the well all necessary and proper rotary machinery, drill pipes, tool joints, drilling engines, pumps, and all other necessary rotary equipment and tools for the drilling of the well below that depth, and that at that depth he furnished to the trustees for future drilling operations his equipment, tools, and appliances which he had at the well at that depth.

[2-4] One of the important matters in dispute is the meaning of the phrase "necessary supplies," which in the contract the trustees agreed to pay for, as also for all the contractor's labor and drilling crews until such well was completed. Appellants object to certain bills which they claim respondent should pay, which are for rentals and equipment which was rented and used upon and in drilling the well and also repairs to tools; for tools and equipment bought by respondent for replacement or addition and for transportation. If these items are included in the phrase "necessary supplies," it is clear that under the contract the trustees were required to pay for them. Respondent contends that these items come under "necessary supplies" in well-drilling contracts. It is axiomatic that, where the language of a written contract is ambiguous, extrinsic evidence is admissible for the purpose of disclosing the intention of the parties, and that a party to a contract is presumed, in dealing with any individual in a particular profession or business, to have dealt and contracted with such individual according to a usage of that business. When a contract is made with a man concerning the business of his craft, it is presumed to have been framed on the basis of such usage which will be availed of to shed light upon the meaning of the contract in so far as its terms are ambiguous.

In Hind v. Oriental Products Co., Inc., 195 Cal. 655, 667, 235 P. 438, 443, the court says:

> "It is the general rule that when there is a known usage of the trade, persons carrying on that trade are deemed to have contracted in reference to the usage unless the contrary appears; that the usage forms a part of the contract, and that evidence of usage is always admissible to supply a deficiency or as a means of

interpretation where it does not alter or vary the terms of the contract. Brown v. Howard, 1 Cal. 423; Taylor v. Castle, 42 Cal. 367; Burns v. Sennett, 99 Cal. 371, 33 P. 916; Union Ins. Co. v. American Ins. Co., 107 Cal. 333, 40 P. 431, 28 L. R. A. 692, 48 Am. St. Rep. 140; 6 Cal. Jur. 315, and cases cited; Miller v. Germain, etc., Co., 193 Cal. 62, 222 P. 817 [32 A. L. R. 1215])."

There is positive evidence to the effect that the term "supplies" has a particular meaning in the oil business. R. E. Stearns, field manager of the Universal Consolidated Company, who testified that he had been in the oil business about 30 years, and had had experience in all branches of this business from roustabout and dresser of tools to superintendent and manager, testified that the term "supplies" meant anything used in connection with the drilling or maintenance of an oil well; that it included rent of tools; that it included replacements of parts which were used in the drilling of a well; that this term would include pipe, fittings, cordage—in fact anything that was used around a well. Ralph Winger, superintendent of drilling and producing for the Standard Oil Company in the northern Santa Fé fields, testified that he had been in the oil business all his life, and had drilled 90 wells in Santa Fé Springs and 140 wells on the Murphy lease, and further testified that anything that was taken out to a rig during drilling or operation was charged as "supplies"; that dump carts, oils, wrenches, gate valves, hose, water hose, mud hose, crown box, shoes, and all "such stuff" were supplies. Robert B. Moran, one of the defendant trustees, a petroleum engineer and geologist who looked after all the "engineering work" for defendant trustees, testified that the dressing down of tools and bits, the remodeling of a taper tap, the recutting of a tooth in a rotary shoe, the building up of a Hosmer blowout preventer, and the building up of gums would be "supplies" within the meaning of that term as used in the oil business. Plaintiff Todd testified that in the oil well business the word "supplies" had a particular meaning; that this term, as used in the oil business, meant materials that were used in the drilling of the well, such as replacements for broken parts; that it meant anything aside from the drilling equipment itself that was spent in drilling the well, the material aside from the original equipment.

[5] It can hardly be contended that defendant trustees were not at the time they entered into the drilling contract familiar with this meaning. The trustees were three in number: Shirley E. Meserve, T. Howard Knight, and Robert B. Moran. Mr. Meserve testified that he had been in the drilling business for a period; Mr. Knight was connected with the Rio Brave Oil Company, and Mr. Moran, as already noted, was an expert petroleum engineer and geologist. The jury was therefore justified in finding that the term "necessary supplies" had a particular meaning according to the usage of the oil business, and that this meaning was known to the defendant trustees at the time they entered into the drilling contract. In using this term in the drilling contract, the parties must be deemed to have used it in accordance with the meaning given it by this usage. Evidence of this usage was admissible despite the fact that such usage had not been pleaded. Becker v. Incorporated Town of Churdan, 175 Iowa, 159, 157 N. W. 221; Globe & Rutgers Fire Ins. Co. v. David Moffat Co. (C. C. A.) 154 F. 13, 22; McDonald v. Union Hay Co., 143 Minn. 40, 172 N. W. 891.

[6] We do not agree with appellants' contention that the salary of J. P. Evans is not included as a part of the labor which appellants had agreed to pay. Paragraph eighth of the drilling contract obligated appellant trustees to pay for all of respondent's "labor and drilling crews." Appellants have cited and discussed several authorities indicating that the word "labor" does not include services performed by a superintendent. From these cases appellants argue that the word "labor" must be construed to mean "manual labor," from which it follows that a salary paid to a superintendent is not a charge for "labor." McCreary v. Toronto Midway Oil Co., Ltd., 38 Cal. App. 17, 175 P. 87, is the only California case cited to support appellants' contention. That was an action brought to foreclose a mechanic's lien. In that case plaintiff, who claimed the lien, did not state that he had performed any services of any description upon or for the benefit of the property upon which he sought to foreclose the lien. The court points out that there is nothing in the claim of lien which indicates that the claimant performed any manual labor; that, so far as his lien is concerned, plaintiff's case "can be no stronger than is set forth in his claim of lien, and in that, as we have seen, there is no statement as to manual labor." The case was also decided upon the ground that the claim of lien had been prematurely filed, and therefore conferred no right to a lien.

In Kritzer v. Tracy Engineering Co., 16 Cal. App. 287, 116 P. 700, where plaintiff had acted as foreman or superintendent of construction work in connection with the erection and construction of a power plant upon a mill site, which case involved the same principle confronting us here, the court says:

> "It is finally contended that plaintiff could have no lien upon the property for work and labor performed in the construction of the plant so contracted to be erected upon the property by the Tracy Engineering Company, for the reason that said work and labor was done and performed as foreman. * * * This question was before the Supreme Court of Nevada (Capron v. Strout, 11 Nev. 310), and the court there said, Beatty, Judge, writing the opinion:

'It is argued that the intention of the law was to secure those only who performed labor upon the mine with their hands; that to give it a wider construction, one that will make it include the wages of a foreman like Stuart, will make it cover the case of a general superintendent and other officers of a corporation, and thereby impair the remedy of those who are the special objects of the legislative care. * * * According to the findings, he certainly did work in the mine, though not with his hands, and it is clear that the direct tendency of his work was to develop the property. We think the foreman of work in the mine is as fully secured by the law as the miners who work under his direction.' To the same effect is Cullins v. Mining Co., 2 Utah, 219, which is affirmed in same case (Mining Co. v. Cullins, 104 U. S. 176, 26 L. Ed. 704). These cases were decided under statutes almost identical with section 1183, Code of Civil Procedure [citing cases]."

In Hornlein v. Bohlig, 37 Cal. App. 646, 174 P. 697, the court affirmed a judgment allowing plaintiff, who was an engineering expert, a mechanic's lien.

[7] If the testimony of respondent is to be believed—and his credibility is entirely a question for the jury or the trial court—the defendant trustees reasonably anticipated at the outset that they would be charged for Evans' services. Respondent testified that prior to the execution of the contract he had a conversation in Dr. Knight's office, at which Dr. Knight, Mr. Shirley Meserve, Mr. Wagner, and possibly Mr. Bremner and Mr. Moran were present; that the cost of the well below the 3,500-foot mark was discussed; that Dr. Knight asked him, "What are you going to charge for the tool pusher?" and that he replied that he paid the tool pusher $500 a month, and that he (Todd) also stated, "If I am drilling more than one well there, I will prorate his time."

Commencing with the time the well was drilled below the depth of 3,456 feet, the evidence is clear that the trustees knew that Evans was performing sevices as "tool pusher" in connection with the drilling operations below that depth. They were constantly receiving carbon copies of orders upon supply houses and well reports signed by Evans. Furthermore, it appears that defendant trustees paid cash in full settlement of all statements rendered prior to November 21, 1923; that for a period of more than two months after the commencement of the second stage of the drilling they paid statements which included an itemized charge for the salary of Evans. It is apparent, therefore, that appellants placed the construction on the contract here indicated with reference to the meaning of the terms "labor" and "necessary supplies"—they have so shown by their acts under it. As was said in Retsloff v. Smith, 79 Cal. App. 452, 249 P. 889:

> "Lord Chancellor Sudgen once said: 'Tell me what you have done under a deed, and I will tell you what that deed means.' If the meaning of the language of an instrument can be considered doubtful, the court will call in the aid of the acts done under it as a clue to the intention of the parties [citing cases]. * * * To hold otherwise a construction would have to be placed upon the contract that would be extremely technical and literal and without reference to what the parties intended."

[8] There is no merit in appellants' assignment that respondent was negligent in landing the oil string. The testimony is that Todd discussed his plan with trustee Moran, who is a geologist and mining engineer and who looked after the work for defendant trustees, and Moran testified:

> "I told him (Todd) that that was satisfactory to me, if he thought that would accomplish the end. I told Mr. Todd both at the beginning of the conversation and at the end of it that his experience in matters of handling pipe was much greater than my own, and I preferred to defer to him in such matters. * * * The last thing he (Todd) said when I left—I believe the conversation took place down in the field—that the pipe would be run with a cased end, and the two joints of black pipe on the end of it, and I told him that that was all right with me, but, if he figured out a better way to do it before I would come out, that he would—would it be all right for him to do it."

Mr. McCutcheon, the vice president of Formax Oil Company, testified that he had "lowered several strings where we closed the bottom of the pipe in a torpedo shape," exactly in the manner shown by Defendants' Exhibit 2. Mr. Stearns, field manager of the Universal Consolidated Oil Company, testified that the use of a "sealed shoe" was not confined to instances where there was some obstruction in the hole; that "it is customary for me to use a pointed sealed shoe and every one of those I used is still in the well; I didn't use an open shoe in any of the wells I drilled in Los Angeles county—nor in Torrance nor Santa Fé Springs." Mr. Winger, superintendent of drilling and producing for the Standard Oil Company, stated that he used closed ends like that exhibited in Defendants' Exhibit 2. It is true that there were several witnesses who testified to the contrary and who stated that they had never seen a shoe with an end similar to that exhibited by Defendants' Exhibit 2. This, however, merely raised a conflict, which was for the jury under the instruction given by the court that, in drilling the well, plaintiff was bound to exercise that degree of skill which those of his trade or profession ordinarily possess.

[9] Appellants' complaint that they were wrongfully charged for labor while the men were playing cards may be answered by the testimony of the drillers engaged in drilling the well. Mr. Dellinger testified that he observed the men playing poker; that "every few days they would play," but that it was

customary for members of the crew to play cards or amuse themselves in some way during their shifts when not actually engaged in work; that during a shift when a well is being drilled there was not work for each and every member of the crew at all times during each shift; that at the times when he saw members of the crew playing cards there was no work which they could do; that when running a Hughes bit a driller could sometimes spare four of the crew for the entire eight-hour shift, but that it was necessary to have those men there during that shift, even though they were not actively engaged in some work connected with the drilling, in case some trouble should occur, "a twist-off or engine breakdown or something like that"; that, when running a Hughes rock bit the motion of the machinery was very, very slow, and that at such times one man could operate the machinery and bit; that when running with that bit, on a day shift, the other members of the crew could probably be doing something around the derrick, but that on the night shift it was not customary for them to do that; that during the time when there was daylight there was not always something for the men to do around the derrick when they were not actually required on the drilling of the hole. Mr. Hamilton testified that he did not remember that there was any poker playing on the derrick when he was in charge; that he did not himself play poker when he was on the job. The witness, however, testified that, while he was operating the rock bit his men were not at all times engaged in some work; that, if there was not anything to do on the rig they would read a magazine, or do anything they wanted to, as long as they were at the rig in case they were wanted. Mr. O. Pyron said that he believed that "once or twice" the men in his tour played poker while they were on the derrick; that he did not remember that this occurred more than that; that he thought he played once. This witness, however, testified that he himself never played cards when there was anything else he could do, and that none of his crew ever played cards when there was any work they could do; that it was customary for members of the crew, when not actually engaged in their work, to indulge in some pastime. Mr. M. Pyron, another driller, testified that the men did some few times play poker while he was in charge after the 3,500-foot level had been passed, but that this never occurred when there was any work they could do. While witnesses for defendants testified that on two or three occasions they saw members of the crews playing poker, they did not testify that at such times there was any work requiring their attention, nor to any fact from which it could reasonably be inferred that any loss resulted to defendants therefrom.

[10-15] Appellants urge error in refusing defendants' proposed instructions numbered 1, 3, 6, 7, 8, 9, 14, 18, 19, 20, and 21. By instruction 1 defendants requested the court to instruct the jury without qualification that the items of defendants' counterclaim, amounting to $11,771.56, were proper charges in favor of defendant trustees, and that they were entitled to recover on their counterclaim this exact amount. Included in this amount there were numerous items for which upon any interpretation of the contract defendant trustees were bound to pay. As to the refusal of instruction 3, it may be said that the jury found that plaintiff was not negligent in failing to land the 4¾-inch oil string. If this finding is supported by the evidence, then this instruction is immaterial, and its refusal is not reversible error. Further defendants sought in this instruction to have the court declare to the jury that under their cross-complaint defendants were claiming $14,753.04 on account of oil which would have been produced between February 19 and April 23, 1924, less the cost of production and maintenance. Defendants' contention is that, but for the negligence of plaintiff, the well would have been put upon production about February 19, 1924. There is some evidence concerning the production after the well was brought in on April 23, 1924, and from this the total net production during a certain period thereafter could be computed. The conclusion, however, from Mr. Moran's testimony that he thought the well would have produced more oil during the period in question, is of necessity mere speculation, and upon the evidence in the record there is no foundation for any claim to damages on account of loss of oil by reason of a delay in the completion of the well, much less a claim reduced to actual dollars and cents. This element of damage is too remote and speculative. Corbin Oil & Gas Co. v. Mull, 123 Ky. 763, 97 S. W. 385. Again, the requested instruction merely covered certain of defendants' contentions, and in support of the judgment it will be assumed that the jury was fully advised of defendants' contentions in the argument to the jury in the absence of a showing of reversible error. As to instruction 6, we may say that, as both parties conceded that the jury should pass upon the meaning of the term "labor" as used in drilling contracts and both having requested instructions leaving to the jury to determine whether the services of Evans would properly come within the meaning of the term "labor," the instruction as requested, which in effect took from the consideration of the jury all facts indicating how the parties themselves may have construed the term, was properly refused. The instruction directed the jury to disallow all claim on account of Evans' salary in the event that they disbelieved plaintiff's testimony concerning his conversation with the defendant trustees, and would tend to confuse or mislead the jury by diverting their attention from a portion of the evidence. Fox v. Harvester Works, 83 Cal. 333, 23 P. 295. Instructions 7, 8, and 9 relate to poker playing by members of plaintiff's drilling crews. In the absence of evidence showing that members of the drilling crews played poker when there was work for them to do at the well, there is no foundation for the instructions. The testimony is without contradiction that none of the members of the crews played cards when there was work around the well that could have been done. It is well settled that, even where a requested instruction is pertinent to an issue, the refusal of the instruction is proper, if under the evidence the issue could be determined in only one way. Sill v. Ceschi, 167 Cal. 698, 704, 140 P. 949; Estate of Budan, 156 Cal. 230, 234, 104 P. 442; De Soto v. Pacific Electric Ry. Co., 49 Cal. App. 285, 288, 193 P. 270; McCollum v Barr, 38 Cal. App. 411, 429, 176 P. 463. Instructions 14, 18, 19, 20, and 21 are directed to the issue relating to plaintiff's alleged negligence in failing to lower successfully the string into the well. These instructions are in any event merely cumulative, singling out particular means or instrumentalities employed by plaintiff in the drilling operations. The jury was instructed fully as to the degree of skill, care, and diligence required to be exercised by plaintiff in the instructions given, and therefore no error results from a refusal to give these instructions singling out details or means employed. The jury was instructed:

> "If you find from the preponderance of the evidence in the case that Mr. Todd, the plaintiff in this case, was negligent in any of the respects alleged in the cross-complaint on file herein against him, and that such negligence proximately resulted in the sticking of the 4¾-inch oil string, in the month of February, 1924, then and in such event you are instructed to find in defendants' favor, on their cross-complaint, for such damages as, from the evidence, you find they approximately sustained by reason of such negligence. Plaintiff at all times when on the well in question was bound to exercise that skill which those in his then trade or profession possessed, and was bound to do only those things which those thus trained and skilled would have then done under all the circumstances and conditions that then existed, and was then bound not to do all such things as those thus skilled in his trade or profession would not have done under the circumstances and conditions then existing."

[16] As to appellants' assignment that the evidence is insufficient to sustain the verdict, it may be said that we think there is no merit in the contention. The only question raised which has not been touched upon is the question of the premiums paid on compensation insurance. Appellants make the contention that the verdict is not sustained by the evidence in regard to these charges, that the record clearly shows that one premium was paid to cover all the employees of plaintiff, many of whom were working on other wells, and that the bookkeeper made an arbitrary division of the insurance premium.

It is true that these policies of insurance covered Todd's employees engaged in his entire business operations wherever such operations might have been conducted. However, it is provided in these policies that the premium shall be based upon the entire remuneration earned during the policy period by all employees engaged in Todd's business operations described in the policy and covered thereby. The rate stated in these policies for employees is the same in each policy, viz. $5.02 per $100 of remuneration. This rate was called to the attention of the court at the time these policies were introduced in evidence. It is conceded that the entire time consumed in drilling the well below the depth of 3,456 feet was 223 days. The drilling operations were continuous for a period of 24 hours per day, and were divided into three shifts or "tours" of 8 hours each, so that during each 24-hour period three separate crews were employed in the drilling operations. The testimony is clear and undisputed that during this entire period there were five members of a drilling crew employed on each shift or tour, viz. a driller, a derrick man, a cat-head man, a fireman, and a floor man, and that the driller received $15 a day, the derrick man $7.50 a day, the cat-head man $7.50 a day, the fireman $7 a day, and floor man $7 a day. The amount of these wages paid during this period is fixed by stipulation of counsel. The aggregate wage paid to a crew of five men for a single tour was therefore $44. Since there were three tours during each 24-hour day, the aggregate wage paid to the members of all crews employed during a given day was $132. Since the entire period involved was 223 days, the aggregate amount of wages paid to members of the drilling crews during the entire period was $29,436. The salary paid to J. P. Evans as foreman during this period of 223 days was $2,537.31. This makes a total of $31,973.31, and this amount exceeds the amount actually claimed by Todd on account of amounts paid by him for labor and drilling crews. The daily well reports or drilling reports covering this entire period of 223 days were offered and received in evidence as Plaintiff's Exhibit 10 without objection. The total amount paid by plaintiff during the period of 223 days is therefore determined, and, the policies of workmen's compensation insurance specifying as they do the rate of premium at $5.02 per $100 of remuneration, it was simply a matter for the jury to compute the portion of the premium covering the operations in connection with the well in question.

[17] Appellants, under their assignment "Errors in Admission of Evidence," enumer-

ate a great many instances in which it is claimed that the court erred in admitting evidence over their objections. They do not, however, argue their objections in their brief nor cite any authorities, and therefore these objections are not to be considered. People v. Hayes, 72 Cal. App. 292, 297, 237 P. 390.

This disposes of the points urged by appellants, and, as we find no error in the record calling for a reversal, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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93 Cal. App. 443

Ex parte PASSARELLO. (Cr. 1479.)

District Court of Appeal, First District, Division 2, California. Aug. 4, 1928.

1. Habeas corpus 🔑34—Judgment wherein trial judge erroneously reduced jury's verdict from first to second degree burglary, affirmed on appeal, held res judicata in subsequent habeas corpus proceeding.

Where trial judge, in entering judgment on verdict of guilty of burglary, first degree, entered an order reducing verdict to burglary, second degree, on ground of insufficiency of evidence to sustain conviction for first degree burglary, and, after judgment of affirmance had become final, Supreme Court in another case declared district court to be without power to reduce the verdict in such a case and that it should either enter judgment on the verdict as rendered by the jury or grant a new trial, *held* that judgment was nevertheless final, and was res judicata in defendant's subsequent habeas corpus proceeding.

2. Habeas corpus 🔑4—Erroneous reduction of verdict from first to second degree burglary held not reviewable in habeas corpus, which is not writ of error.

Trial judge's error in reducing verdict of burglary, first degree, to burglary, second degree, and entering judgment thereon, having been committed within his jurisdiction, was not reviewable in defendant's subsequent habeas corpus proceeding to secure his release from custody on the ground that judgment on which he was held was void, since habeas corpus is not a writ of error.

Application by Paskie Passarello for a writ of habeas corpus to be directed to the Warden of the State Prison at San Quentin, to secure the petitioner's release from custody on the ground that the judgment of conviction on which he is held is void. Writ dismissed, and petitioner remanded.

Ernest Spagnoli, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

NOURSE, J. [1] Petitioner was tried on an information framed in two counts—burglary and grand larceny. The jury rendered its verdict finding him guilty on both counts and fixing the degree of burglary under the first count as of the first degree. The trial judge, in entering judgment, sentenced the petitioner on both counts in accord with the verdict of the jury, but appended an order purporting to find that petitioner was guilty of burglary in the second degree. An appeal was taken from the judgment and affirmed in People v. Sugarman & Passarello, 80 Cal. App. 321, 251 P. 949. The board of prison directors thereupon fixed the term of petitioner's sentence as one year upon the grand larceny count and eight years on the burglary count. The petitioner sues out this writ seeking his release from the state penitentiary on the ground that the judgment under which he is confined is void because the act of burglary upon which he was convicted was in fact burglary of the second degree, that the verdict of the jury finding him guilty of first degree burglary was therefore not supported by the evidence, and that the trial judge was without jurisdiction to reduce the degree of the crime from that found by the jury.

All the points raised on this application were raised before the District Court of the Second District on the appeal from the judgment. It was there held, on the authority of the rule cited in 16 C. J. p. 1303, that, where the trial court is of the opinion that the evidence does not support the verdict rendered, but does support a conviction of a lesser offense necessarily included in the other, the court has power to impose sentence for the lesser offense on the theory that, by the verdict of guilty of the greater offense, the jury decided that the defendant was guilty of the lesser. Numerous authorities were cited in support of the rule, but it was pointed out in the opinion that no California case had covered the subject.

After the opinion on that appeal had been rendered, and after the judgment therein had become final, the Supreme Court in People v. Superior Court (Cal. Sup.) 259 P. 943, 945, held that the trial judge was without power to reduce a verdict of first degree murder, without recommendation, to one carrying a penalty of life imprisonment, but that, in such a case he should either enter judgment on the verdict as rendered by the jury or grant a new trial.

Though the latter case has established a rule in this state contrary to the rule approved by the district court, the judgment of the latter court on the appeal is nevertheless a final judgment, and the point raised is res adjudicata in so far as this petitioner is concerned. In re Booth, 44 Cal. App. 660, 186 P. 841.

[2] So far as it appears from the record be-

fore us, the evidence in the trial below was sufficient to support the verdict of first degree burglary. When, therefore, the trial judge reduced the verdict to second degree burglary, he merely committed error, but such error was committed within his jurisdiction, and is not reviewable on this proceeding, because habeas corpus is not a writ of error.

No injustice is done the prisoner in remanding him to serve the remainder of the term fixed by the prison directors, as that term is well within the maximum period fixed by law as punishment for the crime of burglary in the second degree at the time when petitioner's offense was committed.

The writ is dismissed, and the prisoner is remanded.

We concur: KOFORD, P. J.; STURTEVANT, J.

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93 Cal. App. 324

KLEBE v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 6029.)★

District Court of Appeal, Second District, Division 2, California. July 27, 1928.

Rehearing Denied Aug. 24, 1928.

1. Master and servant ⇨367—In compensation proceeding, one receiving allotment of ice route, who bought ice, making deliveries and collections independently, and sustaining injury held independent contractor as to iceman in another district.

One receiving allotment of part of ice route, buying his own ice, making collections, and assuming responsibility for customers in his district, without control on the part of the person furnishing the route, and who was injured while delivering ice and sought recovery under the Workmen's Compensation Act, was independent contractor and not employee as to third party delivering ice in different territory, who was associated in the purchase of the route with the person making the allotment.

2. Partnership ⇨20—Persons buying ice route, who divided route, handling deliveries independently without accounting for expenses or profits, held not partners.

Persons purchasing ice route, who agreed between themselves on division of territory, each purchasing his own ice, making deliveries independently without any mutual responsibility for expenses or profits, *held* not partners, in compensation proceedings by alleged employee of one, though they used names jointly on advertising cards.

Proceeding under the Workmen's Compensation Act by W. A. St. Clair against J. G. Knox and George Klebe. From an award in claimant's favor, employer last named brings certiorari. Award annulled.

Bailie, Turner & Lake, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco (W. F. Beem, of San Francisco, of counsel), for respondents.

CRAIG, J. Respondent St. Clair was injured while starting an automobile in his vocation of delivering ice at Huntington Park in Los Angeles county. He made application to the respondent commission for compensation as against J. G. Knox and George Klebe, and, after a hearing, was awarded certain sums of money in cash and in weekly payments until the termination of disability, besides a hospital charge and that of his physician. This is an application of Klebe for review of such award. There is no dispute as to the correctness of the amounts allowed, but the petitioner contends that the applicant was not his employee at the time of the accident.

From the testimony of Knox and Klebe, it appears that some three or four years previously to March 28, 1927, one Guthrie agreed in writing with the Central Ice & Cold Storage Company to purchase ice from it and to distribute ice with his own conveyances and at his own expense to all residents throughout the Huntington Park district. The text of the contract is not before us, but the only conditions imposed by the company and which are material to the instant proceeding apparently were that Guthrie should buy the company's commodity and satisfactorily supply all users within that territory. At some time thereafter Klebe became an employee of Guthrie, for whom he delivered ice over a portion of said territory, while Guthrie, with the assistance of a boy, did the delivering in the balance of the district. Knox testified that he later took the place of the boy, and delivered ice for Guthrie on commission. Subsequently Knox and Klebe purchased the route from Guthrie, and took over certain trucks which he had agreed to purchase, with the understanding that the ice company deduct or withhold from each a certain amount when settlements for ice were made. Knox and Klebe agreed between themselves that the latter should have all of the territory west of Seville street, and that Knox should supply all of the district east thereof. Each purchased his own ice, at about 17½ cents per block of 300 pounds, which, when cut in smaller portions and sold, netted him about 63 cents per block.

Knox and St. Clair both testified that, while the former was delivering ice at the home of the latter's daughter at some time prior to April 2, 1927, St. Clair asked for employment, whereupon Knox informed him that he did not need a solicitor, but that he had more territory than he could use; that St. Clair asked if he could rent a truck for a year or two, that he had previously been in the ice business, but did not have the means to buy a truck. Knox, it appears, purchased a sec-

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★Rehearing denied.

ondhand truck, allotted to St. Clair certain portions of his territory, and it was agreed that St. Clair should buy his own ice, make his own collections, and be responsible for the customers in such territory. It also appears that under Guthrie's contract with the ice company, which Knox and Klebe acquired, it was incumbent upon them or their successors to furnish the commodity to all residents of the entire district, but that, under their contract between themselves, neither one was to be responsible for the other's portion of the territory. Knox testified, and St. Clair in effect admitted, that Knox had no control over St. Clair's work, dealings with the ice company, or deliveries to and collections from his customers, and that, should the latter's business so increase that he could not supply his share of the territory, he would obtain help at his own expense, that he should defray all expenses of operation, and that he was his own boss. St. Clair testified: "I wanted a contract for a certain length of time so I wouldn't get discharged after I got a good business worked up."

[1, 2] All of the evidence before us tends strongly to show that, as to the petitioner in this proceeding, St. Clair was an independent contractor. Klebe did not know of any arrangement between St. Clair and Knox, nor did he know that any one else was delivering ice in a portion of Knox's territory until some days after the applicant had taken it over. The latter made claim in writing, by registered mail, to Knox personally, when injured. Knox & Klebe had been using the same cards for advertising, bearing the names, "Huntington Park Ice Distributors, Knox & Klebe," and on those furnished the applicant he had printed: "The truck is at the Rita St. Garage. 1st Garage North on the right hand side. St. Clair." It affirmatively appears without contradiction that St. Clair had no dealing whatever with, and was in no way answerable to, Klebe. Except for St. Clair's reply when asked why he included Klebe in this proceeding, that he saw both names on the cards, there is no evidence that he knew him.

The only possible ground upon which it might be argued that Klebe should be held for a pro rata share of this award would therefore of necessity depend upon the assumption that he was a copartner of Knox. Both of them denied that either was responsible for any portion of the expenses of the other, or entitled to any of his profits. It does not appear that both were charged by the ice company with the balance due on the trucks purchased by them from Guthrie, but they testified that it was their intention, when such amounts were finally paid, to account with each other as to those items. The sole remaining apparent indicia of a partnership relation consist of the cards and the joint names "Knox & Klebe." The only evidence with relation to these is that they could be printed cheaper in large quantities, and that for the sake of economy they were all purchased at the same time, bearing both names; that the name "Huntington Park Ice Distributors" was used by all distributors in that vicinity, at the instance and request of the ice company. Knox testified:

> "Klebe keeps what he makes, and I keep what I make." "Mr. Klebe didn't have anything to do with this truck; I bought it myself. He didn't know anything about it when I bought the truck. * * * I figured that was on my side of the territory." "I footed the bills on it and kept the rent."

From the foregoing it is obvious that the elements of a partnership, consisting of consent, carrying on a business together, and sharing profits between them, do not appear to have existed between Knox and Klebe herein. This being true, and from the entire absence of any relationship between Klebe and St. Clair personally, it follows that the petitioner is not liable to the applicant on account of his injury.

The award is annulled.

We concur: WORKS, P. J.; THOMPSON, J.

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93 Cal. App. 356

PEOPLE v. NIKOLICH. (Cr. 1676.)

District Court of Appeal, Second District, Division 2, California. July 28, 1928.

1. Criminal law ⚿511(3)—Accomplice's testimony need not be corroborated by direct evidence.

Testimony of accomplice need not be corroborated by direct evidence.

2. Criminal law ⚿511(2)—Corroboration of accomplice's testimony is sufficient, if defendant's connection with crime may fairly be inferred from entire conduct of defendant.

Entire conduct of defendant may be looked to for corroborating circumstances of testimony of accomplice, and if, from such circumstances, connection of accused with crime may fairly be inferred, corroboration is sufficient.

3. Criminal law ⚿511(4)—Evidence corroborating testimony of accomplice held sufficient to connect defendant with possessing still at house from which defendant fled on attempted arrest, and to sustain conviction.

In prosecution for possessing still, where police officers testified that while in house containing still they observed defendant and accomplice coming in front of house, that accomplice unlocked door, and that both defendant and accomplice fled on attempted arrest, and defendant, when subsequently arrested, refused to talk on being accused of being seen at house, evidence corroborating testimony of accomplice was sufficient to connect defendant with commission of offense and sustain conviction.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

L. Nikolich was convicted of possessing a still, and he appeals. Affirmed.

John R. Barta, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, and John D. Richer, Deputy Attys. Gen., for the People.

THOMPSON, J. The defendant and appellant, L. Nikolich, together with the defendant George T. Vidich, was convicted of possessing a still, used and intended to be used in the manufacture and production of intoxicating liquors for beverage purposes. Nikolich prosecutes this appeal from the judgment pronounced upon the verdict of the jury finding him guilty.

The sole ground relied upon by appellant for a reversal of the judgment is that the testimony, aside from that of his accomplice, Vidich, is insufficient. Unquestionably the testimony of Vidich is sufficient to fasten the offense upon appellant and to sustain the verdict, provided only that the corroborating evidence tends to connect the defendant with the commission of the offense. The record discloses that about the 21st day of January, 1928, Deputy Sheriffs Paine and Haworth and a police officer of Huntington Park went to a small frame house set in the rear of the lot and about 100 feet from the street at No. 232 Hollenbeck street in the city of Huntington Park. Upon gaining entrance, they found a 50-gallon still and two 500-gallon vats filled with prune mash and about 35 gallons of whisky. The still was completely connected up for operating, although not in fact running at the time it was found by the officers. The officers remained in the house for some time and put under arrest one Nick Rasich, who came there. Later in the day, and at about 7:30 p. m. the defendant Vidich, in company with the appellant, Nikolich, "came across from a lot over in front of this 232 Hollenbeck street. Upon arriving in front of the house they stopped. Then they went over towards the garage—a distance somewhere between 10 and 15 or 16 feet—from the house. They stood there for a minute or two, and then defendant Vidich came up on the porch and unlocked the door and came inside." At this point, Officer Paine endeavored to put them under arrest, stating that they were county officers, but the appellant Nikolich turned and ran and Vidich also. Vidich was caught within 60 to 80 feet after he started to run, and, after a scuffle with Haddon, the police officer, submitted to arrest. Nikolich was subsequently arrested in Los Angeles upon information as to his whereabouts, furnished by Vidich. At the Vernon police station, Nick Rasich stated in the presence of the appellant that he had seen the appellant at the still several times; the last time being about four nights before the arrest, to which statements the appellant merely responded, "I won't talk until I see my attorney."

[1-3] The law is well settled that the testimony of the accomplice need not be corroborated by direct evidence. The entire conduct of the defendant may be looked to for the corroborating circumstances, and, if from those circumstances the connection of the accused with the crime may fairly be inferred, the corroboration is sufficient. People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Martin, 102 Cal. 558, 36 P. 952; People v. Demera, 64 Cal. App. 121, 220 P. 673. Under this statement of the law, while the corroborating circumstances in this case may be considered meager, yet they must be held sufficient.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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93 Cal. App. 437

WILSHIRE OIL CO. v. STAR PETROLEUM CO. et al. (Civ. 6160.)

District Court of Appeal, First District, Division 2, California. Aug. 4, 1928.

1. Deeds ⟹166—Common grantor, bringing about condition inviting breach, held not entitled to forfeiture.

Where common grantor and owner of reversionary interest, pursuant to conveyance providing for reversion in case premises should be reserved for prospecting for oil or other hydrocarbon products, had by his own acts in consenting to making of oil leases and joining therein brought about conditions which would invite a breach of the covenant, he was not entitled to forfeiture for breach thereof by purchaser who originally entered on premises in good faith and erected residence thereon in conformity with restrictions contained in deed.

2. Appeal and error ⟹635(3)—Judgment must be affirmed, where appellant, basing appeal on ground findings were unsupported by evidence, failed to print findings or evidence (Code Civ. Proc. §§ 953a, 953c).

When an appeal was taken under Code Civ. Proc. § 953a, based on ground that certain findings were unsupported by evidence, and neither findings which were thus attacked nor any of the evidence was printed in appellant's briefs or in any supplement as required by section 953c, judgment must be affirmed because of failure to show error; all presumptions being in favor of regularity of judgment.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the Wilshire Oil Company against the Star Petroleum Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Haas & Dunnigan, of Los Angeles, for appellant.

Neil S. McCarthy, Earl L. Banta, and Herbert R. MacMillan, all of Los Angeles, for respondents.

NOURSE, J. Plaintiff sued to recover possession of land, claiming a forfeiture of a condition subsequent contained in the deed of conveyance. The cause was tried before the court sitting without a jury, and resulted in a judgment for the defendant, from which the plaintiff appeals upon a typewritten record.

The condition which it was claimed had been breached was attached by the common grantor of a large number of lots situated in what was known as the Athens tract in Los Angeles county. It was expressly declared to be a covenant running with the land, inuring to the benefit of all other lot owners in the tract, and included in the deeds of conveyance of these other lots. It provided for a reversion to the common grantor if the premises conveyed or any part of them should be used for the purpose of prospecting for oil or other hydrocarbon products. The premises in controversy were deeded by the common grantor to the defendant Shoemaker on June 17, 1913. Thereafter the common grantor leased other portions of the tract for oil development purposes and solicited other lot owners in the tract to join in said leases. Other lot owners of the tract entered into oil leases, and their properties were also being exploited for the production of oil. After this had been done and after oil operations were commenced on various portions of the tract, the common grantor conveyed to the plaintiff herein by quitclaim deed its reversionary interest to lot 4 of block 53 of the tract, one of the lots owned by the defendant Shoemaker. Prior to the commencement of the action, the plaintiff had acquired lot 3 immediately adjoining lot 4 (the lot here in controversy) and lot 6 of the same block, and had commenced operations for the drilling of oil upon both lots either through its own efforts or through leases granted by it.

On this appeal the appellant concedes the foregoing facts and stipulates that the character of land in the tract involved by reason of actual oil development has changed from that of residential land to that of oil-producing land; that the object of plaintiff in purchasing the reversionary interest in the lands in question was to develop the same for oil; that the plaintiff itself procured oil development to be prosecuted upon lands adjoining the lands in question; and that the common grantor had made a practice of selling, for substantial valuable considerations, surrenders of its estate in reversion based upon this condition subsequent in order that the land might be used for oil development purposes. Among other defenses raised by the defendants was that the common grantor by its own act in granting oil leases upon other lots in the tract had waived the right to enforce the condition subsequent and that because of these acts and the acts of other lot owners the character of land in the tract had so changed that it was no longer equitable to enforce the condition which had been inserted in the deeds for the purpose of reserving the land for residential purposes.

[1] The trial court found that all the lot owners in blocks 26 to 50, inclusive, of said Athens tract, and all the lot owners in tract 819, which includes block 53 and the premises involved herein, have consented to the making of oil leases, and have joined in oil leases, and that by reason thereof derricks and other equipment for the drilling and producing of oil have been erected on many of said lots with the consent and approval of the common grantor and the plaintiff herein. It was also found that the defendant Shoemaker had entered upon the premises in good faith and erected a residence thereon in conformity with the restrictions contained in his deed, but that, without his consent, the common grantor, together with other lot owners in the tract, had changed the character of the tract so that it was no longer desirable as a residential section, but it had become a section devoted mainly for the uses and purposes of developing oil.

Neither of these findings is attacked by the plaintiff, and the case comes squarely within the rule of the majority opinion in Downs v. Kroeger, 200 Cal. 743, 748, 254 P. 1101, 1103, and Miles v. Clark, 44 Cal. App. 539, 549, 187 P. 167, 171, where it was said that—

> "Where there has been a change in the uses to which property in the neighborhood is being put, so that such property is no longer residence property, it would be oppressive and inequitable to give effect to restrictions where the changed condition of the locality has resulted from other causes than their breach."

Here the changed conditions have resulted from the breach of the restrictions, not by the party seeking to be relieved from the restrictions, but by the common grantor and the other lot owners who, by their breach of the restrictions, rendered the respondents' property no longer suitable for residential purposes. It would be equally "oppressive and inequitable" to enforce a restriction against one lot owner when the common grantor, who is the owner of the reversionary interest, has by his own acts brought about the conditions which would invite a breach of the covenant. Brown v. Wrigtman, 5 Cal. App. 391, 394, 90 P. 467; Los Angeles, etc., Land Co. v. Marr, 187 Cal. 126, 133, 200 P. 1051. There is no equity in appellant's case. Its counsel frankly confesses that he is a "highwayman without a mask"; that the appellant is seeking to enforce the forfeiture for the sole purpose of enabling it to prosecute drilling operations on the premises which it seeks to forfeit.

[2] But, aside from any of these questions, the judgment must be affirmed because the

appellant has failed to show error. The appeal is taken under section 953a, Code of Civil Procedure, and is based upon the grounds that findings Nos. 2, 3, 5, 6, and 10 are unsupported by the evidence. Neither the findings which are thus attacked nor any of the evidence is printed in either of appellant's briefs nor in any supplement as required by section 953c, Code of Civil Procedure. As said in Estate of Berry, 195 Cal. 354, 359, 233 P. 330, when an appeal is taken under this method, and based upon the insufficiency of the evidence to support a finding under attack, it is necessary, not only to print the evidence, but also the finding. As indicating the character of appeal presented, we find in appellant's opening brief the statement that "nearly all the findings have for their support only testimony which was both irrelevant and immaterial on the issues before the court. As a result, the judgment is erroneous and should be reversed." But the plaintiff has not printed the pleadings, findings, nor evidence to support his general attack upon "nearly all the findings," and as all the presumptions are in favor of the regularity of the judgment, it is not incumbent upon this court to search the typewritten record to discover error. Scott v. Hollywood Park Co., 176 Cal. 680, 681, 169 P. 379; Jeffords v. Young, 197 Cal. 224, 229, 239 P. 1054; Dahlberg v. Dahlberg (Cal. Sup.) 260 P. 290.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

93 Cal. App. 216

PEOPLE v. WESTCOTT. (Cr. 1665.)★

District Court of Appeal, Second District, Division 2, California. July 19, 1928.

Hearing Denied by Supreme Court Sept. 17, 1928.

1. Criminal law ⇨935(1)—Granting defendant new trial after conviction of murder held proper under evidence.

Granting defendant's motion for new trial after verdict convicting him of murder *held* proper under the evidence.

2. Criminal law ⇨1156(2)—Appellate court cannot say that granting defendant new trial for insufficiency of evidence to sustain conviction constitutes abuse of discretion.

When the trial judge in a criminal case, sitting as a thirteenth juror, is not convinced to a moral certainty and beyond a reasonable doubt that the evidence is sufficient in character and weight to justify a conviction, it is not for the reviewing court to say as a matter of law that the granting of a new trial constitutes abuse of discretion.

Appeal from Superior Court, Los Angeles County; Ruben Schmidt, Judge.

Carl Westcott was convicted of murder, his motion for a new trial was granted, and the People appeal. Affirmed.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and Asa Keyes, Dist. Atty., and Wm. O. Russell, Deputy Dist. Atty., both of Los Angeles, for the People.

Paul W. Schenck, and Marcus L. Roberts, both of Los Angeles, for respondent.

CRAIG, J. The respondent was accused by the grand jury of Los Angeles county with the crime of murder, was convicted by a jury, and the judgment was reversed. 260 P. 901. Upon a second trial he was again convicted, the jury recommending imprisonment for life, whereupon he moved for a new trial, which was granted, and the people now appeal from the order granting such motion.

[1] To state most favorably to the people the evidence upon which they rely for a reversal, Charles G. Westcott, the defendant's father, was shot as he opened the door of his residence in response to the bell at 909 South Cochran street, and died shortly afterward. At the time of the shooting, the decedent's widow saw a shadow and heard a footstep on the front porch. A Mrs. Heffelfinger, while walking westerly on Ninth street, toward the Westcott residence, heard two shots in the direction of their house, and, instantly looking up, saw the form of a person emerge from some brush on a vacant lot at the corner of Cochran and Ninth streets, where she also heard footsteps as of some one running. This witness testified that she saw two men near by, with whom she talked, but that she did not go to the house where she heard the shots. The men, Eldridge and Smith, swore that they heard shots, and that, after meeting Mrs. Heffelfinger, they ran to the Westcott residence, looked in the window, and seeing the body of a man lying upon the floor, proceeded to the front door, whereupon they learned the victim's identity, rendered first aid, and summoned an ambulance. It appears that the crime was committed at about 8 o'clock p. m. The motorman and conductor of an east-bound street car testified that at about 8:40 of that evening, as they were leaving Third and Sycamore streets, about 8 blocks westerly and northerly from the Westcott house, a bareheaded man ran up Sycamore street from the south and boarded their car; that he appeared to be nervous, and continued to look backward through the rear windows of the car until it passed Ninth and Cochran streets, when he walked to the front of the car and sat down; that he was talking to himself, appearing "distracted"; and that he frequently threw his hair back from his forehead. Two porters at a barber shop on West Sixth street, in the center of town, testified that at about 9 o'clock p. m. a man resembling the defendant called at

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★Hearing denied by Supreme Court.

their stand and had his shoes shined; that he wore a pair of trousers like those introduced in evidence, in the left knee of which there was a tear similar to one appearing in the exhibit. A hostess at Wilson's Dance Studio at 616½ South Hill street testified that the defendant called at the studio after 9 p. m. and danced for about 15 or 20 minutes, that she noticed the tear in his trousers, and that he frequently threw his hair back with his hands. Police officers swore that the defendant was taken in custody at about midnight of the same date, and the left knee of his trousers was torn, and that they removed mustard pods, seeds, and leaves from the cuffs. From the testimony of other witnesses it appears that in the spring of 1926, a plank was braced from the ground to the top of a hedge at the corner of the Westcott house, and that, on the date of the shooting, October 20, 1926, it had not been disturbed, that the hedge was then apparently in its usual condition, and that salt grass and mustard were growing in the vacant lot between the house and the corner of Ninth and Cochran streets. On the morning of October 21st, the top of the hedge was mashed down, the plank lay flat on the ground, and there appeared in the soft soil the imprint of a person's knee; splinters on the plank contained fibers of dark gray cloth of a texture similar to that of the defendant's suit. Three experts, after careful examination of the threads, seeds, and leaves found upon Westcott's clothing, were of the opinion that they were identical with those discovered on the lot adjoining the scene of the homicide. The prosecution introduced in evidence a copy of the will of Charles G. Westcott, which devised and bequeathed about $93,000 worth of property to his children, and it was stipulated that respondent had since received $93,397.65 from his father's estate.

Aside from the resemblance of the cloth in respondent's trousers to the fragments found upon the plank, which, according to the theory of the prosecution, had been knocked down by some one in climbing over the hedge in flight, and the fact that seeds and leaves in the cuff of his trousers might have been accumulated by running through the vegetation on the adjoining lot, there is practically no evidence tending to connect him with the offense. Mrs. Heffelfinger was unable to say whether or not it was moonlight on October 20, 1926, or that there was a street light at the corner in question; she was unable to say whether the figure which ran from the house was that of a man or a woman. Eldridge and Smith both looked in the direction from which the report of the shots came, but neither of them saw any person or heard any footsteps. The motorman and conductor, although positive that the man said by them to resemble the respondent was bareheaded, could not swear that he had no hat with him; both testified that they would not attempt even to swear that Westcott was the man who boarded their car, they thought there was a resemblance, but, as testified by the conductor, that was all he "would venture to say." Respondent's wife testified that there was salt grass and mustard growing "all over the lot" at their home in Venice, and that her husband walked around in the lot with their baby every day. The bootblacks swore that there was no dirt upon his shoes when they were shined about an hour after the occurrence in controversy, but that there was an "average amount of dust"; neither of these two witnesses thought that he was bareheaded, and one of them stated that he was sure the defendant had a hat.

The defendant did not take the stand, nor did any witness who knew him testify as to his whereabouts prior to 9 o'clock on the evening of October 20, 1926, an hour after the commission of the offense. The mere fact that within that time he could have fired the shots, run through the vacant lot, boarded a street car 8 blocks away, and arrived at the center of town, is but a series of conjectures. As stated in People v. Smith, 55 Cal. App. 324, 203 P. 816:

> "But the fact that an accused person had an opportunity to commit the crime with which he is charged is of itself only a circumstance, from which, with other circumstances, guilt may be conjectured or inferred; and it is the established rule that an incriminating circumstance from which guilt may be inferred must not rest on conjecture. It is not permissible to pile conjecture upon conjecture. We cannot build one inference upon another. * * * It would, said Chief Justice Denio in People v. Kennedy, [32 N. Y. 141], supra, be 'like the blind leading the blind.' The rule, as stated by the New York court in the Kennedy Case, is that circumstantial evidence 'consists in reasoning from facts which are known or proved, to establish such as are conjectured to exist; but the process is fatally vicious if the circumstance from which we seek to deduce the conclusion depends itself upon conjecture.'"

[2] We think the trial court was wholly warranted in granting the motion for new trial in the instant case. In any event, when the trial judge in a criminal case, sitting as he does as a thirteenth juror, is not convinced to a moral certainty and beyond a reasonable doubt that the evidence is sufficient in character and weight to justify a conviction, it is not for a reviewing court to say as a matter of law that the granting of a new trial constituted an abuse of discretion. Having observed the witnesses and the jurors, and having had an opportunity for testing the truth of the witnesses' statements, he may have doubted the adequacy of the identification of the defendant, or the weight apparently accorded the circumstantial evidence by the jury. The rule is established beyond cavil that in cases such as the one before us there is no basis for questioning the discretion of the superior court or substi-

tuting that of the appellate court therefor. People v. Taylor, 80 Cal. App. 658, 252 P. 729; People v. Canfield, 173 Cal. 309, 159 P. 1046.

The order granting a new trial is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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93 Cal. App. 334

PEOPLE v. FLORIS. (Cr. 1451.)

District Court of Appeal, First District, Division 1, California. July 28, 1928.

1. Criminal law ⚷1159(2)—Reviewing court cannot set aside verdict, unless clearly unsupported by any sufficient substantial evidence on any hypothesis.

A reviewing court cannot set aside a verdict, unless it clearly appears that there is no sufficient substantial evidence in the record to support it on any hypothesis whatever.

2. Homicide ⚷250—Evidence held to sustain conviction of manslaughter.

Evidence in trial for murder *held* sufficient to sustain conviction of manslaughter.

3. Criminal law ⚷1159(4)—Whether inconsistencies and contradictions show witnesses unworthy of belief is for jury, not appellate court.

Whether inconsistencies and contradictions in testimony show that witnesses are not worthy of belief is for the jury, not the appellate court, to determine.

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Lebrado Floris was convicted of manslaughter, and he appeals. Affirmed.

Thos. D. Johnston and H. M. Bishop, both of Martinez, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

KNIGHT, J. Appellant was charged with murder, and upon trial was convicted of the crime of manslaughter. He now seeks a reversal of the judgment of conviction upon the sole ground that the evidence is not sufficient to sustain the verdict.

About 8 o'clock on the evening of October 23, 1927, the deceased, Antonio Mariscal, was stabbed in the neck and died instantly. The homicide occurred on a public street in North Richmond, Contra Costa county, during a quarrel which appellant had provoked with three men named Marcus, Nougiera, and Alameda. At the trial appellant denied the killing, but his guilt was established mainly by the testimony of the three men mentioned, and on this appeal he concedes that the evidence is conflicting, and also that if the testimony of the three witnesses mentioned be true it is legally sufficient to support the conviction, but claims that Mariscal was doubtless stabbed by either Marcus, Nougiera, or Alameda, and that in order to fasten the crime falsely upon him they committed perjury in giving their testimony.

[1] The law is well settled that a reviewing court has not the power to set aside a verdict unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence in the record to support the verdict. As said in People v. Tom Woo, 181 Cal. 315, 184 P. 389:

> "In passing upon this question we will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. For it is the function of the jury in the first instance, and of the trial court after verdict, to determine what facts are established by the evidence, and before the verdict of the jury, which has been approved by the trial court, can be set aside on appeal upon the ground we are discussing, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. * * * We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict."

In the case of People v. Fitzgerald, 138 Cal. 39, 70 P. 1014, the rule is summarized as follows:

> "By the Constitution, appellate jurisdiction is conferred upon this court in 'criminal cases prosecuted by indictment or information in a court of record on questions of law alone.' Where there is evidence, therefore, to sustain the verdict, a question of law cannot arise, but only in a case where there is in effect an entire lack of evidence."

To the same effect is People v. Willard, 150 Cal. 543, 89 P. 124.

[2] Briefly stated, the circumstances attending the killing, as proved by the testimony adduced by the prosecution, most of which was, as stated, given by the three witnesses above mentioned, were as follows: Marcus, Nougiera, and Alameda, all of whom are of Portuguese nationality, came out of a poolroom, starting to go home. Appellant, who was under the influence of liquor, had been visiting at the house of a friend across the street from the poolroom, and the deceased, Mariscal, who was a friend of appellant, had been sent by the latter's wife to bring him home. As appellant and Mariscal, both of whom are Mexicans, came out of the house, appellant, manifesting a hatred toward the three men evidently on account of their nationality, started to curse and revile them. Marcus made some reply and ap-

pellant immediately leaped toward him. Mariscal tried to restrain him. Meanwhile Marcus reached to take a picket from a fence close by, and in doing so fell down. As he fell he saw that appellant had a knife in his hand, and he shouted: "Look out, boys; he's got a knife." Thereupon Alameda joined Mariscal in trying to hold appellant, who was still cursing and trying to free himself, and during the struggle appellant cut Alameda about the head with the knife. Mariscal, still holding appellant, told him to let the men alone, that they had done no harm, and with an oath appellant replied: "Let me go, or I'll kill you," or words to that effect, and immediately appellant stabbed Mariscal in the neck and he fell to the street dead.

[3] Obviously the foregoing evidence sustains the verdict. Appellant endeavors to point out certain inconsistencies and contradictions in the testimony of the three witnesses named, particularly as to events occurring immediately following the homicide, and he argues therefrom that said witnesses are not worthy of belief; but, as shown by the authorities hereinabove quoted, these were matters to be addressed to and determined by the jury, and, it having accepted their testimony as being true, we are not at liberty to interfere with its conclusion on appeal.

The judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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93 Cal. App. 445

TAYLOR et ux. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY. (Civ. 6110.)

District Court of Appeal, Second District, Division 2, California. Aug. 4, 1928.

Appearance ⚷9(2)—Motion to dismiss filed in defendant's original supersedeas proceeding in appellate court on ground court lacked jurisdiction of subject-matter constituted "general appearance."

Successful plaintiffs in municipal court by filing motion to dismiss order to show cause in defendant's original supersedeas proceeding in appellate court on ground that court did not have jurisdiction over the parties nor of the subject-matter thereby made a "general appearance" and became subject to jurisdiction of appellate court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Appearance.]

Original application by Mertice E. Taylor and wife for supersedeas, to be directed to the Superior Court of the State of California in and for the County of Los Angeles, to stay hearing of an appeal from the municipal court. On motion of George Alexander and another to dismiss the application. Motion denied.

George I. Devor, of Los Angeles, for petitioners.

Everett W. Mattoon, County Counsel, and Gordon Boller, Deputy County Counsel, both of Los Angeles, for respondent Superior Court.

Joseph M. Bernstein, of Los Angeles, for respondents Alexander and Nathan.

THOMPSON, J. This is an original petition seeking a writ of supersedeas, directed to respondent, staying the hearing of an appeal from the municipal court of Los Angeles to the superior court, entitled Alexander et al. v. Taylor et al. The unusual situation presented is as follows: Alexander and Nathan, copartners, recovered judgment in the municipal court against Taylor and his wife, defendants in that action and the petitioners here. The defendants appealed to the superior court, furnishing the regular undertaking on appeal. A motion was made to dismiss the appeal and denied on February 6, 1928. A second motion to dismiss was presented and denied on February 15, 1928. On the 10th of March, 1928, the judge of the municipal court who tried the action refused to settle the bill of exceptions on the ground that it had not been filed within the time required by law, and on the 23d of March the defendants and petitioners here commenced a proceeding in mandamus to compel the municipal court judge to settle the bill. An alternative writ issued, but on April 9th the peremptory writ was denied, and petitioners are prosecuting an appeal from that judgment, which appeal is now pending. The petition here alleges that the hearing of the appeal from the first judgment in the superior court was continued by that court from May 29th until June 1, 1928, in order that petitioners might present their application for the writ of supersedeas. It is also alleged that George Alexander and Mort Nathan are parties affected by the petition. The order made staying the proceedings required that copies be served not only upon the respondent court but also upon Alexander and Nathan. By way of return the respondent court sets forth that the appeal from the judgment denying the writ of mandate involves the interpretation of section 953d of the Code of Civil Procedure (as added by St. 1927, p. 86), and is, in the opinion of the judge signing the return, prosecuted in good faith. George Alexander and Mort Nathan have appeared by what they term a special appearance, making a motion to dismiss the order to show cause on the ground "that the court had no jurisdiction to issue the writ directed to the respondents or over the parties named therein." At the time of the oral argument Alexander and Nathan asked leave to file their demurrer and answer after the motion was disposed of in the event it should be denied, and an order was made that the motion to dismiss, in so far as it applied to jurisdiction over the parties, would first be determined and if denied they would be given time to file a demurrer or answer or both.

We are therefore called upon to determine, first, whether the appearance which has been made by Alexander and Nathan is a special appearance in fact or whether it is general, and they have therefore submitted to the jurisdiction of the court. We have emphasized by quoting the exact language of their ground for dismissal because it therein appears, as it does from their argument, that they not only claim that this court has no jurisdiction over the parties, but also has no jurisdiction over the subject-matter, i. e., "no jurisdiction to issue the writ." Under these circumstances we are constrained by a long line of authorities to hold that they have made a general appearance and have submitted to the jurisdiction of the court. In the case of Roberts v. Superior Court, 30 Cal. App. 714, 159 P. 465, where a similar motion was made, the court says:

> "* * * A motion to dismiss on the ground of want of jurisdiction of the subject matter of the action necessarily calls for relief which may be demanded only by a party to the record. It has been uniformly so held, as logically it could not otherwise be held, and, furthermore, that where a party appears and asks for such relief, although expressly characterizing his appearance as special and for the special purpose of objecting to the jurisdiction of the court over his person, he as effectually submits himself to the jurisdiction of the court as though he had legally been served with process. In re Clark, 125 Cal. 388, 58 P. 22; Security Loan & Trust Co., etc., v. Boston & South R. F. Co., 126 Cal. 418, 58 P. 941, 59 P. 296; [Maclay] MacClay Co. v. Meads, 14 Cal. App. 363, 112 P. 195, 113 P. 364; Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317."

And in Security Loan & Trust Co. v. Boston & South R. F. Co., supra, this apt sentence is found:

> "If a party defendant wishes to insist upon the objection that he is not in court for want of jurisdiction over his person, he must specially appear for that purpose only, and must keep out for all purposes except to make that objection."

See, also, Olcese v. Justice Court, 156 Cal. 82, 103 P. 317; Remsberg v. Hackney Mfg. Co., 174 Cal. 799, 164 P. 792.

In this case it must be held that Alexander and Nathan responded to the orders served upon them by a general appearance.

Motion denied; respondents Alexander and Nathan given five days from date within which to file their demurrer or answer.

I concur: CRAIG, Acting P. J.

OGBURN v. TRAVELERS' INS. CO.★

(Civ. 6299.)

District Court of Appeal, First District, Division 2, California. Aug. 3, 1928.

Hearing Granted by Supreme Court Oct. 1, 1928.

1. Insurance 🔑146(3)—There must be uncertainty or ambiguity in policy to resolve doubts against insurer.

There must be some uncertainty or ambiguity in insurance policy before the rule that doubts should be resolved against the insurer can be applied.

2. Insurance 🔑146(3)—Policy must be considered as whole in determining existence of ambiguity or uncertainty requiring resolution of doubts arising from conflict between caption and provisions against insurer.

Caption is not part of provisions of insurance policy, but, even if it were, policy must be considered as a whole and read together in determining existence of ambiguity or uncertainty requiring resolution of doubts arising from conflicts between them against insurer.

3. Carriers 🔑4—"Common carrier" is public utility, required to extend services to all requesting it and obeying lawful rules and regulations.

A "common carrier" is a public utility or servant, required to extend its services to all who request it and place themselves within lawful rules and regulations governing its use and operation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Common Carrier.]

4. Insurance 🔑452—Hotel elevator held not "conveyance provided by a common carrier" within accident policy.

A hotel elevator *held* not a "conveyance provided by a common carrier" within the terms of an accident insurance policy.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Carl Ogburn, as administrator of the estate of Byron C. Ogburn, deceased, against the Travelers' Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

Joseph T. O'Connor, of San Francisco, for appellant.

Burbank & Spence, Daniel W. Burbank, and Homer R. Spence, all of San Francisco, for respondent.

WARNE, Presiding Justice pro tem. This is an appeal by defendant from a judgment in favor of plaintiff as administrator of the estate of Byron C. Ogburn, deceased, in a suit to recover upon an accident insurance policy. The deceased purchased a travel accident ticket policy from the defendant insurance company at San Antonio, Texas. The de-

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★Superseded by opinion of Supreme Court, 276 P. 1004.

ceased was killed in an elevator accident which occurred in the Hotel Flower in San Francisco. The Hotel Flower is a public hotel, having transient and permanent guests and furnishing hotel service. The entrance door to the hotel was kept open to the public. The hotel maintained an elevator service which was generally used by guests, visitors, employees, tradesmen, and waiters.

On the day of the accident the deceased, in company with a Mrs. Proctor, rang to summon the elevator to the ground floor for the purpose of being conveyed to the fifth floor of the hotel. In response the elevator was brought to the ground floor by Mrs. Willott, the operator. Mrs. Proctor was standing at the right side of the elevator door as she faced it, Mr. Ogburn being behind her in a position in front of the door and about three feet distant therefrom. As the operator opened the door Mrs. Proctor stepped into the elevator, and the elevator was immediately started upward without previously closing the door. Deceased, who was following Mrs. Proctor into the elevator, started to enter just the elevator went upwards, and, because of the premature starting of the elevator, his foot went into the shaft and he fell to the basement, receiving the injuries which resulted in his death.

The heading or caption of the policy issued to the deceased reads:

> "Covers Accidents Only While a Passenger on Passenger Conveyances and While in or About Railroad Passenger Stations. Age 18 to 70."

In the body of the policy it is provided:

> "The Travelers' Insurance Company hereby insures the person whose signature is hereto affixed and named in the stub of this ticket policy in the possession of the company bearing even number and date herewith against bodily injuries effected solely by external, violent and accidental means, and sustained while riding as a passenger on any public conveyance provided by a common carrier and such conveyance is being propelled on land or water by mechanical power."

Appellant contends that the accident was not covered by the policy in this, that the insured was not riding on "a passenger conveyance provided by a common carrier."

[1, 2] It is to be noted that the caption of the policy quoted uses the words "passenger conveyance," while the body of the policy uses the words "public conveyance provided by a common carrier." The respondent says:

> "It makes no difference which of these provisions we concern ourselves with. If these terms differ, conflict, are ambiguous or would create an uncertainty, a liberal interpretation is to be adopted which is most favorable to the insured."

That the rule is well settled that any uncertainty, ambiguity or reasonable doubt should be resolved against the insurer is not questioned. 14 Cal. Jur. p. 443; Joyce on Insurance (2d Ed.) § 222; Pacific Heating Co. v. Williamsburgh, 158 Cal. 367, 111 P. 4; Mah See v. North American Ins. Co., 190 Cal. 421, 213 P. 42, 26 A. L. R. 123. However, before the rule can be applied there must be some uncertainty or ambiguity in the policy. First National Bank v. Maryland Cas. Co., 162 Cal. 61, 69, 121 P. 321, Ann. Cas. 1913C, 1170; Blunt v. Fidelity & Casualty Co., 145 Cal. 268, 271, 78 P. 729, 67 L. R. A. 793, 104 Am. St. Rep. 34. In order to hold the policy ambiguous and uncertain we would have to hold that the caption was a part of its provisions. We see no reason to hold that the caption was a part of the provisions of the policy. But even if it were to be so construed, the policy would have to be considered as a whole and read together. Sharp v. Scottish Union, etc., Co., 136 Cal. 542, 544, 69 P. 253, 615; Yoch v. Home Mutual Ins. Co., 111 Cal. 503, 44 P. 189, 34 L. R. A. 857; Hill v. Travelers' Insurance Co., 146 Iowa, 133, 124 N. W. 898, 28 L. R. A. (N. S.) 742.

We now turn to the question as to whether a public hotel in the operation and management of a passenger elevator for the convenience of its guests and invitees is to be classed as a "common carrier" within the purview of the policy in question. It is the rule in this state that persons or corporations operating a passenger elevator are to be treated as common carriers of passengers in determining the degree of care required in the operation thereof. Champagne v. Hamburger, 169 Cal. 683, 147 P. 954; Treadwell v. Whittier, 80 Cal. 574, 22 P. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. But the precise question as to whether a manager or proprietor of a passenger elevator should be treated as a common carrier in the full sense of the term has not heretofore been presented to the Supreme or Appellate Courts of this state. In 10 Corpus Juris, at page 609, the author, in discussing the status of elevators as carriers, says:

> "The owner or manager of a passenger elevator used in a building for the transportation of tenants and others is not in the full sense of the term a common carrier of passengers. However, with reference to the safety of passengers on an elevator a similar degree of care is usually required of the owner or manager as is exacted of other passenger carriers, and with this idea in view it has been held in many cases that such an owner or manager is a common carrier of passengers as to persons using the elevator."

In Hutchinson on Carriers (3d Ed.), vol. 1, § 100, the rule is stated as follows:

> "The owners and managers of passenger elevators, although spoken or by some courts as common carriers of passengers, cannot properly be so classed. The public carrier of passengers, on account of the nature of his employment, is charged in law with certain duties owed to the public, among which is that of receiving upon his vehicle all who may offer themselves for transportation, and who stand ready to pay the

legal fare and comply with his reasonable rules and regulations. When the nature of the business of operating a passenger elevator is considered it is clear that the proprietor owes no such duty to the public and is, therefore, not a carrier of passengers in the full sense of the term as legally understood. Nevertheless, with reference to the safety of their passengers, the law has imposed upon the proprietors of passenger elevators duties precisely similar to those exacted of passenger carriers by railroad."

In 9 Ruling Case Law, p. 1237, it is said in reference to the status of the owner or manager of an elevator:

> "When the question is squarely presented, as when it sought to construe a statute referring to the duties or liabilities of 'common carriers,' it is held that such expression does not refer to the proprietors of elevators."

See, also, Seaver v. Bradley, 179 Mass. 329, 60 N. E. 795, 88 Am. St. Rep. 384.

[3] We quote with approval the following language to be found in the recent case of Southern Railway Co. v. Taylor, 57 App. D. C. 21, 16 F.(2d) 517:

> "Bouvier defines a common carrier as 'one whose business, occupation, or regular calling it is to carry chattels for all persons who may choose to employ and remunerate him.' This of course applies, not only to the carrying of chattels, but to the carrying of passengers for hire. It will be observed, however, that a common carrier is required to extend its services to 'all persons who may choose to employ and remunerate him.' In other words, a common carrier is a public utility, a public servant, required to extend its services to all who request it, providing they place themselves within the lawful rules and regulations governing its use and operation. It logically follows that the operator of an elevator in an office building is not a common carrier, nor is he engaged in commerce. He is not required to carry all who may demand passage. The matter of extending service is entirely within his control. The elevator is merely an instrumentality furnished for the convenience of those who occupy and use the building, at all times within the control of the owner."

Respondent cites the following cases in support of his contention that one who operates or maintains an elevator is a common carrier: Steiskal v. Marshall Field & Co., 238 Ill. 92, 87 N. E. 117, 119; Goldsmith v. Holland Building Co., 182 Mo. 597, 81 S. W. 1112; Champagne v. Hamburger & Sons, 169 Cal. 683, 147 P. 954; Watts v. Murphy, 9 Cal. App. 564, 99 P. 1104; Smith v. Odd Fellows Building Association, 46 Nev. 48, 205 P. 786, 23 A. L. R. 38; Engstrand v. Hartnett, 106 Wash. 404, 180 P. 132; Springer v. Ford, 189 Ill. 430, 59 N. E. 953, 52 L. R. A. 930, 82 Am. St. Rep. 464; and Beidler v. Brandshaw, 200 Ill. 425, 65 N. E. 1086. In each of these cases the courts were considering the degree of care required of the operator of an elevator towards his passenger, as compared with the degree of care imposed upon a common carrier under similar circumstances. The courts were not called upon to decide the status of an elevator, and statements made by the courts in those cases to the effect that the operator of an elevator in a public building is a common carrier were used in the sense that a similar degree of care is required of the owner or manager of an elevator as is exacted of common carriers.

[4] We conclude that the elevator in question was not a conveyance operated by a common carrier and that the accident in question did not fall within the terms of the policy, and that the judgment should be reversed.

We do not consider it necessary to decide the remaining points presented on this appeal.

The judgment is reversed.

We concur: STURTEVANT, J.; NOURSE, J.

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93 Cal. App. 276

BARNETT ROSENBURG, Inc., v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY. (Civ. 6065.)

District Court of Appeal, Second District, Division 2, California. July 26, 1928.

New trial ⚷163(1)—Judge's statement to clerk on stepping from bench that he had decided to deny new trial held not formal order precluding subsequent granting of motion.

Statement of trial judge, made to his clerk on stepping from bench, that he had decided to deny motion for new trial, *held* not a formal order denying new trial, and filing with clerk on the following day of written order signed by the judge granting the motion was therefore within court's jurisdiction.

Application by Barnett Rosenburg, Inc., formerly known as the Goodman & Rosenburg Company, Inc., for a writ of prohibition to be directed to the Superior Court in and for Los Angeles County. Writ discharged.

Hibbard & Kleindienst, of Los Angeles, for petitioner.

Loewenthal, Lissner, Roth & Gunter, of Los Angeles, for respondent.

CRAIG, J. But one question in presented for determination in this proceeding. It is necessary for us to decide whether or not, under the circumstances recorded, the trial court made a formal order denying a motion for a new trial. Since we conclude that no such action was taken, there is no occasion for discussing other points argued.

From the recitals of the petition and from the statement of the judge who tried the case, made upon the presentation of the motion to correct the records in the action, it appears that, after trial and judgment rendered for the plaintiff in the case of Standard Cabinet

Works, a Corporation, v. Goodman & Rosenburg Co., Inc., a Corporation, et al., the trial judge, on the 14th day of March, 1927, stepped from the bench and thereafter, while still in the courtroom, said to his clerk that he had decided to deny the motion for a new trial in said case. On the following morning, before the convening of court, the judge informed the clerk that he had changed his mind about the matter and instructed the clerk to make a minute entry granting the motion and to send notice accordingly. On the 13th day of December, 1927, a written order was made and filed with the clerk granting the motion for a new trial.

The decision of our Supreme Court in United Railway v. Superior Court, 197 Cal. 687, 242 P. 701, states the law clearly. It was there made plain that an order granting or denying a motion for a new trial may be only in one of two ways: (1) By audible pronouncement from the bench in open court. An order denying the motion for a new trial was not thus made in this case at all. (2) By filing with the clerk in the action a written order signed by the judge. Such an order granting the motion for a new trial was signed and filed on the 13th day of December, 1927, as above stated, and while the court still retained jurisdiction to make the order.

The writ is discharged.

We concur: WORKS, P. J.; THOMPSON, J.

93 Cal. App. 209

PAPESCHI et ux. v. LA CAVA et al. ★
(Civ. 6092.)

District Court of Appeal, First District, Division 2, California. July 18, 1928.

Hearing Denied by Supreme Court Sept. 13, 1928.

1. Money received 🔑12—Defendant's unauthorized payment to another is no defense to action for money received for plaintiff's use and benefit.

It is no defense to action for money had and received for use and benefit of plaintiffs that defendant, after receiving the money, made a payment to another; he having no authority to do so.

2. Money received 🔑18(3)—Judgment in action for money received was properly for a defendant, not shown to have received any.

Judgment for a defendant in action for money had and received was proper, there being no evidence that she received any moneys.

3. Money received 🔑18(3)—In absence of showing that defendants acted jointly, plaintiffs held properly denied judgment against defendant to whom defendant who received the money made payment.

There being no evidence in action for money had and received that defendant C., to whom defendant F., after receiving money for use and benefit of plaintiffs, made a payment, acted jointly with F., *held* plaintiffs were properly denied judgment against C.

4. Trial 🔑404(1)—Finding that plaintiffs did not rescind held finding on issue of repudiation.

Finding on issue of repudiation of contract by plaintiffs *held* made by finding that they did not rescind the transaction; "rescind" being used as synonym of "repudiate."

5. Vendor and purchaser 🔑102, 334(4)—Even if purchaser by demand, in notice of defects in title, for immediate return of deposit, rescinded contract, held, vendor by doing nothing also rescinded it, entitling purchaser to return of deposit.

Even if contract for purchase of land, giving purchaser 30 days to examine title, and, if finding any objections, to state them, and requiring vendor, if objections be made, to use diligence to remove them in 90 days thereafter, and providing that, if they cannot be removed in such time, all rights and obligations under the contract may, at purchaser's election, terminate, and deposit shall be returned to purchaser, was rescinded by purchaser concluding his notice of objections found with demand, because of the number of such defects and objections, for immediate repayment of deposit, the contract was also rescinded by vendor making no effort to clear the title, and never attempting to tender a deed, under which circumstances purchaser was entitled to return of deposit.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Agostino Papeschi and wife against N. V. La Cava and others. From judgment for plaintiffs against defendant G. Fracchia alone, she and plaintiffs appeal. Affirmed.

Waldo F. Postel, of San Francisco (L. Seidenberg, of San Francisco, of counsel), for appellant Fracchia and respondents Rosina.

Randolph V. Whiting and Henry F. Wrigley, both of San Francisco, for respondents Papeschi et al.

STURTEVANT, J. The plaintiffs commenced an action against the defendants to recover money. They were given judgment against one of the defendants, and that defendant has appealed. They were refused judgment against the other defendants, and from that portion of the judgment the plaintiffs have appealed.

The plaintiffs pleaded their claim in three separate counts. On the third count neither party introduced any evidence and no findings were made. The first count was framed as a common count for money had and received. The second count pleaded a written promise to pay. The defendants filed answers denying the allegations contained

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★Hearing denied by Supreme Court.

in each count, and each defendant alleged that the plaintiffs rescinded the contract. Among others the court found:

> "That within two years last past, at the city and county of San Francisco, state of California, defendant G. Fracchia, originally sued here and sometimes known as S. Fracchia, became indebted to plaintiffs, in the sum of $600, for and on account of moneys had and received by said defendant for the use and benefit of plaintiffs, and which said sum said defendant in writing promised and agreed to pay to plaintiff; that although demand has been made on said defendant for the payment of said sum no part thereof has been paid."

The trial court also found that the plaintiffs never rescinded the said contract. There is no finding that Mary Rosina, as an individual or as executrix of the last will of her deceased husband, or that N. V. La Cava, did receive, or did not receive, any moneys. The uncontroverted evidence was to the effect that Rosa Papeschi paid to the defendant La Cava, as a deposit on a purported contract to purchase real estate the sum of $600 and of that sum the defendant La Cava paid to the defendant Fracchia $300. There is no evidence in the record that either of those defendants does not now hold the moneys so received, or that either of said defendants has legally parted with any of the moneys so received.

[1] In accordance with the finding above quoted, the trial court rendered judgment against the defendant Fracchia in the sum of $600. In doing so the court did not err. The defendant had received $600. The witnesses so testified; but they attempted to show that Fracchia then made a payment to La Cava. He had no authority to do so. The payment did not relieve him of responsibility.

[2] As recited above, there is no finding and no evidence that Mary Rosina, as an individual or in her representative capacity, received any moneys whatever. There is no evidence and no finding that she made any promise of any kind. The judgment refusing relief against her was correct. Whittier v. Home Savings Bank, 161 Cal. 311, 119 P. 92. As the record shows that, if a finding had been made, it must necessarily have been against the plaintiff and in favor of Mary Rosina, the judgment in her favor will not be reversed, but, on the other hand, the same will be affirmed.

[3] As to the defendant La Cava, the plaintiffs make the broad statement that the judgment should be reversed. There is no finding and there is no evidence that he acted jointly with the defendant Fracchia. Ordinarily he would not be liable. 41 C. J. p. 62. The plaintiffs do not call to our attention any facts, nor cite us to any law, showing liability as to him. The judgment as to La Cava is therefore affirmed.

[4, 5] In his answer the defendant Fracchia pleaded a repudiation of the contract by the plaintiffs. He now complains because the trial court did not make a finding thereon. The point has no merit for two separate reasons. Among other things, the trial court found that the "* * * plaintiffs did not rescind the transaction." The trial court doubtlessly used the word "rescind" as being a synonym of the word "repudiate," as will presently more fully appear. The other reasons supporting the findings made by the trial court rest on a consideration of the following facts:

The contract, as written, provided that the purchaser should have 30 days to examine the title, and if he found any objections that he should state the same in writing. If any objections were made the seller should "* * * use all due diligence to remove them within 90 days thereafter, * * * but, if such objections cannot be removed within the time allowed, all rights and obligations hereunder may, at the election of the purchaser, terminate and end, and said deposit shall be returned to the purchaser. * * *" The contract was written August 24, 1925. On September 23, 1925, the purchaser served a notice stating certain objections to the title and then closed the notice as follows:

> "Because of the number of such defects and objections, demand is hereby made for the *immediate* repayment to A. F. R. Papeschi of the sum of $600 heretofore paid to you, the said N. V. La Cava, in connection with the signature of the aforesaid purported agreement of sale."

The defendant Fracchia calls attention to the fact that the contract gave him 90 days to clear the title, and that the notice served by the plaintiff departed from the terms of the contract because it required an "immediate" repayment. He therefore asserts that the plaintiff repudiated or rescinded the contract. Conceding, without deciding, that the plaintiff did rescind the contract, it is equally clear that the defendant also rescinded the contract, for the evidence is without conflict that after September 23, 1925, the vendor made no effort whatsoever to clear the title and that he never at any time made any attempt to tender a deed. Under these circumstances the plaintiff was entitled to a return of her deposit. Cleary v. Folger, 84 Cal. 316, 319, 24 P. 280, 18 Am. St. Rep. 187; Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 16, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Lemle v. Barry, 181 Cal. 6, 10, 183 P. 148.

If the plaintiff's notice is construed as the defendant contends it should be construed, it follows that the finding should have been that both parties rescinded the contract. In that event the plaintiffs were entitled to recover. On the other hand, if the plaintiffs' notice is construed more liberally, it follows that it was not necessarily an unwarranted notice under the terms of the contract, and that the plaintiff did not rescind or repudiate the contract and the finding as made by the trial court was correct.

We find no error in the record. The judgment is affirmed as to each party.

We concur: KOFORD, P. J.; NOURSE, J.

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93 Cal. App. 313

HARTFORD ACCIDENT & INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 6073.)

District Court of Appeal, Second District, Division 2, California. July 27, 1928.

1. Master and servant ⟹403—Burden of proving workmen's compensation claimant was independent contractor and not employee was on party raising issue.

Burden of proving that workmen's compensation claimant was an independent contractor and not employee of party for whom services were being rendered when she was injured was on party raising such issue.

2. Master and servant ⟹367—One performing services under principal's control as to result only, and not as to means, is "independent contractor" (Workmen's Compensation Act).

One who renders service for a specified recompense for a specified result under the control of his principal, as to the result of his work only, and not as to the means by which such result is accomplished, is an "independent contractor," not entitled to benefits of Workmen's Compensation Act (St. 1913, p. 279).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

3. Master and servant ⟹367—Woman employed by realty company to solicit purchasers of lots held "employee," entitled to compensation for injury, not "independent contractor" (Workmen's Compensation Act).

Woman employed by realty company to solicit prospective buyers of lots in tract being developed by company, at the agreed sum of $2 for each person whom she might interest in the property and cause to visit the tract, and a commission on any sales she might make, *held* an "employee," entitled to compensation for injury under Workmen's Compensation Act (St. 1913, p. 279), and not an "independent contractor," where she was required to report each morning, whether she had prospects or not, and to attend weekly meetings of salesmen and solicitors.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employé.]

Certiorari to review an order of the Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act (St. 1913, p. 279) by Helen C. Shaffer, claimant for personal injuries, opposed by the Beeman & Rice Realty Company, employer, and the Hartford Accident & Indemnity Company, insurance carrier. To review an award of the Industrial Accident Commission in favor of claimant the insurance carrier brings certiorari. Affirmed.

George L. Greer, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CRAIG, J. The respondent Helen C. Shaffer was injured while soliciting prospective purchasers of real estate in the city of Los Angeles, on October 20, 1927, as an employee of the Beeman & Rice Realty Company. She made application to the division of industrial accidents and safety, and, after a hearing, the commission awarded $192.50 hospital expenses at $3.50 per day, and allowed the applicant $11.12 per week, beginning October 28, 1927, until the termination of disability or further order of the commission, and dismissed as to the employer. A motion for rehearing was presented, which was denied, and the insurance carrier, petitioner herein, instituted this proceeding to review said award.

It appears that the applicant was employed by assistant sales managers of the realty company to solicit prospective buyers of lots in a tract which it was developing, at the agreed sum of $2 for each person whom she might interest in the property and cause to visit the tract, and a commission of 1 per cent. upon any sales she might make. The record is not clear as to the exact time that she had been so employed. She testified that she began work on the 18th of October, 1927, and also that she worked "3 or 4 days"; a representative of the company testified that she worked 5 days; and the respondent Commission in its briefs recites that she earned "$66.50 during her employment of 4 or 5 days."

It is the contention of the petitioner that Mrs. Shaffer was not an employee, but that she was an independent contractor, and that the evidence does not justify the award. It is conceded that she was not limited to any particular territory in which to work, nor was she furnished by the company with the names of people whom she should interview; and she testified that she "had no specified hours," so long as she did her work and obtained her load for the following day. It appears, however, that she was required to telephone to the main office each morning whether she had prospects or not; that she was not instructed to any great extent, because of her past long experience in selling real estate; that private machines of the company called for her each morning, and she directed them to the residences of her prospects, whom they conveyed to the tract. The manager also testified that a meeting for the instruction of salesmen and solicitors was held each Monday evening, at which attendance was required, that it was not optional with them whether they should attend or not, and that the company held up their checks in the event of absence without good cause. Another of the company's witnesses testified that a good solicitor would average $20 to $25 per week, and that one working as the applicant did would average at least $22 per week. It was further testified that such solicitors "can't work for another real estate company while they work for us."

[1-3] If this statement of facts leaves any doubt as to whether or not the applicant was an independent contractor, it is especially important to observe that, since the fact is undisputed that at the time of the injury she was rendering services for the Beeman & Rice Realty Company, the burden of proof that the employee was an independent contractor was upon the party raising such issue. York Junction Tr. & S. Co. v. Industrial Acc. Com. (Cal. Sup.) 261 P. 704. Referring to the definition of an independent contractor as it is stated in the Workmen's Compensation Act (St. 1913, p. 279), our Supreme Court has said:

> "One who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only, and not as to the means by which such result is accomplished" is an independent contractor. Flickenger v. Industrial Acc. Com., 181 Cal. 425, 184 P. 851, 19 A. L. R. 1150; Fidelity & C. Co. v. Industrial Acc. Com., 191 Cal. 404, 216 P. 578, 43 A. L. R. 1304.

It cannot be said that in the instant proceeding the employer has complied with the rule requiring that it show that the employee was under the control of the principal "as to the result of the work only." On the contrary, it would appear that here the employer had the right to control the mode in which the work was to be done; the employee was required to attend meetings every Monday night, which were called salesmen's meetings. Except for this designation, there is nothing to indicate their purpose, but, in the absence of showing to the contrary, it may be assumed that the employees were given such instructions as the employer might see fit to give upon such occasions. It was testified by the applicant that she was not instructed to any extent, because her past experience made it unnecessary. However, this is a concession that the right to give instructions was recognized as existing. It is clear, too, that the employer had the right to terminate the employment at any time. This is a circumstance "tending [strongly] to show the subserviency of the employee, since it is incompatible with the full control of the work usually enjoyed by an independent contractor." Eng-Skell Co. v. Industrial Accident Com., 44 Cal. App. 210, 186 P. 163; Fidelity & C. Co. v. Industrial Accident Com., supra. Nor is it inconsistent with the theory that the applicant was not an independent contractor that she might perform other work than that for the principal. Helmuth v. Industrial Acc. Com., 59 Cal. App. 160, 210 P. 428. However, it was testified in this case that she was not permitted to work for any other real estate employer while engaged in the work in question.

We therefore conclude that the applicant was an employee of the real estate company by whom she was employed and for whom she performed services, up to and including the time of her injury. Her employment was in the nature of piece work; she worked from day to day, and could discontinue work at any time; she was required to report every morning. The case falls within the rule of Helmuth v. Industrial Acc. Com., supra.

The award is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

93 Cal. App. 454

Ex parte BALEN. (Cr. 1711.)

District Court of Appeal, Second District, Division 2, California. Aug. 6, 1928.

Criminal law ⚷1218—Confinement in county jail on felony charge before conviction therefor satisfied prior sentence to city jail for misdemeanor.

One confined in county jail from May 11th, on which he was sentenced to city jail for 30 days on plea of guilty on misdemeanor charge of possessing intoxicating liquors in violation of Wright Act (St. 1921, p. 79) until July 16th, when granted probation after conviction on June 20th, of felony of possessing still, *held* entitled to release on writ of habeas corpus from city jail, in which confined on misdemeanor charge after release from county jail; his detention in latter before June 20th being no part of punishment for felony.

Application by George Balen for a writ of habeas corpus to the Chief of Police of the City of Los Angeles to secure petitioner's release from custody on plea of guilty of possessing intoxicating liquor. Writ granted.

John F. Groene, of Los Angeles, for petitioner.

E. J. Lickley, City Prosecutor, and Joe W. Matherly and F. W. Fellows, Deputy City Prosecutors, all of Los Angeles, for respondent.

THOMPSON, J. The petitioner in this case was arrested on May 7, 1928, charged with possession of intoxicating liquors in violation of the Wright Act (St. 1921, p. 79). On May 11, 1928, he pleaded guilty to this charge and by judgment of the municipal court was ordered confined in the city jail for a period of 30 days or, in lieu thereof, to pay a fine of $300. On May 10th, after his arrest on the misdemeanor charge, complaint was filed against the petitioner charging him with the possession of a still, a felony, and he was taken from the city jail to the county jail, where he was confined until July 16, 1928, on which date he was granted probation, he having been tried and found guilty of the latter offense on June 20th.

It will be observed that petitioner was confined in the county jail for a period of 67 days, and since his release from the county jail has been confined in the city jail, making a total of 81 days' confinement to the time the petition herein was filed. It is petitioner's contention that his detention in the county jail subsequent to May 11th, the day on which he was sentenced on the misdemeanor charge and on which day the commitment issued, is in satisfaction of that judgment. Almost the same situation was presented to us in the case of In re Ahumada (Cal. App.) 269 P. 181, the only difference being that in the Ahumada Case the petitioner was found not guilty of the felony charge and in the instant case it was determined that he was guilty. It cannot be said, however, that petitioner's detention in the county jail prior to June 20th was any part of the punishment for the more serious crime. For this reason we can see no substantial distinction between the two cases, and since we are not persuaded to depart from the conclusion arrived at in that case, which was that the petitioner had served the sentence imposed upon him on account of the misdemeanor, we must hold that petitioner here is also entitled to his liberty.

The writ is granted.

We concur: CRAIG, Acting P. J.; HAZLETT, Justice pro tem.

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93 Cal. App. 390

GOLDEN STATE ORCHARDS v. HARTER.
(Civ. 3109.)

District Court of Appeal, Third District, California. July 31, 1928.

1. Contracts 🔑249—Fruit grower could not nullify agreement for processing and packing fruit without paying sum equal to profits thereunder.

Where fruit grower contracted for processing and packing of fruit after sale thereof, it could not thereafter nullify agreement either in whole or in part by selling fruit with understanding that it was to be delivered without first being processed and packed, unless paying a sum equal to what profits would have been for doing work in accordance with terms of agreement.

2. Agriculture 🔑11—Fruit packer agreeing to process and pack fruit held entitled to lien on fruit and possession thereof until payment of charges (Civ. Code, § 3051; Warehouse Act of 1909, § 27, as amended by St. 1919, p. 398).

Under Civ. Code, § 3051, or Warehouse Act of 1909, § 27, as amended by St. 1919, p. 398, fruit packer contracting for processing and packing of fruit was entitled to a lien on fruit and possession thereof for that purpose until payment of all legitimate charges accruing against property by virtue of such agreement.

3. Agriculture 🔑15—Fruit packer held entitled to return of fruit for purpose of enforcing lien thereon for processing and packing.

Where answer in action in claim and delivery for redelivery of possession of certain fruit delivered to packer for processing and packing requested a return of property for purpose of enforcing lien thereon for services performed pursuant to agreement, defendant was entitled by reason of denials of plaintiff's right to possession either to return of fruit or amount of lien thereon, without regard to counterclaim setting up charges against fruit for services performed and to be performed under agreement.

4. Damages 🔑121—Fruit packer may recover, for breach of contract to process and pack fruit, difference between contract price and cost of completing performance (Civ. Code, § 1512).

Under Civ. Code, § 1512, relative to damages recoverable in case performance of obligation is prevented by creditor, a fruit packer contracting for processing and packing fruit may recover as damages, on breach thereof by grower, the difference between contract price and cost of completing performance of contract.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by the Golden State Orchards against C. B. Harter. Judgment for plaintiff, and defendant appeals. Reversed.

W. P. Rich, of Marysville, and Lawrence Schillig, of Yuba City, for appellant.

Arthur L. Erb, of Beverly Hills, and W. H. Carlin, of Marysville, for respondent.

HART, J. This is an action in claim and delivery for the redelivery to the possession of the plaintiff by the defendant of 370 tons of dried French prunes and 80½ tons of dried Muir peaches, of the alleged approximate aggregate value of $70,000, or, in case such redelivery is not had or cannot be made, that plaintiff be awarded judgment in the said sum of $70,000 as the value thereof, together with the sum of $10,000 as damages for the wrongful detention of said fruit by defendant after demand was made by plaintiff for the return to it of the possession thereof.

The plaintiff is a California corporation, with its principal place of business in the county of Glenn, and was, at all the times mentioned in the pleadings and herein, the owner of an orchard of extensive acreage near Hamilton City, said county.

The defendant, at all said times, "was and now is engaged in the drying, packing, and processing of dried fruits, at Harter Station, on the Sacramento Northern Railway, in Sutter county, Cal., and during all of said times owned and possessed the necessary equipment, buildings, machinery and warehouses for the doing of said work and the storing of such fruit." It appears that during the month of September, 1924, after the plaintiff had completed the harvesting of its fruits produced on its said orchard, and after the close of the harvesting season, plaintiff and defendant entered into negotiations for the delivery by the plaintiff to the defendant of certain quantities of dried prunes and peaches, produced on said orchard of plaintiff, "for the sorting, grading, processing, packing and storing of such fruit by said defendant." Thereafter certain written correspondence was had between the parties relative to said negotiations, and it is the letters passing between them and constituting such correspondence which form the agreement formally entered into between the parties for the purpose mentioned. The following are the letters referred to:

"C. B. Harter.

"Yuba City, Cal., Sept. 27, 1924.

"Golden State Orchards, Hamilton City, Glenn Co. Cal. Attention Mr. Moore—Gentlemen: In accordance with our conversation with your Mr. Moore on our visit to your orchards on Sept. 24th, we are pleased to outline our proposition to pack your fruit.

"We propose to receive, grade, process and pack your prunes and peaches in accordance with the best approved methods and in regular containers according to trade standards. We shall use the utmost diligence in taking proper care of your fruit while in our custody. Through our special arrangements with Harry Hall & Co., Inc. we will pack your fruit under brands favorably known for many years.

"Our charges for this work are $30 per ton for well cured fruit. Any extra handling such as for hand sorting on account of defective fruit to be charged to your account at cost.

"In stating our proposition to you be believe you realize the advantages of having your goods merchandized put up as described. Should there be any questions in your mind which we have not made clear we shall be glad to come to an understanding and trust we shall hear favorably from you in the course of a few days.

"Yours very truly, C. B. Harter."

"Golden State Orchards.

"Hamilton City, Cal., Oct. 15, 1924.

"C. B. Harter, Esq., Yuba City, Cal.—Dear Sir: Referring to your letter of Sept. 27th, and to our conversation held at your plant on Oct. 12th. We wish to confirm our understanding of the arrangement you proposed to us for handling our fruit.

"The charges of every nature for handling our fruit from on board cars your station Harter, processing, grading, packing and loading, when sold, shall be $30 per ton of cured fruit. This price to include storage of the fruit until such time as it is sold and also the use of bags for containing the fruit from our ranch to your packing plant.

"Knowing the great importance of grading the processed fruit as well of course as properly processing, we rely upon your promise to place in charge a well experienced man.

"Further it is our understanding the fruit will be, when received by you, sized or graded and held in bins set aside for our sole use until we have sold them.

"We confirm the statement made to you regarding our arrangement with Harry Hall, Inc., viz., that they will from time to time submit bids upon which if we accept will pay to them their commission of 5 per cent. This makes it possible for us to accept the highest price no matter from what source it comes.

"Please acknowledge receipt of this letter and if it meets with your approval confirm.

"Yours very truly,
"Golden State Orchards,
"By Granville Moore."

"C. B. Harter.

"Yuba City, Cal., Oct. 17, 1924.

"Golden State Orchards, Hamilton City, Glenn Co. Cal. Attention Mr. Granville Moore—Gentlemen: Your favor of October 15th has been received and the contents noted. With regard to the charges we wish to call your attention to the third paragraph of our letter to you of September 27th, in which we stated that the charges would be $30 per ton for packing well cured fruit. Any extra handling such as for defective fruit to be charged to your account at cost.

"In reference to the storage, the charge of $30 per ton is to include storage till the 1st of June, 1925. We will issue warehouse receipts if desired.

"With the above limitations to your letter, we hereby wish to confirm it.

"Yours very truly, C. B. Harter."

Thereafter, and in pursuance of the agreement evidenced by said letters, the plaintiff, with sacks or bags furnished by the defendant, sacked, shipped and delivered to defendant, at Harter Station, in Sutter county, and the latter received and took into his possession, 370 tons of dried French prunes and 80½ tons of dried Muir peaches. It appears that, on the 31st day of January, 1925, the plaintiff agreed to sell and did sell the entire lot of prunes delivered to defendant under the agreement to Guggenheim & Co., and agreed to sell and did sell the entire lot of peaches, likewise delivered, to the California Packing Company; that thereafter the plaintiff served upon the defendant a written demand for the redelivery to it by him of all of said fruit unprocessed and unpacked, etc., thus, so far as plaintiff was concerned, terminating or proposing to terminate the life of the agreement before its terms had been complied with. With this demand the defendant refused to comply. This writing stated that plaintiff had made a contract for the sale of said fruit and "desires to consummate such sale by delivery of the products, and failure to receive the same and make such delivery will entail upon the undersigned a great loss in excess of probably more than $10,000; * * *" that "in connection with this demand the undersigned hereby offers to satisfy any warehouseman's lien which you may have or hold against said property." By said writing the plaintiff also demanded from the defendant "an itemized statement, or if not convenient for an itemized statement, a reasonable statement of any and all legal charges which you may have against said property." This demand was refused by the defendant, in a letter dated February 4, 1925, and served upon the plaintiff. This letter reads, in part, as follows:

> "Under such agreement with Golden State Orchards, a corporation, this fruit was received by me as aforesaid, to be graded, processed, and packed, for which you agreed to pay me the sum of $30 per ton and aggregating $13,515.00. This fruit was to be processed and packed out as ordered by you, and all the work to be done by me, including the storage of such fruit, has been performed, except to process and pack, and I understand you now wish to break your agreement with me and take the fruit as it now is. In order to accommodate you, I am willing to let you have the fruit upon the surrender of the warehouse receipts issued therefor, properly indorsed, and I will deduct from said sum of $13,515.00, so agreed to be paid by Golden State Orchards, the amount that it will cost me to complete said contract in accordance with the terms thereof, which sum for such uncompleted work, labor, and materials will amount to the sum of $5,230.31.
>
> "Therefore, I demand payment from you of the sum of $8,284.69, plus the further sum of $25.37 which you agreed to pay in addition to said $30 per ton for hand-sorting such fruit, which additional work has also been done, and I claim a lien on said fruit as security for the payment to me of the sum of $8,310.06, being the amount which is due me in case you desire to terminate and cancel the agreement aforesaid. The warehouse receipts mentioned by you as issued when said fruit was received by me, pursuant to said agreement, were issued at your special request in order that you might use the same as collateral in obtaining advances on such fruit, and the same were issued in the form they were to give notice of my claim of lien for the work to be done and performed by me and advancements therefor in accordance with such agreement.
>
> "Warehouse and weighing charges are included in said sum of $30 per ton, so agreed to be paid by Golden State Orchards, and are included in the amount herein demanded of you, but if you desire such agreement canceled the sum herein demanded from you does not include any costs which may be incurred in delivering such fruit to you in its present condition. The amount herein demanded is a reasonable charge in view of the agreement hereinbefore referred to.
>
> "You are further notified that I am ready and willing to complete the terms of my agreement with you, but if it is any accommodation to you to terminate such agreement am willing to allow the same to be canceled upon receipt of the sum herein demanded, together with the warehouse receipts as aforesaid."

Thereafter, and on the 13th day of February, 1925, the plaintiff instituted this action, and the sheriff of Sutter county in due time took possession of the fruit in accord with the procedure prescribed by section 511 of the Code of Civil Procedure. The defendant made no demand for a return to his possession of the fruit. The complaint is in form usual in actions of claim and delivery. The defendant, by his answer, besides tendering an issue upon the question of the right to the possession of the fruit (claiming and setting up a special lien thereon, the force of which is dependent upon possession) pleaded as and by way of a "counterclaim," a demand for payment by the plaintiff of the sum of $13,529.36, which includes services already performed on said fruit when the same was removed from his possession by the sheriff and also for "the processing and packing of such fruit, which processing and packing has been prevented by the taking of said property from the possession of said defendant."

Among the court's findings are the following:

> "III. * * * On the 3d day of February, 1925, and prior to the date of the commencement of this action, plaintiff did offer and tender to defendant payment of all charges, claims and demands which defendant had against said property and also offered and tendered to him the warehouse receipts issued by defendant upon the receipt of said property, and did offer to perform all acts and things on plaintiff's part to be done and performed in connection with said property, and did thereupon demand delivery of the possession of said property to plaintiff, and defendant did thereupon wrongfully and illegally fail and refuse to deliver up said property to plaintiff or any portion thereof," etc.
>
> "V. In pursuance of said agreement evidenced by said Exhibits A, B, and C (the above letters), plaintiff delivered said fruit namely, said prunes and peaches, to defendant at Harter Station in the county of Sutter, state of California, and the defendant did receive said fruit, did weigh, sort, grade, and place the same in bins, but he did not process or pack said fruit or any thereof; defendant was ready and willing to process and pack said fruit but was not directed so to do by plaintiff, as such processing and packing was to be *done only in the event that plaintiff should sell such fruit, and, as aforesaid*, plaintiff removed said fruit from the possession of the defendant before the same was sold.
>
> "VI. At the date of the commencement of this action there was due, owing and unpaid from the plaintiff to defendant, for the said storage of the work done upon said prunes and peaches aforesaid, the sum of $1,576.50 and the further sum of $25.37 as the reasonable cost of said hand sorting done to said fruit by defendant, making in all the sum of $1,601.87 which is the total amount of all claims and demands on the part of defendant against plain-

tiff in connection with said prunes and peaches and for the payment of which prior to the date of the commencement of this action, defendant did have a lien upon said fruit aforesaid."

It was further found that the plaintiff "did not suffer any consequential damage, either in the sum of $10,000, or in any other sum."

Judgment, in accordance with the findings and conclusions of law, was entered, the defendant being thereby awarded the sum of $1,601.87 for services rendered upon said fruit down to the time the possession thereof was taken by the sheriff, as already explained.

Being dissatisfied with said judgment, the defendant, after unavailingly pressing a motion for a new trial, took and here prosecutes this appeal from said judgment.

The principal question presented by this appeal is whether or not defendant's lien extended to the whole amount which he was entitled to recover from the plaintiff, not only for what he had actually done but for damages resulting from plaintiff's prevention of the completion of the contract. There is no reasonable ground for doubting that the agreement between the parties as indicated by said letters, and, indeed, as shown by the court's findings, was and is that Harter was to receive, store, process, and pack the fruit when a sale thereof was made by the plaintiff and upon notice of such sale. The letter from the plaintiff to the defendant dated October 15, 1924, and in reply to the letter from the latter to plaintiff of September 27, 1924, as will be perceived, plainly supports this view of the agreement. It, among other things, states:

> "The charges of every nature for handling our fruit from board the cars your station Harter, processed, grading, packing and loading, *when sold*, shall be $30.00 per ton of cured fruit."

The court, as stated, in effect, so found in finding V, as follows:

> "* * * Defendant was ready and willing to process and pack said fruit but was not directed so to do by plaintiff, as such processing and packing was to be done only in the event that plaintiff *should sell* such fruit."

Moreover, the testimony of Granville Moore, president of plaintiff, and who for the latter conducted the negotiations between the parties culminating in the making of the written agreement (the letters), testified that the agreement was intended to be this: That for "doing this work—taking the fruit to the warehouse and holding it, storing it, processing, packing it and shipping it out" for plaintiff—the defendant was to receive "$30 per ton, with a declared profit of $5 per ton." Trans. pp. 20, 21.

[1] From finding V, that the defendant was not directed by the plaintiff to process and pack said fruit, "as such processing and packing was to be done only in the event that plaintiff should sell such fruit," it seems clear that the theory of the decision is that the agreement as expressed in said letters was intended to mean and does mean that, irrespective of whether the terms of the agreement had or had not been fully performed, the plaintiff could withdraw from the defendant's possession said fruit at any time before a sale thereof was made and so terminate the life of the agreement. Of course, as above indicated, we do not agree with that construction. The finding referred to, though, derives no support in the evidence. The admitted fact is (as shown above) that the fruit was sold by the plaintiff on the 31st day of January, 1925, and that the written demand was served on the defendant on the 3d day of February, 1925—that is, that document was dated that day, but, as the record is not clear as to the particular time at which the demand was served on the defendant, it is to be presumed that it was served on the day of its date. The fruit *having thus been sold*, under the terms of the agreement, it was the duty of the plaintiff to direct the defendant to process and pack the fruit and thereupon ship or deliver it to the purchasers, or, if plaintiff desired and intended to or did sell the fruit in bulk unprocessed and unpacked, then to pay him (defendant) a sum equal to what his profits would be for doing that work if he had not been prevented by the plaintiff from performing in full the terms of their agreement. The plaintiff, however, as we may well assume, sold the fruit with an understanding with the vendees that it would or was to be delivered to the latter without first being processed and packed. It is a self-evident proposition that the plaintiff could not nullify its agreement, either in whole or in part, in that way.

In the case of California Cured Fruit Ass'n v. Stelling, 141 Cal. 713, 75 P. 320, it was held that where a fruit grower made a contract for the exclusive possession of his fruit crop by the fruit association, which was to undertake the inspection, packing and selling thereof, and delivered the crop to the association, and afterwards retook possession thereof, the association had the right of possession and a cause of action in claim and delivery to recover the fruit from the grower. The principle upon which the decision of that case proceeded is applicable to the instant case.

[2] It is expressly conceded in the brief of respondent that as a warehouseman "he received this fruit and undoubtedly he had a lien upon the fruit for whatever services he rendered in connection therewith. This we conceded, and in our demand for the possession of the fruit already set out in this brief we asked defendant to specify the amount he claimed due and owing to him for all services he had actually performed or caused to be performed in connection with the warehoused

commodities." This same concession is made in several other places in the same brief. Of course, under the construction of the agreement, as we have announced it above, the defendant was entitled to a lien on the fruit and possession thereof for that purpose until the payment to him by plaintiff of all legitimate charges which would have accrued against said property if he had completed the performance of the contract, and he was not compelled or under obligation to surrender possession thereof until such charges were paid. See Civ. Code, § 3051. Or, if said section is not the direct authority for a lien in such case, or has been superseded by certain provisions of the so-called Warehouse Act of the Legislature of 1909 (Stats. 1909, p. 437), then his lien upon the fruit attached by virtue of certain provisions thereof. Section 27 of said act, as said section was amended in 1919 (Stats. 1919, p. 398), provides, in part as follows:

> "Subject to the provisions of section thirty, a warehouseman shall have a lien on goods deposited by the owner or by the legal possessor of the property or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, coopering and other charges and expenses in relation to such goods."

See, also, in this connection, section 31 of said act.

The record discloses that, as provided by said act, warehouse receipts were issued by the defendant upon the delivery from time to time of said fruit to the latter by the plaintiff. In each of the receipts so issued the net weight of the prunes and the peaches was set forth and also a statement that the fruit was "received in original condition to be graded, processed and packed in accordance with agreement with Golden State Orchards." Section 3 of said act provides for the insertion in the warehouse receipts of any terms and conditions other than those prescribed in section 2, such "other terms or conditions" not to be contrary to the provisions of the act, nor in anywise to "impair his (the warehouseman's) obligation to exercise that degree of care in the safe-keeping of the goods intrusted to him which a reasonably careful man would exercise in regard to similar goods of his own."

[3] Nor did the defendant here waive or lose his right of lien on the property until full performance on his part of the agreement because he failed to take steps looking to the delivery by the sheriff of the property to him, in accord with section 514 of the Code of Civil Procedure. As seen, in his written refusal to comply with plaintiff's demand for the redelivery to it of possession of the fruit, he asserted his right to a lien upon the fruit for all services required of him by the agreement, and asserted the same claim, in his purported counterclaim. Properly in this connection it may be suggested that the so-called counterclaim does not set up the charges against the fruit for services performed and to be performed under the agreement. The prayer of the answer is "for the return to defendant of said personal property, to wit, said prunes and peaches, for the purpose of enforcing his said lien thereon or for the sum of $13,529.36, the value of his special interest and lien in said property." But, the plaintiff having taken possession of the fruit in the replevin action, the defendant, assuming that the allegations of his answer are true, would have been entitled to all that he asks for in the prayer of the answer without filing any counterclaim. On the mere denials of his answer of the plaintiff's right to possession and proof of the facts necessary to establish the probative impregnability of those denials, the defendant would be entitled either to the return of the fruit or the amount of his lien thereon. Therefore the counterclaim, so-called, may be treated as surplusage and wholly disregarded, and still the issue to be decided stands well tendered by the denials of the answer.

It follows from the foregoing that the plaintiff was not entitled to the possession of the fruit at the time the demand was made upon the defendant to redeliver possession thereof to it, nor, consequently, at the time of the institution of this action. "The purpose of the action of claim and delivery, like the common-law writ of replevin, is to try the right to the possession of personal property or chattels, and therefore, where a party claims the possession of movables and resorts to the action in claim and delivery to establish his claim, it is incumbent on him to prove that he is entitled to the *immediate possession* of the chattels or personal property, whatever may be the source of such claimed right." Normart v. Safer, 67 Cal. App. 507, 519, 227 P. 943, 948; see, also, Sidney v. Wilson, 67 Cal. App. 282, 227 P. 672; Automobile Truck Co. v. Salladay, 55 Cal. App. 219, 203 P. 163. The defendant, as we have said, was, under the agreement, entitled to the possession of the fruit until the purposes of the agreement, so far as he was concerned, were fulfilled, or, perhaps, at least (and this seems to be implied from his letter to plaintiff of October 17, 1924), until June 1, 1925.

[4] As to the measure of damages in a case where, as here, the performance of the contract or obligation is prevented by the creditor, the rule is, as it is stated in section 1512 of the Civil Code, as follows:

> "If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties."

Of course, said section automatically became a part of the agreement here, and we think it cannot reasonably be construed otherwise than as giving the defendant the right to claim as compensation under the agreement the difference between the contract price and the cost of completing performance of the contract.

In Connell v. Higgins, 170 Cal. 541, 150 P. 769, it is said that the damages in such case "would consist of the profits he would have made if he had been permitted to complete the work according to the contract." In Carlson v. Sheehan, 157 Cal. 692, 109 P. 29, section 1512 of the Civil Code is construed to mean that "if performance is prevented by the party who is to make such payment, the person doing the things is entitled to payment as for full performance." This statement of the rule in such cases is upon its face too broad, but we are certain that what was and is meant by said statement is that the party who is to perform the service or do the things required of him by the contract is entitled, in such case, to receive the profits only which would accrue should there be full performance of the contract by him; or, in other words, that the party who was to do the things specified in the contract is entitled in such case to "payment as for full performance," less the cost which would necessarily be incurred by full performance.

The trial court permitted the defendant to testify as to what it would cost him to complete the terms of his agreement upon the understanding that such testimony would be stricken out if the court should find that it was not admissible under what the court might later conclude was the proper theory of the case. Under the theory of the trial court's decision, if correct, the testimony was not admissible, and upon that theory it was stricken out, or, at any rate disregarded, in the rendering of the decision. In our view of the case, as it is above pointed out, the testimony was proper. Of course, its probative value was and is a matter to be determined by the trial court.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

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93 Cal. App. 328

ZWART v. LANDFIELD et al. (Civ. 5438.)

District Court of Appeal, First District, Division 1, California. July 28, 1928.

1. Corporations 🔑121(5)—Inference of seller's knowledge of falsity of representations in sale of stock held sustained by evidence.

Evidence in an action to rescind purchase of stocks on ground of fraud *held* to sustain inference that seller knew the representations being made as to condition of company and value of its stocks were false.

2. Corporations 🔑121(5)—Finding that inexperienced buyer of stock rescinded in reasonable time after discovery of fraud held sustained by evidence.

Finding that inexperienced buyer of stock rescinded within a reasonable time after the discovery of the fraud *held* sustained by evidence that he did so shortly after learning from a broker that the stock was of insignificant value.

3. Sales 🔑38(3)—Seller's expression of opinion should be honestly entertained to avoid rescission for fraud.

Expression of opinion by seller to avoid rescission by buyer for fraud should be honestly entertained by seller.

4. Sales 🔑38(3)—Whether seller's representations are opinions or of fact depends largely on circumstances.

Whether or not representations by seller are of fact or matters of opinion depends largely on the circumstances.

5. Sales 🔑38(3)—Seller's expression of opinion may amount to fraud, if accompanied by active misrepresentations or concealment or if relating to fact out of buyer's knowledge or means of ascertainment.

Expression of opinion by seller may amount to fraud, where it is accompanied by active misrepresentations or concealment, or where it relates to a fact as to which the buyer has no knowledge or means of ascertaining the truth.

6. Sales 🔑38(7)—General rule as to right of buyer, ignorant of facts, to rely on seller's statement of material facts, stated.

As general rule, buyer has right to rely on seller's statements of material facts essentially connected with the substance of the transaction, where buyer is ignorant or inexperienced in regard to matters concerning which material representations are made, and such ignorance is known to seller, who is also aware that reliance is being placed on his representations, and that the facts are not and cannot be expected to be within buyer's knowledge.

7. Sales 🔑38(1)—One false material statement is enough for rescission.

If one material statement of seller be false, it is sufficient ground for rescission.

8. Principal and agent 🔑23(1)—Conclusion that defendant was owner of the establishment, employees of which sold stock to plaintiff on fraudulent representations, held justified by the evidence.

Conclusion that defendant was proprietor of the business at time employees of it sold stock to plaintiff on fraudulent representations, notwithstanding his claim of prior gift thereof to his wife and subsequent acquisition thereof from her, and that at the time he was managing it for her, *held* justified by the evidence.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by F. M. Zwart against P. E. Landfield and another. From a judgment against the named defendant, he appeals. Affirmed.

Erwin C. Easton and E. B. Taylor, both of San Francisco, for appellant.

Everette C. McKeage, of San Francisco, for respondent.

KNIGHT, J. This action was commenced against the above-named defendants, to rescind the sale of corporate stock upon the ground of fraud, and to recover the purchase money previously paid therefor. The trial court held that the company defendant and P. E. Landfield were "one and the same person and are identical," and gave judgment against the latter, from which judgment he has taken this appeal. Insufficiency of the evidence to support the findings and the judgment constitute the grounds of appeal.

We have examined the evidence, and it is evident therefrom, we think, that a fraud was practiced on respondent, and, although the testimony is conflicting on several points, we believe that, as a whole, it is legally sufficient to support the conclusions drawn by the trial court that the fraud was actionable, and entitled respondent to the relief granted. In narrating the evidence, therefore, we shall mention only those portions which, in our opinion, tend to support the findings and judgment. It may be stated as follows: Appellant was engaged in the business of selling corporate securities under the firm name of Edward Marvin Company, and at the time these transactions with respondent took place was dealing particularly in the sale of the capital stock of a corporation known as the New Dominion Copper Company, which was evidently in a state of collapse, because about the time of the sale of the stock to respondent, or shortly thereafter, it suspended operations. The actual sales of said corporate stock were made through several salesmen employed by appellant for that purpose, and the fraudulent methods claimed to have been employed in inducing people to buy the stock were disclosed at the trial by two salesmen who had been in the employ of appellant about the time the sales to respondent were made. They testified that these methods originated in appellant's office and were practiced with his knowledge and approval. They consisted of the making of misrepresentations to prospective purchasers as to the value of the stock, the quotations of the market reports, the financial condition of the company, its future prospects, and the certainty of the investor to make large profits in dealing with the stock; furthermore, that fraudulent practices were indulged in at the office in leading prospective buyers to believe that prominent and influential business men and bankers were investing heavily in the stock. One of the salesmen summarized these methods thus: "The idea is to get the sucker's money."

Respondent, as the evidence shows, was inexperienced in buying securities, and, after reading his testimony, it is apparent that he was readily susceptible to influence and imposition, and evidently the methods above described were used in inducing him to purchase the stock, for he testified that the negotiations were conducted in the following manner: A salesman named Stewart first phoned him at his place of business in Palo Alto and asked him if he wanted "to make some easy money," and, after a brief conversation, which is not important, respondent told Stewart that the thing for him to do was to come to his office. Stewart arrived that afternoon, and, after talking to him about the New Dominion Copper Company, advised respondent to buy 500 shares. At the same time Stewart exhibited a newspaper which purported to contain the stock market reports, saying that the stock was listed on the New York Curb and the Boston Stock Exchange, and was then selling for $2 per share and in no time would go up to $4 per share. Respondent stated that he did not have that much money, and Stewart replied, "You don't need that much money; You buy 500 shares and pay half down, and give me a selling order for 250, and in no time you will have your principal back;" saying also, "I will guarantee you, Mr. Zwart, that the stock will go up in no time." After some further discussion, respondent signed an order authorizing appellant to purchase for him 200 shares at $2, paying therefor $400, and he was also charged with and paid an additional $15 as a "service charge" for obtaining the stock.

Four days later, and on May 27, 1927, Stewart returned to Palo Alto and told respondent that he "was a darn fool," that the stock had gone up to $4 a share, and, exhibiting a newspaper, which contained the stock market reports, told respondent he could then double his money by buying 300 shares more, which Stewart said he thought he would be able to obtain for him at the old price of $2 a share; and, after leaving respondent for a few minutes for the ostensible purpose of phoning to San Francisco to ascertain if the stock was still available at the price mentioned, returned and said that it was. Thereupon respondent signed another order anthorizing appellant to purchase for him 300 shares at $2 a share, upon which he made a down payment of $300 and a further payment of $22.50 as a "service charge." Shortly after Stewart left, respondent consulted a newspaper and found the stock listed at only 1¼ and 1½. He immediately phoned appellant's office for an explanation, and was assured by a Mr. Collins, who was in charge of the office, that the price respondent had seen quoted in the newspaper was an error. Later on, apparently the same day, respondent proceeded to appellant's office in San Francisco, where he met and talked with Collins, and the latter convinced respondent that the low price quoted in the newspaper was a misprint. While discussing the matter Collins called respondent's attention to a man standing in the adjoining room, and told him that he was the acting mayor of San Francisco, naming him, that he had purchased 10,000 shares, and that, "if a fellow like that buys the stock, it is a very good investment," whereupon Collins induced respondent to purchase an additional 500 shares upon the same kind of an order at $2 a share, upon which respondent made a down payment of $500, and also paid $68.75 as a "service charge." At the same time, at Collins' suggestion, respondent signed an order authorizing appellant to sell 250 shares of his stock at $4, under the belief that he would soon double his money. Some time afterwards respondent learned from a broker that the stock was of insignificant value, and shortly afterwards respondent served notice of rescission and demanded the return of his money. None of the stock which respondent was induced to buy, and upon which he made a total payment of $1,306.25, was ever delivered to him, nor was any of the stock he authorized appellant to sell for him ever sold.

[1] As indicated, in our opinion the evidence adduced is legally sufficient to sustain the fair inference that appellant knew the representations which were being made as to the condition of the company and the value of its stock were false; and this inference is supported by the further fact that in July, 1924, the sales manager informed one of the salesmen that the company was shut down and doing no business. The representation that the stock was listed on the New York Curb was also shown to be false, it having been stricken therefrom ten days prior to the first sale to respondent; and, although it was listed on the Boston Exchange, it was on the inactive list and running very low. As to the value of the stock, as shown by the Boston Exchange reports, the evidence discloses that on May 23, 1924, the date of the first sale, it was quoted at prices between 1½ and 2. On May 26th, the day before the second and third sales, it went up to 3¼, but the next day, when the second and third sales were made, it was quoted at only 1¾ high, 1⅛ low, and 1¾ closing instead of 4, as represented. Neither was there any truth in the representation made by Collins that the acting mayor of San Francisco was there in the office or that he had purchased 10,000 shares of the stock.

[2] As stated, respondent had no experience in the purchase of corporate stock, and it is plain to be seen that in buying the stock he relied upon the representations made to him as to the value of the stock and the prospects of the company, and particularly with reference to the stock being listed on the New York Curb, and that he would not have purchased the stock had it not been for the making of said representations. Furthermore, we are of the opinion that the trial court was justified in finding that respondent rescinded within a reasonable time after the discovery of the fraud.

[3-7] Possibly, as appellant contends, some of the representations related more or less to matters of opinion, but expression of opinion, to avoid an action for deceit, should be honestly entertained by the person making the same (Macdonald v. De Fremery, 168 Cal. 189, 142 P. 73; Phelps v. Grady, 168 Cal. 73, 141 P. 926; Barron Estate Co. v. Woodruff, 163 Cal. 561, 126 P. 351, 42 L. R. A. [N. S.] 125); and whether or not representations are of fact or matters of opinion depends largely on the circumstances (Hall v. Mitchell, 59 Cal. App. 743, 211 P. 853; Hodgkins v. Dunham, 10 Cal. App. 690, 103 P. 351). Moreover, the expression of opinion may amount to fraud where it is accompanied by active misrepresentations or concealment, or where it relates to a subject as to which the parties have no knowledge or means of ascertaining the truth. Hall v. Mitchell, supra. The general rule is that one has a right to rely on statements of material facts essentially connected with the substance of the transaction where one of the parties is ignorant or inexperienced in regard to matters concerning which material representations are made, and such ignorance is known to the other party, who is also aware that reliance is being placed on his representations, and that the facts are not, and cannot be expected to be, within the first party's knowledge (12 Cal. Jur. 754, and cases cited); and, if one material statement be false, it is sufficient ground for rescission (Beeman v. Richardson, 185 Cal. 280, 196 P. 774). The foregoing rules are particularly applicable to the facts of the present case, and in our opinion sustain the judgment rendered.

[8] Further contention is made by appellant that, at the time these transactions took place, he was not the owner of the business, and therefore cannot be held liable personally for the alleged fraud. With respect thereto, the testimony shows that he was admittedly the owner of said business up to January, 1924, at which time he claims that, on account of a family disagreement, the nature of which was not disclosed, he gave the business to his wife; but that in the following September he again became the owner. He further claims that during the interim he managed the business for his wife at a salary of $150 a week. During the time he claims that his wife was the owner, however, no changes whatever were made in the operation of the business. His name remained on the door of the offices; the printed stationery was not changed; he continued to hire and direct the services of the employees, and to conduct the business generally the same as he had before the asserted transfer of ownership took place; nor did he revoke the certificate previously filed by him to do business under the fictitious name of "Edward Marvin Trust

Company." We think the trial court was justified in concluding, therefore, that appellant was at all times the owner of the business.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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93 Cal. App. 490

PETERSON v. BOARD OF SUP'RS OF SAN MATEO COUNTY et al. (Civ. 6419.)★

District Court of Appeal, First District, Division 2, California. August 14, 1928.

Rehearing Denied Sept. 13, 1928. Hearing Denied by Supreme Court Oct. 11, 1928.

Counties ⟹18—Statute providing that board of supervisors "may," by two-thirds vote, change boundaries of supervisorial districts held permissive (Pol. Code, § 4029).

Pol. Code, § 4029, providing that board of supervisors may, by a two-thirds vote, change boundaries of supervisorial districts of county, and that said districts shall be as nearly equal in population as may be, *held* to vest supervisors with permission to change their supervisorial districts as convenience requires, but only then by two-thirds vote, and, if such districts are changed, the then changed or newly established districts shall be nearly equal in population as may be; word "may" as used therein being permissive and not being used as equivalent to "shall" or "must," in view of section 4041.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, May (In Statutes as Permissive or Mandatory).]

Appeal from Superior Court, San Mateo County; J. R. Welch, Judge.

Application for writ of mandate by Frederick Peterson against the Board of Supervisors of San Mateo County, composed of Thomas L. Hickey and others, to require them to redistrict the supervisorial districts of the county. From a judgment dismissing the petition, petitioner appeals. Affirmed.

John F. Davis, of San Francisco, and Fletcher A. Cutler, of Burlingame, for appellant.

Franklin Swart, Dist. Atty., of Redwood City, for respondents.

WARNE, Presiding Justice pro tem. By petition filed in the superior court of San Mateo county, appellant asked for a writ of mandate commanding the board of supervisors of said San Mateo county to redistrict the supervisorial districts of said county. The complaint alleges, in substance, that San Mateo county is divided into five supervisorial districts; that the present supervisorial districts were established by ordinance in the year 1901, and that said supervisorial districts have not been changed since said time; that since said time the population of said county has greatly increased so, "that, as the supervisorial districts are now situated and exist, the vote of a registered voter of district numbered 4 is equal to 14 votes of district numbered 2 and the vote of a registered voter of district numbered 5 is equal to 19 votes of district numbered 2 and equal to 16 votes of district numbered 1; that the population as now exists in the said five supervisorial districts is not as equal in population as may be, but is grossly unequal as between said supervisorial districts;" "that on the 25th day of July, 1925, * * * petitioner (appellant) and seven other taxpayers, registered voters of district No. 2, signed and filed a petition with the county clerk of San Mateo county, asking that said board of supervisors by ordinance redistrict the said San Mateo county, and change the boundaries of the said supervisorial districts, so that they would be 'as nearly equal in population as may be' in conformity with the provisions of section 4029 of the Political Code of the state of California, and other provisions of the statutes of said state, and in conformity with the Constitution of this state; that it then and there, pursuant to said law, became the duty of said board to redistrict the county into five supervisorial districts; * * * that said petition was presented to said board, and, after hearing same, said board made an order refusing to redistrict the county as requested or at all, and at the present time do refuse to redistrict said county of San Mateo, or to take any action whatsoever towards redistricting said county of San Mateo, as required by law of the state of California; that the foregoing facts were all admitted to be true; that said board arbitrarily and without cause or excuse unlawfully refused to grant said petition to redistrict the county of San Mateo, in any manner, and still refuses to do so." The petition further alleges that appellant "has not any plain, speedy, or adequate remedy in the ordinary course of law."

The respondents interposed a demurrer to the petition upon the ground that "said petition does not state facts sufficient to constitute a cause of action against said defendants (respondents) or any one of said defendants; further, that there is another action pending involving the same matters, between the same parties." With the demurrer, and as a part thereof, respondents filed a special plea in abatement. The trial court sustained the demurrer on the ground that the petition does not state facts sufficient to constitute a cause of action and overruled the special plea "without prejudice." Appellant failed to amend, and judgment was entered in favor of the respondents herein dismissing said petition. Appellant has appealed from the judgment.

Appellant contends that, under the statement of facts as set forth in his petition, he

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★Rehearing denied. Hearing denied by Supreme Court.

is entitled as a matter of law to the relief which he seeks by reason of the provisions of section 4029 of the Political Code. Said section reads as follows:

> "The board of supervisors *may*, by a two-thirds vote of the members of said board, change the boundaries of any or all of the supervisor districts of a county. Said districts shall be as nearly equal in population as may be. The boundaries of no supervisor district shall at any time be changed in such manner as to affect the term of office of any supervisor who has been elected, and whose term of office has not expired. No change in the boundaries of any supervisor district shall be made within ninety days next preceding a general election."

Appellant argues that the word "may" as used in said section means shall or must. That it is mandatory when applied to a public duty, and not directory. In support of his contention, appellant quotes the rule for construing the meaning of the word "may" as laid down in 26 Cyclopedia of Law and Procedure, p. 1590, which is as follows:

> "As used in the statutes, in its ordinary sense the word 'may' is permissive and not mandatory, merely importing permission, ability, possibility or contingency; but it has been properly construed as employed in an imperative or mandatory sense when the Legislature imposes a positive duty and not a discretion or where a public duty is involved, where a right is given or a duty imposed, where the public interest, or where a matter of public policy and not merely a private right is involved, where the statute directs the doing of a thing for the sake of justice or the public good, or where the statute imposes a duty or confers a power on a public officer for public purposes. * * *"

To the same effect, appellant cites the case of Hayes v. County of Los Angeles, 99 Cal. 76, 33 P. 766, and Matter of Application of Cencinino, 31 Cal. App. 238, 160 P. 167, to the same effect.

We concede that the rule is as laid down above, but we do not believe that it is applicable to the case at bar in the sense that the word "may" as used in section 4029 of the Political Code should be construed to read "shall" or "must." It is our opinion that the word "may," as used in said section, is used in the permissive sense. By section 4041, subd. 2, of the Political Code of this state, the power is vested in boards of supervisors "to divide the counties into townships, election, school, road, supervisor, sanitary, and other districts required by law, change the same, and create others, as convenience requires." However, supervisorial districts may only be changed by a two-thirds vote of the members of the board of supervisors. Pol. Code, § 4029. Appellant would have us read section 4029 of the Political Code as meaning that, whenever there exists an inequality of electors in the supervisorial districts in a county, the board of supervisors of such county must change the boundaries of the supervisorial districts so that said districts shall be as nearly equal in population as may be. There is nothing in the language of either section 4029 or 4041 of the Political Code that warrants such a construction. There is nothing therein imposing a positive duty on boards of supervisors to change the boundaries of supervisorial districts by reason of inequalities resulting from the movement or change in population.

We believe that it was the intention of the Legislature in enacting section 4029 of the Political Code to vest boards of supervisors with permission to change their supervisorial districts as convenience requires, but only then by a two-thirds vote of their members, and that, in the event such districts are changed, the then changed or newly established supervisorial districts "shall be as nearly equal in population as may be." Such was apparently the meaning placed upon section 4029 of the Political Code by the Supreme Court of this state in the case of Harnett v. County of Sacramento, 195 Cal. 676, 235 P. 445. If such was not also the intent of the Legislature, what was the necessity of requiring a two-thirds vote of the members of a board before a change can be made?

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

93 Cal. App. 481

Ex parte WAGNON. (Cr. 1686.)

District Court of Appeal, Second District, Division 2, California. Aug. 9, 1928.

1. Divorce 🔑309—Order increasing payments for minor's support over previous order in divorce proceedings in another county, not attacked as inadequate, held void in husband's proceeding to secure release from commitment for contempt (Civ. Code, § 137).

Where there was a subsisting and enforceable order in divorce action in one county for husband's payment of specified sum for support of child, order subsequently entered in another county increasing payments without any showing as to inadequacy of first order or necessity of increase *held* void under Civ. Code, § 137, in husband's habeas corpus proceeding to secure release from commitment for contempt.

2. Contempt 🔑81—One may purge himself of contempt by showing invalidity of order involved.

By showing invalidity of order sought to be enforced in contempt proceeding, one may purge himself of contempt, and should in such event be discharged from commitment.

Application by John M. Wagnon for writ of habeas corpus to secure petitioner's release after commitment for contempt. Writ granted and petitioner discharged.

Robert E. Austin and John N. Helmick, both of Los Angeles, for petitioner.

Joseph N. Owen, of Los Angeles, for respondent.

CRAIG, Acting P. J. The petitioner was committed to the county jail of Los Angeles county for contempt of court for failure to pay a monthly award to his wife, Nellie R. Wagnon, for the maintenance and support of their minor child. He seeks his freedom from such confinement by habeas corpus.

It appears that on May 18, 1918, Mrs. Wagnon filed in the superior court of San Bernardino county a suit for divorce from the petitioner, which resulted in a judgment for the defendant; but the court made an order therein directing that he pay $15 per month for the maintenance and support of the minor. Thereafter, and on December 13, 1918, the petitioner herein instituted a suit for divorce in the superior court of Los Angeles county, reciting in his complaint: "That there is now living of the issue of said marriage one child, Virginia Merle Wagnon, aged six years." No appearance was made by the defendant in the latter action, and an interlocutory decree was entered by default. No allowance was requested in the complaint last mentioned, but the court inserted in the interlocutory decree a provision that the plaintiff, petitioner herein, pay to the defendant $15 per month for the maintenance and support of said minor. Thereafter petitioner was served with an order to show cause why said amount fixed in the Los Angeles suit should not be increased. He appeared personally, and after hearing it was ordered that he pay in lieu of the $15 formerly ordered the sum of $45 per month. All payments required by the order of the San Bernardino court were made as they became due, but petitioner did not pay the monthly allowance ordered by the superior court of Los Angeles county. On January 12, 1928, he was ordered to show cause why he should not be punished for contempt for failure to obey this latter order, and on the 24th of said month he appeared and answered. Evidence, oral and documentary, was introduced, and the matter was submitted, whereupon petitioner was adjudged guilty of contempt of court and sentenced to confinement in the county jail.

The commitment recites all of the foregoing facts, among others, and that the plaintiff had the ability to make such payments, "but that he willfully and intentionally failed, neglected, and refused to comply with said order." It is therein further stated: "The foregoing facts constitute contempt of court."

[1, 2] So far as appears, the plaintiff, petitioner here, was afforded no opportunity to furnish evidence of the existence of the first order when the interlocutory decree was signed in Los Angeles county. There is no showing in the record before us that the defendant attempted to obtain in San Bernardino county an increase of the amount there adjudged as sufficient for the needs of the minor child, or that there was any showing before the Los Angeles court as to the inadequacy of the first order, or the necessity for an increase in the amount allowed. At the date of the interlocutory decree and of the motion for an increase in Los Angeles county, there was a subsisting and enforceable order in the first action requiring petitioner to pay $15 per month with which the petitioner had been and was then complying. The effect of the second order was to require petitioner to pay twice each month the amount theretofore adjudged as adequate, for the same purpose, and this amount was thereafter increased to four times that amount. The situation was therefore the same as that presented in Smith v. Smith, 147 Cal. 143, 81 P. 411, wherein it was held that this could not be done, and it was there held that the first decree could not be eliminated from consideration, the court saying:

> "An amount awarded for maintenance may, as the circumstances, needs, and conditions of the parties in whose favor it is awarded, change, become inadequate; but relief under these changed conditions may be obtained by application to the court in which the maintenance proceeding was instituted. Civ. Code, § 137."

The same rule was announced in Sheppard v. Sheppard, 161 Cal. 348, 119 P. 492, Farrar v. Farrar, 45 Cal. App. 584, 188 P. 289, Helpling v. Helpling, 74 Cal. App. 431, 240 P. 1023, and Dixon v. Dixon, 74 Cal. App. 101, 239 P. 383. In Farrar v. Farrar, supra, it was also held that in the absence of showing to the contrary, it must be assumed that the first allowance was based upon sufficient evidence, and that the amount then allowed was adequate.

It becomes apparent, therefore, that the recital in the commitment in this case that "the foregoing facts constitute contempt of court" was contrary to numerous rulings upon the subject, and that it was based upon an order which was not enforceable. We are not unmindful of authorities holding that an order valid upon its face will not be reviewed, or error of the trial court corrected, in habeas corpus proceedings. It appears, however, that upon the showing in the court below of the facts here presented, and in fact recited in the commitment itself, the petitioner was not guilty of contempt of court, and there are cases in this state holding that by showing the invalidity of the order sought to be enforced in contempt proceedings one may purge himself of the contempt, even though it be contempt to violate the order, and should in such event be discharged. Ex parte Clarke, 126 Cal. 235, 58 P. 546, 46 L. R. A. 835, 77 Am. St. Rep. 176; Tomsky v. Superior Court, 131 Cal. 620, 63 P. 1020; Abbott v. Abbott, 24 Cal. App. 475, 141 P. 939.

The writ is granted, and the petitioner is discharged.

We concur: THOMPSON, J.; HAZLETT, Justice pro tem.

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93 Cal. App. 189

MELICK v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 6044.)

District Court of Appeal, Second District, Division 2, California. July 17, 1928.

1. Prohibition 🔑26—Where court's failure to appear in writ of prohibition was unobjected to, appearance by other defendant will be considered as though made by court.

In proceedings for writ of prohibition to prevent sale of property under execution, brought against petitioner in attachment and court ordering sale, where no point was made because of failure of court to appear, appearance of other defendant will be considered as if it had been made by court.

2. Attachment 🔑198—Immediate sale of attached property cannot be had on notice to defendant not owning property (Code Civ. Proc. § 548).

Under Code Civ. Proc. § 548, providing for immediate sale of property, notice to one defendant, not owner of attached property, where defendant other than one served with notice was owner, is not sufficient to authorize sale.

3. Attachment 🔑198—Notice to "adverse party," to authorize immediate sale of attached property, must be given defendant owning property attached (Code Civ. Proc. § 548).

Under Code Civ. Proc. § 548, providing for immediate sale of property attached after notice to adverse party, in case party has been personally served, or after order of service of summons by publication has been made, notice must be given to defendant owning property attached, if defendant comes within language of statute requiring service or publication; term "adverse party" referring to such defendant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adverse Party.]

4. Prohibition 🔑20—On demurrer to petition to prohibit sale of attached property, affidavit attached as exhibit, alleging interest by affiant in property, held not to affect petitioner's allegations of ownership.

On demurrer to petition for writ of prohibition to prevent sale of property under an execution, affidavits by defendant in attachment proceedings, accompanying petition as exhibit only, and not adopted in petition, alleging affiant was using property attached in drilling well and that affiant purchased property, though showing affiant's interest in attached property, cannot affect positive allegations in petition that petitioner was at all times owner of property.

5. Prohibition 🔑3(5)—Petitioner for prohibition against sale of attached property, not appearing in attachment proceedings, held not to have adequate legal remedy by giving undertaking discharging attachment (Code Civ. Proc. §§ 554, 555).

Petition for prohibition to prevent sale of property under execution could not be defeated on ground that petitioner had adequate remedy at law, under Code Civ. Proc. § 554, providing that defendant appearing in action may have discharge of attachment on giving undertaking under section 555, where petitioner did not appear in action in which attachment was levied on property.

6. Prohibition 🔑10(1), 11—Prohibition to restrain sale of attached property for want of jurisdictional steps could not be defeated under rules prohibiting prohibition to correct error or excessive jurisdiction (Code Civ. Proc. § 548).

Rules that prohibition will not lie to correct mere error, and will not lie to correct excess of jurisdiction, unless point has been raised in jurisdiction attacked, *held* not applicable to petition for prohibition to prevent sale of attached property on ground that court had no jurisdiction to order immediate sale without taking jurisdictional steps required by Code Civ. Proc. § 548.

7. Certiorari 🔑1—Writ of review applies only to annul court order.

Writ of review can be resorted to only for purpose of annulling order of court complained of.

8. Certiorari 🔑64(1)—On writ of review, annulment of order can only be determined on record on which order is made.

On writ of review, record on which assailed order is made is only basis on which it is to be determined whether order is to be annulled.

9. Prohibition 🔑3(2)—Prohibition to prevent sale of attached property alleged to be owned by petitioner could not be defeated because of remedy by writ of review of order of sale, record of which did not show plaintiff's ownership.

Writ of prohibition to prevent sale of attached property, based on allegation that petitioner not appearing in attachment proceeding or served therein was sole owner of property, a fact which did not appear in record leading to order requiring sale, could not be defeated on ground that petitioner had remedy by writ of review, since writ of review would afford petitioner no remedy at all.

Application for writ of prohibition by J. B. Melick against the Superior Court of the State of California in and for Los Angeles County and another. Writ granted.

Stanley Pedder, of San Francisco, and Frankley & Spray, of Los Angeles, for petitioner.

Raymond B. Wells and Hiram E. Casey, both of Los Angeles, for respondent Kelley.

WORKS, P. J. This is a proceeding for the writ of prohibition. It appears from the petition upon which the alternative writ was issued that an action was commenced in respondent court by respondent Kelley against five defendants, two of whom were one J. H. Cochran and the petitioner here, J. B. Melick; that summons and complaint therein were served upon Cochran, but that no service was ever made upon petitioner, nor were any steps ever taken to procure a publication of summons as to him, nor did he ever appear in the action; that a writ of attachment issued in the action by virtue of which the sheriff attached certain property, and that petitioner is, and at all times mentioned in his petition was, the sole owner of the property thus seized; that thereafter Cochran, and he only, was served with a notice of motion for an immediate sale of the property attached; and that such proceedings were thereafter had that the motion was granted and an immediate sale was ordered. The writ of prohibition is sought for the purpose of preventing the sale.

Respondent Kelley made return to the petition by answer and by general demurrer, but at the oral argument the answer was withdrawn, and respondent Kelley stood upon the demurrer. There are no other appearances, but no point is made because of the failure of respondent court to appear. The appearance of respondent Kelley will therefore be considered as if it had been made by respondent court.

[1] Section 548 of the Code of Civil Procedure, under which the order for an immediate sale was made, provides in part:

> "Such order can be made only (1) after notice to the adverse party or his attorney in case such party has been personally served with a summons in the action, or (2) after an order of service of summons by publication has been made."

The first point to be determined by us is whether respondent court had jurisdiction to order the immediate sale of petitioner's property. In other words, is the section of the Code satisfied by notice to one defendant, not the owner of attached property, where more than one are sued, and where a defendant other than the one served with notice is the owner?

[2, 3] We need not decide whether the language of the statute providing for notice "to the adverse party" operates as a mandate requiring notice to all defendants in an action in which more than one are sued and served with process, for the contention now before us is satisfied by a determination of the question whether the notice is sufficient, if given to a defendant who is not the owner of the property seized. It will be observed that under the statement of facts above made, in the light of the statute, notice to petitioner was not legally possible. Our attention is directed to no authority upon the question before us, and apparently none exists. The mere statement of the question, however, seems to carry an answer to it. While no insinuation is made that such a state of affairs exists here, the perpetration of gross frauds would be invited under a construction of section 548 which would admit of an immediate sale upon mere notice to a defendant having no interest in the attached property. This is so apparent that the specific means whereby such frauds could be committed need not be pointed out. It cannot be believed that the Legislature intended to hold out such a temptation to unfair dealing. We cannot escape the view that the legislative intent was that notice should be given the defendant or defendants who own the property attached in a given case, provided they come within the language of the statute requiring service of publication. We think "the adverse party" mentioned in the section is such a defendant, or such defendants. Indeed, respondent Kelley seems to concede this point, for he says in his brief:

> "It is plainly evident that the 'adverse party' referred to in the foregoing Code provision means the party who would be adversely affected by the sale of the attached property, and not necessarily all of the defendants."

[4] But respondent Kelley follows this concession with several contentions in which we cannot follow him. He makes the point, for instance, although half-heartedly, that the petition before us does not show that the attached property belongs to petitioner, despite the positive allegation therein that it does. We term his contention half-hearted, because he asserts that certain matters appearing in an exhibit attached to the petition, to which we shall refer more specifically in a moment, "leave considerable doubt as to whether the property in question was the property of Melick, of Cochran, or of 'the defendants.'" The exhibit to which we allude is a copy of an affidavit filed by Cochran with respondent court, for he appeared in response to the notice of motion served upon him, and objected to the making of the order for an immediate sale of the attached property. The property seized by the sheriff consists of certain oil well equipment, including an oil derrick, and at the time of the levy of the attachment it was actually in use in the putting down of an oil well. The affidavit of Cochran contains statements to the effect that "affiant is now engaged in the drilling" of the well, "that affiant has expended approximately $40,000 in the drilling of said well to its present depth," that if the attached property were sold at once "the lease of affiant and defendants" on the oil well property would be canceled, "that if the derrick herein referred to on affiant's property is sold" certain stated consequences would follow, "that at the time affiant purchased the [attached] property from said plaintiff" certain terms were given, "and that

at said time affiant signed a conditional sales contract."

It is clear to us, under well-known rules of pleading, that these statements in Cochran's affidavit, assuming for the sake of argument that they amount to assertions by Cochran that he has an interest in the attached property, can neither control nor affect the positive allegation by petitioner in his petition that he is and was at all times which are of interest here the owner of it. The statements of Cochran are not adopted in the petition, and his affidavit accompanies the pleading as an exhibit only for the purpose of showing the chain of proceedings leading to the order for an immediate sale of the attached property.

[5] It is insisted by respondent Kelley that petitioner has a plain, speedy, and adequate remedy at law, and that therefore he cannot be awarded relief under the writ of prohibition. The argument upon this contention is divided into several branches. The point is first made that petitioner could have had the attached property released by giving the undertaking contemplated by section 554 of the Code of Civil Procedure, but the contention fails because of the positive language of the section. The enactment provides that, "whenever any defendant has appeared in the action, such defendant may upon reasonable notice to the plaintiff" apply for a discharge of an attachment upon giving the undertaking mentioned in the section and in section 555. It has already been seen that petitioner has never appeared in the action in which the attachment was levied upon his property.

[6] Respondent Kelley next contends that petitioner had an adequate remedy at law by motion in respondent court to set aside the order requiring an immediate sale. This point is not argued. Counsel content themselves with brief quotations from several authorities in support of it. One of these quotations relates to the proposition that we must assume that, if petitioner made such a motion, respondent court would decide the motion correctly. There is such a rule, beyond a doubt. One quotation is to the effect that prohibition will not lie to correct mere error. This well-known rule has no application here, for the question before us is whether respondent court could order an immediate sale of petitioner's property without taking the jurisdictional steps required by the section of the Code under which the order was attempted to be made. Two of the quotations are to the effect that prohibition will not lie to correct an excess of jurisdiction, unless the point relied on has been made in the tribunal whose jurisdiction is sought to be assailed. This is the general rule, no doubt, but there are notable exceptions to it, and we think the present proceeding comes within the exceptions, and not within the rule. So much seems to have been decided in Grinbaum v. Superior Court, 192 Cal. 528, 221 P. 635, a proceeding for the writ of review, in which it was contended that the petitioner had an adequate remedy at law by motion in the respondent court. In discussing this point the Supreme Court said:

> "As to the petitioner's second suggested remedy, viz. that of a motion to set aside such void order in the court making the same, in response to this suggestion it may be stated that it has never been the practice to require a party injuriously affected by a judgment or order of a court which court had never acquired jurisdiction over either his person or property to make the same, to first apply to the court making said order to have the same vacated; nor should it be so in reason, since to apply such a rule would be to require such a party to submit himself to the jurisdiction of the court making such void order, and thus commit himself thenceforward to the tender mercy of the court making the same. We are cited to no authority which goes so far as to hold that a person having a clear right to make a direct attack by certiorari upon a judgment or order of a judicial tribunal upon the ground of lack of jurisdiction must first seek relief from such judgment or order in the court which was without jurisdiction to make or enter the same. The cases of Rue v. Quinn, 137 Cal. 651 [66 P. 216, 70 P. 732], People v. Davis, 143 Cal. 673 [77 P. 651], and Benning v. Superior Court, 34 Cal. App. 296 [167 P. 291], go no further than to hold that a party affected by an order of a court, void upon its face, may apply to the court making the same, to have it vacated, but do not hold that such party is obliged to do so before applying for a writ of review. On the other hand, in the case of Havemeyer v. Superior Court, 84 Cal. 327 [24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192], which arose on application for a writ of prohibition, this court, after an exhaustive consideration of the subject, said (page 405 [24 P. 141]): 'If a want of jurisdiction is apparent on the face of the proceeding in the lower court, no plea or preliminary objection *is necessary* before suing out the writ of prohibition.' This we think to be the true and reasonable rule applicable to cases of this character."

[7-9] Respondent Kelley insists that petitioner may not have the writ of prohibition, because he may have relief by means of the writ of review; the order made by respondent court not being appealable. Henry Cowell Lime & C. Co. v. Figel, 27 Cal. App. 11, 148 P. 796. Granting that the right to the writ of review will bar the right to prohibition if a proceeding of the latter nature is invoked to accomplish a purpose which can be attained by a proceeding for review, no such situation is presented here. If petitioner had sought the writ of review, his resort to that remedy could have been for no other purpose than to annul the order of respondent court of which he now complains. Such is the end only which can be reached by that proceeding. Moreover, on review, the record upon which an assailed order is made is the only basis upon which it is to be determined

whether the order is to be annulled. Here petitioner seeks to prevent the carrying out of the order for an immediate sale of his property. That relief is asked upon the allegation in his petition that he is the sole owner of the property, a fact which nowhere appears in the record leading to the order. It is manifest that in this instance review would not merely be no adequate remedy. It would afford petitioner no remedy at all.

Demurrer overruled. A peremptory writ of prohibition will issue.

We concur: CRAIG, J.; THOMPSON, J.

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93 Cal. App. 509

RHOADES v. SILVIUS. (Civ. 5186.)

District Court of Appeal, Second District, Division 1, California. Aug. 16, 1928.

1. Bills and notes 🔑443(4)—Indorsement in blank and assignment for collection constitute sufficient transfer of note to authorize suit by assignee (Civ. Code, §§ 1459, 3115).

Indorsement of note in blank by competent officer of payee bank, and assignment thereof to another for collection, constitute a transfer sufficient to authorize assignee to maintain action thereon, under Civ. Code, §§ 1459, 3115.

2. Appeal and error 🔑1011(1)—Findings on conflicting evidence as to whether guarantor tendered payment of note must prevail.

Findings on conflicting evidence as to whether defendant guarantor tendered payment of note sued on must prevail.

3. Guaranty 🔑25(3)—Evidence held not to show that guaranty contract was made without separate consideration after delivery of note (Civ. Code, § 2792).

In action against guarantor on note, evidence *held* not to show that contract of guaranty was made after delivery of note, without separate consideration, and hence void under Civ. Code, § 2792.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by F. C. Rhoades against F. D. Silvius and another. From a judgment against the named defendant, he appeals. Affirmed.

Albert G. Payne, of Los Angeles, for appellant.

Frank M. Bering, of Los Angeles, for respondent.

CONREY, P. J. This action was brought against Higgins, the maker of the note, and Silvius, guarantor of its payment. Judgment by default was entered against the maker. After trial of the case against the guarantor, judgment was entered against him, from which judgment he now appeals.

The grounds of appeal, as gleaned from the brief for appellant (there being no clear statement of points and authorities, and there being no index of contents or table of cases, as required by the rules of court), appear to be: First, that the plaintiff is not entitled to maintain the action; second, that appellant tendered payment of the note and that the offered payment was refused; third, that the contract of guaranty was made subsequently to the delivery of the note and without any separate consideration, and is therefore void under the provisions of section 2792 of the Civil Code.

[1] The note was made to the Citizens' Trust & Savings Bank of Los Angeles. The assistant cashier of the bank testified that the note was assigned to plaintiff, Rhoades, for collection. The note itself, as produced in evidence by the plaintiff, bears the bank's indorsement in blank, placed thereon by a competent officer. These facts constitute a transfer sufficient to authorize the plaintiff to maintain the action. Civ. Code, §§ 1459, 3115; Ralph v. Anderson, 187 Cal. 45, 200 P. 940; Giselman v. Starr, 106 Cal. 651, 657, 658, 40 P. 8.

[2] Appellant testified that, on a date after the note fell due, and in response to a letter from the bank demanding payment, he went to the bank with sufficient funds in hand for payment of the note, and told the assistant cashier, Mr. Ralston, that he was ready to pay, and asked for an assignment of the note to himself; that Mr. Ralston responded that arrangements had been made with the Third Street Branch, another branch of the same bank, to handle the matter. Assuming, without deciding, that appellant's testimony, if uncontradicted, was sufficient to establish a valid tender, we are met by the fact that Mr. Ralston denied that appellant ever offered him any money in payment of or on account of said note, or ever asked for an assignment thereof. On this point, therefore, the case is reduced to the familiar condition wherein there was a conflict in the evidence, and the findings must prevail.

[3] The contract of guaranty signed by appellant was indorsed on the back of the note. The only evidence concerning the time of signature by appellant is in his own testimony, wherein appellant stated, in substance, as follows:

"Q. Mr. Silvius, was this the first note that you indorsed at this bank for Mrs. Higgins? A. This was a renewal. * * * Q. Now, was she present when you indorsed this as guarantor? A. No, sir. Q. What was the condition of the note when you indorsed it; had she signed it? A. Yes, sir. Q. What did they say to you, if anything, about the former note of which this is a renewal? A. That it had run out and they wanted it renewed. Q. How long after Mrs.

Higgins had signed the note, if she had signed it? A. I don't know; I expect two or three days afterwards. Q. Did you receive anything for it? A. No, sir. Q. Did they say anything about what they had done with the former note which you had signed? A. I suppose they tore it up. Q. Did they say anything about it? A. No, sir. Q. What did they say about Mrs. Higgins having signed this note previously, if anything? A. They said she signed it and left it there for me to sign later on."

The foregoing testimony is entirely consistent with the facts of a single transaction. No effort was made by appellant to prove that the former note had been surrendered to the maker and the note accepted by the bank before the guaranty was signed. On the contrary, assuming that the ordinary course of business was followed, the former note was not surrendered or the new note accepted until appellant had signed the contract of guaranty.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

93 Cal. App. 504

PEOPLE v. HUNTLEY. (Cr. 1478.)

District Court of Appeal, First District, Division 1, California. Aug. 16, 1928.

1. Bigamy ⚷7—Prosecution need not prove, in bigamy trial, that prior marriage was in force at time of second marriage; burden being on defendant to prove contrary (Pen. Code, §§ 281, 282).

In trial for bigamy, under Pen. Code, § 281, it is incumbent on prosecution to prove first and second marriages and that former spouse is living, but not that prior marriage was still in force at time of second marriage; burden being on defendant to show that case is within exceptions enumerated in section 282.

2. Criminal law ⚷315—Marriage status, proved by prosecution in bigamy trial, is presumed to have continued, in absence of contrary evidence (Pen. Code, §§ 281, 282).

Marriage status having been proved in bigamy trial under Pen. Code, § 281, and no evidence introduced that defendant did not know that former marriage had been dissolved or that first wife had been absent for five years without being known by defendant to be living, as provided by section 282, presumption is that such status continued to exist.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Joseph M. Huntley was convicted of bigamy, and he appeals. Affirmed.

E. E. Gehring, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

TYLER, P. J. [1] Appellant was charged by information with the crime of bigamy. It was alleged, in substance, that on or about June 1, 1927, defendant unlawfully married one Nellie Jones, when at such time he had a lawful wife living. To this indictment defendant pleaded not guilty. Trial was had, which resulted in a conviction. It was proved that defendant had married one Phoebe Huntley in the year 1914. It was also proved that on June 1, 1927, defendant married one Nellie Jones, and that at such time Phoebe Huntley was still alive. The prosecution then rested, and, defendant failing to take the stand, no further evidence was introduced. Motion for an instructed verdict was thereupon made that defendant be acquitted, as the evidence was insufficient to sustain a verdict of conviction; the prosecution having failed to show that the first marriage was in full force and effect at the time the second marriage was entered into. The motion was denied. Defendant then offered an instruction to the same effect, which was refused. The verdict of conviction followed. Appellant's sole contention is that it was not only necessary for the prosecution to prove the two marriages, but that it should have gone further, as the burden was upon it to prove that the prior marriage was still in force and effect at the time of the second marriage. There is no merit in the contention. Section 281 of the Penal Code defines the crime of bigamy as follows: Every person having a husband or wife living, who marries any other person, except in cases specified in the next section, is guilty of bigamy. The section referred to (282) provides that section 281 does not extend (1) to any person by reason of any former marriage, whose husband or wife by such marriage has been absent for five successive years without being known to such person within that time to be living; nor (2) to any person by reason of any former marriage which has been pronounced void, annulled, or dissolved by the judgment of a competent court. In a prosecution for bigamy under section 281, Penal Code, it is incumbent on the prosecution to prove, not only the first and second marriages, but also that the former husband or wife was living. 4 Cal. Jur. p. 346. In the present case this was done. It then became incumbent upon defendant to show that the case came within a class enumerated in section 282. This is on the theory that, when a defendant is, in the first instance, shown to have done an act which is unlawful unless he was distinctly authorized to do it, the proof of authority is thrown upon him. Commonwealth v. Boyer, 7 Allen (89 Mass.) 306. The exceptions contained in section 282 constitute, therefore, only matters of defense. The offense as defined in section 281 consists in marrying a second time while the husband or wife of a

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

defendant is still living. People v. Priestly, 17 Cal. App. 171, 118 P. 965. The question as to whether or not a first marriage no longer exists is one peculiarly within the knowledge of a defendant, and in such a case the burden is upon him to prove it. Commonwealth v. Boyer, supra. This burden is not an unreasonable one (People v. Velasquez, 70 Cal. App. 362, 233 P. 359).

[2] Then again, the marriage status having been proved, and there being no evidence to show that defendant did not know that his former marriage had been pronounced void, annulled, or dissolved, or that the first wife had been absent for five years without being known by the defendant to be living, the presumption is that the status as shown by the prosecution continued to exist. People v. Stokes, 71 Cal. 263, 12 P. 71.

The judgment is affirmed.

We concur: CAMPBELL, Justice pro tem.; KNIGHT, J.

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93 Cal. App. 516

ALTMAN v. BLEWETT.

ANDERSON et al. v. SAME.

(Civ. Nos. 3530, 3531.)

District Court of Appeal, Third District, California. Aug. 16, 1928.

1. Vendor and purchaser ⚷18(3)—Judgments that vendor's title was subject to purchasers' right to purchase on happening of certain event held not to change time for exercise of options to purchase.

Where defendant, who sold two lots to plaintiffs under agreement that, when a street was put through two other lots, defendant would sell remainder of such lots to plaintiffs, subsequently defendant commenced actions against plaintiffs to quiet title to the latter two lots, in which actions it was adjudged that defendant's title was subject to plaintiffs' options to purchase said lots when street was put through, *held*, that said judgments adjudicated validity of the contracts, and defined plaintiffs' and defendant's respective interests, but did not change time for exercise of options to purchase, nor make it incumbent on plaintiffs to exercise options on entry of judgments, instead of on dedication of property to street uses.

2. Quieting title ⚷19—Object of action to quiet title is to finally determine controversy, as between parties, by settling all conflicting claims (Code Civ. Proc. § 738).

Under Code Civ. Proc. § 738, an action to quiet title is brought to determine any adverse claims that may be asserted by defendant to land in controversy, and court must declare and define interest held by defendant, if any, so that plaintiff may have a decree finally adjudicating extent of his own interest in property; object of action being to finally determine, as between the parties, all conflicting claims to property, and to decree to each such interest or estate therein as he may be entitled to.

3. Specific performance ⚷105(3)—Right to enforce options to purchase, effective November 10, exercised on following November 15 and January 2, respectively, held not barred by laches.

Where plaintiffs' time for exercising options to purchase realty did not arrive until condemnation judgment was entered on November 10, 1924, and in the case of two lots involved options were accepted and payment of price tendered on November 15 and January 2, 1925, respectively, *held*, that plaintiffs' right of action for specific performance was not barred by equitable laches.

4. Assignments ⚷18—Contract to convey other lots on happening of certain event held assignable.

Vendor's contract to convey other lots to purchaser when a street was put through such other lots *held* assignable, and enforceable by assignee, in absence of words of limitation in option to purchase forbidding its assignment, or of circumstances showing that it was given because of peculiar trust or confidence reposed in optionee.

5. Specific performance ⚷51—Fairness and reasonableness of contract to convey must be determined from conditions at execution of contract; subsequent increase in value being immaterial, as respects specific performance.

As respects plaintiffs' right to enforce specific performance of defendant's contracts to sell realty to plaintiffs on happening of certain contingency, the fairness and reasonableness of the contract must be determined from the conditions existing at the time the contracts were made, and fact that property increased in value since that time is immaterial.

Appeals from Superior Court, Los Angeles County; Walter Guerin, Judge.

Separate actions by J. J. Altman and by Charles E. Anderson and another against Sophia L. Blewett. From judgments for defendant in both actions, plaintiffs appeal. Reversed.

Wm. P. Mealey, of Los Angeles, for appellants.

Haas & Dunnigan, of Los Angeles, for respondent.

BARTLETT, Justice pro tem. It has been stipulated that these two appeals may be heard and determined together; the issues involved being practically identical in both cases. Both actions are for the specific enforcement of contracts for the conveyance of real property, or for damages in case specific performance cannot be decreed.

In action No. 3530, Altman v. Blewett, conveyance from defendant to plaintiff of the southerly 20 feet of lot 6 of the George A. Blewett Home Tract, as per Map Book 3, page 53, of Los Angeles county records, is asked, or, in the event this cannot be decreed, for damages in favor of plaintiff for $5,580. In action No. 3531, Anderson and Anderson v. Blewett, conveyance from defendant to plaintiffs of the southerly 20 feet of lot 12 of the George A. Blewett Home Tract, as per Map Book 3, page 53, Los Angeles county records, is asked, or, in the event this cannot be decreed, for damages in favor of plaintiffs for $1,190.

An answer to the complaint was filed in both actions, and, when the cases came on for trial, objections were sustained to the admission of any evidence on behalf of plaintiffs in support of the allegations in the complaints, and judgments were entered for defendant and against plaintiffs in both actions. From these judgments plaintiffs have taken their appeals; the same being presented on a certified copy of the judgment roll in each action.

In action 3530 plaintiff and defendant are the original parties to the contract of sale on which the controversy is based, while in action 3531 the plaintiffs Charles E. Anderson and Segrid Anderson are the successors in interest of Mary Altman, the original party to the contract of sale with defendant, Sophia L. Blewett, on which the controversy is based.

The contract involved in action 3530 is set forth in full in the complaint and reads as follows:

"Los Angeles, Nov. 20, 1905.

"This contract between George A. and Sophia L. Blewett and J. J. Altman for the purchase of lot 5 of the George A. Blewett Home Tract. The price to be paid for said lot 5 being four hundred and fifty dollars, $450.00, two hundred dollars to be paid at the execution of said contract, the balance of the money on said lot 5 to be paid on or before two years from date, the sum being two hundred and fifty dollars $250.00 at the rate of ten per cent. *enterst* per annum, the *e*nterest to be paid semiannually, and if buyer pays taxes on said lot 5, a rebate of three per cent. is to be returned to said J. J. Altman, and when balance of *of* money is paid on said lot 5 a deed and certificates of title will be given free of charge to J. J. Altman and in case that the street is put through lots 6, 12 and 18, the remaining twenty feet, more or less of said lot 6 can be bought for the same price as lot 5 is sold at. A building restriction on said lot 5 to be nothing less than $1,500.00, fifteen hundred dollars and the main building not to be erected any closer than twenty five feet from the lot line.

"Restriction to hold good for five years.

"Sophia L. Blewett.
"George A. Blewett.
"J. J. Altman."

The contract involved in action 3531 is set forth in full in the complaint and reads as follows:

"Los Angeles, April 27, 1906.

"This contract between George A. and Sophia L. Blewett and Mary Altman, for the purchase of lot 11, of the George A. Blewett Home Tract. The price to be paid for said 11, being $550.00, five hundred and fifty dollars, two hundred to be paid at the execution of said contract, the balance of the money, three hundred and fifty dollars due on said lot 11, to be paid on or before eighteen months from date of said contract at the rate of ten per cent. interest per annum, the interest to be paid semiannually, and if buyer pays the taxes on said lot 11, a rebate of three per cent. is returned to said Mary Altman. And when balance on said lot 11 is paid, a deed, and certificate of title, will be given free of charge to Mary Altman. And in case that the street is put through lots 6, 12 and 18, the remaining 20 feet (more or less), of said lot 12 can be bought for the same price, lot 11 is sold for, building restrictions on said lot 11 to be nothing less than fifteen hundred dollars $1,500.00, the main building not to be erected any closer than twenty-five feet from the lot line. Building restrictions to hold good for five years. Sophia L. Blewett.

"Mary Altman. George A. Blewett."

The material allegations averred in the complaint are: Ownership and subdivision and placing upon the market prior to November 20, 1905, by defendant of the George A. Blewett Home Tract, situated in the city of Los Angeles, between Vermont avenue and Hoover street of that city; location of lots 5 and 11 of said tract as being back to back, lot 5 facing easterly on Hoover street and lot 11 facing westerly towards Vermont avenue, and lot 6 of said tract lying immediately north of lot 5 and lot 12 immediately north of lot 11; lot 6, when the contract was made on November 20, 1905, being 50 feet in width, and lot 12, when the contract was made on April 27, 1906, being 50 feet in width; entry into on November 20, 1905, by defendant with plaintiff Altman of the contract of that date concerning lots 5 and 6 above set forth, and entry into on April 27, 1906, by defendant with predecessors in interest of plaintiffs Anderson of the contract of that date concerning lots 11 and 12 above set forth; representation by defendant to the purchasers of lot 5 and lot 11 at the time of making the contracts that Forty-First drive would be opened through and opposite lots 6 and 12 of the tract as a public street from Vermont avenue to Hoover street; declaration of intent of defendant to dedicate for street purposes and as a part of Forty-First drive the northerly 30 feet of lots 6 and 12; that after the dedication of the northerly 30 feet of lots 6 and 12 there would remain 20 feet off the southerly side of lots 6 and 12 to be used in connection with lots 5 and 11; the giving by defendant to plaintiff Altman the right and option to purchase the remaining 20 feet of lot 6 in case the street is put through lots 6, 12, and 18 for the same price lot 5 is sold at, and the giving by defendant to the purchasers of lot 11 the right and option to purchase the remaining 20 feet of lot 12 in case the street is put through lots 6, 12, and 18, for the same price lot 11 is sold at; that the right to purchase the remaining 20 feet of lots 6 and 12 by the purchasers of lots 5 and 11 was a part of the consideration of the contracts to purchase lots 5 and 11; that the purchasers would not have purchased lots 5 and 11 without the right given to purchase the remaining 20 feet of lots 6 and 12; that when the contracts were made defendant owned the lands lying northerly of lots 6 and 12 from which land the northerly 30 feet of Forty-First drive opposite lots 6 and 12 was to be taken; that after making the contracts defendant sold the land north of lots 6 and 12 and the purchaser thereof dedicated for street purposes the northerly 30 feet of lots 6 and 12; that on November 6, 1906, defendant made, executed and delivered to plaintiff Altman a bargain and sale deed conveying to plaintiff lot 5, and that on June 27, 1907, defendant made, executed and delivered to Mary Altman, a predecessor in interest of plaintiffs Anderson, a bargain and sale deed of lot 11; that after the making of these deeds, and on November 3, 1913, defendant commenced an action against plaintiff Altman, and a similar action against the predecessor in interest of plaintiffs Anderson to quiet the title to lots 6 and 12 by which actions defendant sought to clear the title to said lots of any rights vested in the defendant Altman to lot 6 and of any rights vested in the predecessor in interest of the plaintiffs Anderson to lot 12 to purchase the southerly 20 feet of said lots upon the opening of Forty-First drive; that these complaints were duly answered and said actions tried in the superior court of Los Angeles county, California, and judgments rendered therein whereby it was decreed that defendant was the owner of lots 6 and 12, subject to the right of plaintiff Altman to purchase the southerly 20 feet of lot 6 for the sum of $9 per front foot, with interest thereon at 7 per cent. per annum from November 20, 1905, whenever Forty-First drive shall be opened to a width of 60 feet from Vermont avenue to Hoover street, opposite to lots 6, 12 and 18 of the George A. Blewett Home Tract, and subject to the right of the predecessor in interest of defendants Anderson to purchase the southerly 20 feet of lot 12 for the sum of $11 per front foot, with interest thereon at 7 per cent. per annum from April 27, 1906, whenever Forty-First drive shall have been opened a width of 60 feet from Vermont avenue to Hoover street opposite lots 6, 12, and 18 of the George A. Blewett Home Tract; that the sum of $9 per front foot was the price paid for lot 5, and $11 per front foot the price paid for lot 11; that after the rendering of said judgments and on or about September 13, 1922, the defendant in the action involving title to lot 12 transferred and conveyed lot 11 and all his right, title, and interest in and to lot 12, and all his right, title, and interest in and to the contract relating to lot 12, to one Herbert E. White, who thereafter transferred and conveyed the same to the defendants Anderson; that on June 16, 1923, the city of Los Angeles commenced an action in the superior court of Los Angeles county to condemn for street purposes the northerly 30 feet of lots 6 and 12 and such additional property as was necessary to open Forty-First drive as a 60-foot street through and opposite lots 6 and 12 from Vermont avenue to Hoover street; that thereafter such proceedings were had in this condemnation suit that a final judgment was entered condemning said property for street purposes, the judgment being entered on November 10, 1924; that thereupon Forty-First drive was opened as a 60-foot street from Vermont avenue to Hoover street, through and opposite lots 6 and 12; that thereafter plaintiffs accepted the options to purchase the southerly 20 feet of lots 6 and 12 and tendered defendant the amounts specified in the contracts and judgments as payment in full for the purchase price of the southerly 20 feet of said lots 6 and 12, with interest thereon at 7 per cent. per annum from the date of the contracts, and demanded a conveyance of said properties; the amount tendered by plaintiff Altman being the sum of $420, and the amount tendered by plaintiffs Anderson being the sum of $510; that plaintiff Altman accepted said option and made said tender on November 15, 1924, and plaintiffs Anderson accepted said option and made said tender on January 2, 1925, and that defendant refused to accept said moneys and refused to convey said properties.

The complaints allege readiness, willingness and ability on the part of plaintiffs to purchase the southerly 20 feet of lots 6 and 12 at all times since the date of the contracts whenever Forty-First drive should be opened from Vermont avenue to Hoover street, and it is alleged that the reasonable market value of the southerly 20 feet of lots 6 and 12 at the time of the making and execution of the contracts did not exceed $9 and $11 per front foot, respectively, and that the consideration so to be paid defendant was and is adequate consideration for the properties. In a second cause of action it is alleged in action 3530 that the market value of the southerly 20 feet of lot 6 when the tender of $420 was made therefor on November 15, 1924, was not less than $6,000, and in action 3531 in a second cause of action it is alleged that the market value of the southerly 20 feet of lot 12 when the tender of $510 was made therefor on January 2, 1925, was not less than $2,500. The record shows that the complaint in action 3530 was filed in the superior court of Los Angeles county on December 18, 1924, and that the complaint in action 3531 was filed on January 9, 1925.

[1, 2] But one question presented by each of the appeals is material for determination, and that is: What is the effect of the judgments made by the superior court of Los Angeles county in the actions to quiet title concerning these lots and the contracts involved, and which judgments are pleaded in the two complaints? Section 738 of the Code of Civil Procedure provides that an action may be brought by any person against another who claims an estate or interest in real or personal property adverse to him, for the purpose of determining such adverse claim. The purpose and province of actions to quiet title are clearly stated in the case of Peterson v. Gibbs, 147 Cal. 1, 81 P. 121, 109 Am. St. Rep. 107, where it is said:

> "Such an action is brought, as authorized by the statute, 'for the purpose of determining' any adverse claim that may be asserted therein by a defendant to the land in controversy, and this does not mean that the court is simply to ascertain, as against a plaintiff shown to have a legal interest, whether or not such defendant has some interest, but also that the court shall declare and define the interest held by the defendant, if any, so that the plaintiff may have a decree finally adjudicating the extent of his own interest in the property in controversy. The object of the action is to finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to."

That such is the purpose and object of this species of action is also set forth in Yuba Investment Co. v. Yuba Con. Gold Fields, 199 Cal. 203, 248 P. 672; Miller v. Oliver, 54 Cal. App. 505, 202 P. 172; Howard v. Howard, 67 Cal. App. 56, 226 P. 984; Akley v. Bassett, 68 Cal. App. 270, 228 P. 1057.

Defendant Sophia L. Blewett was plaintiff in both of the suits to quiet title, the judgments in which are pleaded in these actions, and it was on her initiative that the plaintiff in action 3530 and the predecessor in interest of plaintiffs in action 3531 came into court, and set forth their claim to purchase the southerly 20 feet of lots 6 and 12 in the George A. Blewett Home Tract whenever Forty-First drive in the city of Los Angeles shall have been opened to a width of 60 feet from Vermont avenue to Hoover street opposite lots 6, 12, and 18 of the tract. These asserted claims the trial court determined to be good and valid, it being decreed in the action that the answering defendants had a right to purchase the southerly 20 feet of lot 6 and the southerly 20 feet of lot 12 at a fixed and determined price per front foot whenever Forty-First drive in the city of Los Angeles shall have been opened to a width of 60 feet from Vermont avenue to Hoover street opposite to lots 6, 12, and 18. There is nothing uncertain about the extent of the interest which it was determined the defendants in the suits to quiet title had in the properties, nor as to when that interest would ripen into a right to demand a conveyance from the defendant here upon the payment to her of a fixed sum of money. The validity of the two contracts and their extent were completely adjudicated. The time for exercising the options did not arrive until the judgment was entered in the condemnation action brought by the city of Los Angeles, opening up Forty-First drive, which was entered on November 10, 1924. Five days thereafter, on November 15, 1924, the plaintiff in action 3530 tendered defendant $420 in payment for the southerly 20 feet of lot 6 and demanded a deed therefor, and on January 2, 1925, the plaintiffs in action 3531 tendered defendant $510, in payment for the southerly 20 feet of lot 12 and demanded a deed therefor. Under the judgments in the suits to quiet title no conclusion can be reached other than that plaintiffs herein were entitled to deeds of conveyance from defendant upon the making of the tenders of purchase price and demand for deeds for the southerly 20 feet of lots 6 and 12.

[3] The claim of defendant that plaintiffs are barred from the relief sought by reason of equitable laches because payment was not tendered and deeds demanded immediately after the entry of the judgments in the suits to quiet title is without merit upon the facts set forth in the record. In both contracts and judgments the time when the right to a conveyance to the owners of lots 5 and 11 was to arise was when a street 60 feet wide was extended through lots 6, 12, and 18. There is no question about what amount of money was to be paid to entitle plaintiffs to a conveyance. The decree determines that to be a certain rate per front foot for the southerly 20 feet of each lot and interest thereon at 7 per cent. per annum from the date of the contracts regarding lots 5 and 11.

The facts in the cases at bar are entirely different from those in Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516, and Marsh v. Lott, 156 Cal. 643, 105 P. 968, relied upon to support the claim of equitable laches. In the first of these cases plaintiff permitted 25 years to pass before taking any steps to enforce a right which had existed all of that time, while in the second case plaintiff waited 3 years after a defendant had repudiated an option, before bringing his action. The few days elapsing in this case after plaintiffs became entitled to demand a conveyance, before making their demand, cannot be regarded as in any way constituting equitable laches.

[4, 5] The defendant argues that plaintiffs in action 3531 cannot enforce the option given Mary Altman, as successor in interest of said Mary Altman. This contention is based upon a claim that the covenant in defendants' agreement with Mary Altman was a personal one not running with the land. The contract

entered into was to convey lot 11 and part of lot 12 upon the happening of certain events. It was an agreement to convey Mary Altman an interest in lot 12, and it cannot be questioned that Mary Altman had a right to convey this interest. There are no words of limitation in the option to purchase forbidding its assignment, or that it was given because of a peculiar trust or confidence reposed in the optionee. 25 Cal. Jur., p. 509, sec. 37; Simmons v. Zimmerman, 144 Cal. 256, 79 P. 451, Ann. Cas. 850; Blakeman v. Miller, 136 Cal. 138, 68 P. 587, 89 Am. St. Rep. 120. Defendant urges that the contracts sued upon are not fair and reasonable as to defendant and because of this that they cannot be specifically enforced. In this regard the question of fairness and reasonableness must be determined from the conditions existing at the time the contracts were made. The fact that the property has increased in value since the contracts were made has no bearing upon the question as to whether or not the contracts should be specifically enforced. The price the owner was to be paid was the fair market value of the property when the contracts were made. The possibility of an increase in value was an element to be taken into consideration when the contracts were entered into. It cannot be said that the contracts here involved were unfair, unequal or inequitable at the time of their inception. No wrongful or inequitable act on the part of plaintiffs concerning these contracts or arising therefrom appear from the facts alleged in the pleadings that would preclude the relief they are asking. They are seeking an interest in properties in pursuance of contracts which have been passed upon and adjudged legal and valid by a court of competent jurisdiction, in actions invoked by the defendant herein.

Each of the judgments appealed from is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

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93 Cal. App. 252

SCHWARZ v. SCHWARZ. (Civ. 6328.)

District Court of Appeal, First District, Division 2, California. July 24, 1928.

1. Appeal and error 🔑927(3)—On judgment of nonsuit in action to restrain unfair trade dealing, appellate court must assume that issue of unfair dealing, specially pleaded and supported by evidence, was proved.

Where judgment of nonsuit was rendered in action to enjoin defendant from conducting business under name similar to plaintiff's, and issue of unfair trade dealing was specially pleaded and supported by evidence, it must be assumed by appellate court that such issue was proved.

2. Trade-marks and trade-names and unfair competition 🔑75—Actual confusion by similarity of names need not be proved in action to restrain unfair trade dealing, remedy being available to prevent liability to deception.

In action to restrain defendant from conducting business, based on unfair trade dealing, it was not necessary to prove that third parties were actually confused by similarity of names, but remedy may be invoked to prevent liability to deception.

3. Trial 🔑165—Plaintiff is entitled to most favorable construction of all evidence on motion for nonsuit.

On motion for nonsuit in action to restrain defendant from conducting business, based on unfair trade dealing, plaintiff is entitled to most favorable construction of all evidence.

4. Trade-marks and trade-names and unfair competition 🔑75—Evidence showing defendant adopted scheme designed to deceive plaintiff's customers presented case of unfair dealing, entitling plaintiff to some part of relief demanded.

In action to restrain defendant from conducting business of commercial collections under similar name as that previously used by plaintiff, evidence showing unmistakably that defendant adopted scheme of advertising designed to deceive plaintiff's customers, that he actually solicited customers under false impression that he was merely establishing new office of plaintiff's organization, presented case of unfair trade dealing, and entitled plaintiff to some part of relief demanded.

5. Evidence 🔑591—Testimony of defendant, called by plaintiff under statute, held not binding on plaintiff (Code Civ. Proc. § 2055).

Where conflict in testimony in action to restrain unfair trade dealing arose in testimony of defendant, who was called by plaintiff under Code Civ. Proc. § 2055, plaintiff was not bound as to such testimony.

6. Appeal and error 🔑927(3)—Conflict in testimony should be disregarded on appeal from judgment of nonsuit in action to restrain unfair dealing.

On appeal from judgment of nonsuit in action to restrain unfair dealing, conflict in testimony should be disregarded.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action for injunction by Adolph M. Schwarz against Adolph M. Schwarz, Jr., also known as Louis A. Schwarz. Judgment for defendant, and plaintiff appeals. Reversed.

Newlin & Ashburn and R. L. Haight, all of Los Angeles, for appellant.

Abram M. Marks, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued to restrain defendant from conducting business under the name of "Adolph M. Schwarz, Jr., Commercial Collections," or variations of such name calculated to deceive the public, and also from soliciting the business of plaintiff's clientele and from using lists of plaintiff's customers obtained by defendant while he was in the employ of the plaintiff. The cause was tried before the court, and, upon the conclusion of plaintiff's case, the defendant's motion for a nonsuit was granted upon the ground that there was no evidence to sustain the allegations of the complaint. The plaintiff has appealed from the judgment upon a typewritten transcript.

Plaintiff had established and maintained collection agencies in some of the principal cities of the East, and, some two years prior to the filing of the complaint, had established branches of such agencies in San Francisco and Los Angeles. His son, the defendant in this case, had been installed as manager of the branch in Los Angeles, but in the month of August, 1925, because of mismanagement and defalcations on his part, he was ordered to turn over the management of the Los Angeles branch to another, and to report to the Cleveland office. On August 29, 1925, he opened another office in Los Angeles, and notified the customers of plaintiff that he had taken the entire personnel of the old office with him and solicited their business under the new management. Letterheads, billheads and other advertising matter were prepared by him under the name of "Adolph M. Schwarz, Jr., Commercial Collections Anywhere," obviously designed to deceive the customers of the plaintiff, who for many years theretofore had engaged in the business of commercial collections under the designation "Adolph M. Schwarz, Commercial Collections Everywhere" and Adolph M. Schwarz, Attorney and Counselor at Law, Commercial Collections Everywhere."

It was alleged in the complaint that the plaintiff had built up a valuable good will and reputation in commercial collections around the name "Adolph M. Schwarz, Commercial Collections" and "A. M. Schwarz." Though this allegation was denied in the answer, the truth of the allegation was proved beyond question at the trial. On some occasions plaintiff's organization was referred to merely as "Schwarz's" or the "Schwarz organization," or the "Schwarz Los Angeles office," but more frequently the full name of "Adolph M. or A. M. Schwarz" was used. Defendant's true name had been Louis Schwarz, but, before coming to California, he had assumed the name of Louis Carmen. During the time he was employed by plaintiff in the California offices he went under the name of Adolph M. Schwarz, Jr., and in February, 1925, with the consent of his father, he procured a decree of the superior court changing his name to A. M. Schwarz, Jr. Thereafter he conducted his business under that name, still being known "socially" as Louis Schwarz.

It is the theory of the complaint that the defendant's change of name was part of a scheme to defraud his father, and that, when the defendant opened the new offices in Los Angeles with letterheads, billheads, and other advertising matter of the same type, arrangement, and picture as those used by his father, it was with the intention of deceiving plaintiff's customers and causing confusion among them, to plaintiff's damage. There is no proof that defendant contemplated establishing an independent business when he made the change in his name, or that this change was made for any other purpose than to facilitate the handling of the father's business. All the proof, both oral and documentary, shows unmistakably that the defendant adopted a scheme of advertising designed to deceive plaintiff's customers, and that he actually solicited them "with all of the business houses of Los Angeles" under the false impression that he was merely establishing a new office of the Schwarz organization, taking with him "the entire personnel of the old office, consisting of high trained, efficient, and consummate collection talent."

[1] Unlike the case of Dunston v. Los Angeles Van & Storage Co., 165 Cal. 89, 131 P. 115, the issue of "unfair trade dealing" was specially pleaded, and all the evidence, and the presumptions and inferences applicable thereto, tended to prove the allegations of the complaint. The judgment having been on the nonsuit, we must therefore assume this issue to have been proved. Long v. Chronicle Publishing Co., 68 Cal. App. 171, 228 P. 873. Upon the case so made by plaintiff, he prayed for an injunction restraining defendant from conducting the business of commercial collections under the name of "Adolph M. Schwarz, Jr., Commercial Collections," or any variations of said name, consisting of the use of the words "A. M. Schwarz's," or "Adolph M. Schwarz's," or "Adolph M. Schwarz Company," either in conjunction with each other "or in conjunction with other words or name, so as to imitate or so closely resemble the name of the plaintiff as to result in confusion to the public or to the patrons, customers, dealers, clientele, or agencies of the plaintiff."

[2] Plaintiff offered one witness to testify that he had been confused over the two offices. It was not necessary to prove this. "It is the liability to deception which the remedy may be invoked to prevent." T. A. Vulcan v. Myers, 139 N. Y. 364, 34 N. E. 904. This subject is fully discussed in the opinion of Judge Thompson in Sun-Maid Raisin Growers v. Mosesian, (Cal. App.) 258 P. 630, 635.

[3-6] Giving the plaintiff the most favorable construction of all the evidence, as was necessary on the motion for nonsuit, it follows that he presented a case of unfair trade dealing which would have entitled him to

some part of the relief demanded. The defendant's answer on this appeal is that, as to those issues upon which plaintiff offered proof, the evidence was conflicting, and that we should not, therefore, disturb the judgment. The conflict arose in the testimony of the defendant, who was called by the plaintiff under section 2055 of the Code of Civil Procedure. As to such testimony the plaintiff was not bound, but, in any event, the conflict should be disregarded.

Judgment reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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93 Cal. App. 365

HARTSOCK et al. v. MERRITT, City Clerk.
(Civ. 6462.)

District Court of Appeal, First District, Division 2, California. July 30, 1928.

1. Municipal corporations ⚷159(1)—City clerk cannot reject petition for recall election as insufficient, where it conforms to all charter requirements.

The duty of the city clerk not being judicial, but merely to examine petition asking for election to consider recall of city commissioner, and to determine whether it is in form substantially outlined in city charter, is signed by the required number of qualified electors, and verified before a notary public or verification deputy, and, if such facts are found by him to exist, then to certify such facts to council and call election, rejection by him of petition on ground that it is "insufficient" *held* an erroneous conclusion of law.

2. Municipal corporations ⚷159(1)—City charter, requiring petition for recall election to be signed by qualified voters, does not require signatures to be identical with those on registration affidavits.

City charter, requiring that a petition for a recall election be signed by qualified voters, *held* not to require the signatures to be identical with those appearing on affidavits of registration.

3. Mandamus ⚷154(5)—Petition, alleging city clerk fraudulently refused to certify a petition for a recall election, held to state a cause of action.

Petition for a peremptory writ of mandate against city clerk, alleging he fraudulently refused to certify a petition for a recall election, and marked on individual election certificates a precinct number other than that in which elector resided, and then rejected them, *held* to state a cause of action.

Application by A. R. Hartsock and others for a writ of mandate against Frank C. Merritt, as City Clerk of the City of Oakland, to compel him to certify as sufficient a petition for a recall election. Referred to referee.

Frederick Dubovsky, of Oakland, for petitioners.

Preston Higgins, City Atty., C. Stanley Wood, Asst. City Atty., and Alfin N. Nelson, Chief Deputy City Atty., all of Oakland, for respondent.

NOURSE, J. The petitioner has moved for a peremptory writ of mandate upon a petition which he has filed, alleging that the respondent, as city clerk of the city of Oakland, has arbitrarily, and through coercion on the part of his superiors, fraudulently refused to certify as sufficient a petition filed with him asking for an election to vote upon the question of the recall of C. C. Young, one of the commissioners of said city. The respondent has filed a demurrer and answer at the same time, and the cause has been submitted on briefs.

[1] In support of the demurrer the respondent argues that his action in rejecting the petition, no matter how arbitrary or fraudulent it may be, is conclusive, and cannot be controlled by court action. In support of this argument he cites a former decision of this court. Fraser v. Cummings, 48 Cal. App. 504, 192 P. 100. In that case we held that the people of the city of Oakland—

> "have in their charter conferred upon the city clerk the exclusive power to finally determine whether a recall petition conforms to all requirements of the charter, and they have thereby denied to the courts the power of reviewing such determination in a proceeding of this kind."

But in the same paragraph we added that:

> "What might be done in a case where fraud is shown need not be determined because the petition here does not pretend to allege any fraud."

It is the duty of the city clerk to examine the individual certificates, for the purpose of ascertaining whether they comply with the requirements of the charter, and, if a sufficient number of valid certificates are filed, he must certify that fact to the council, and the election must then be called. Ratto v. Board of Trustees, 75 Cal. App. 724, 243 P. 466. The citizen is entitled to have this duty performed honestly and fairly, and, if it is shown to have been done fraudulently or arbitrarily, the action may be controlled by mandamus. Such, in fact, was the ruling in Fraser v. Cummings, supra, and this is supported by all the authorities.

The duty of the clerk is not judicial. Wright v. Engram, 186 Cal. 659, 201 P. 788. The charter requires him "to examine said petition to ascertain whether or not it conforms to all the requirements of this charter." He is not clothed with authority to receive extraneous evidence (Ratto v. Board of Trustees, 75 Cal. App. 724, 726, 243 P. 466), but must determine, from the face of the petition, whether it is "substantially" in the form outlined in the charter, and, from the records of registration, whether it is signed by the required number of qualified electors. In addition to this, he must determine whether the petition has been verified before a notary public or duly qualified verification deputy. If a petition in due form is signed by one who is, in fact, a qualified elector, and verified by him before one who is, in fact, a duly qualified notary public or verification deputy, it may not be rejected because of any fanciful notion which the clerk may have.

When these facts exist, his rejection of the certificate on the ground that it is "insufficient" is merely an erroneous conclusion upon a matter of law (Dufton v. Daniels, 190 Cal. 577, 581, 213 P. 949), and a breach of that public duty which the writ of mandate is designed to control (Section 1085, Code Civ. Proc.; Tulare Water Co. v. State Water Comm., 187 Cal. 533, 538, 202 P. 874; Conn v. City Council, 17 Cal. App. 705, 714, 121 P. 714, 719).

[2] As illustrative of the point, the petitioner here alleges that the respondent fraudulently marked on individual certificates a precinct number other than that in which the elector resided, and then rejected the certificate on the ground that such elector was not registered in the precinct designated. It is also alleged that the certificates of a large number of qualified electors were rejected solely because the elector signed his or her name differently from that appearing on the register of voters. The charter calls for a petition "signed by qualified electors." It does not require the signatures to be identical with those on the affidavits of registration. Conn v. City Council, supra, page 713 (121 P. 714, 719).

[3] It is unnecessary to discuss the petition further. It states a cause of action, and the demurrer must be overruled. The answer denies certain material allegations of the petition, and, though in many instances these denials are in conflict with public records prepared by the same respondent, we deem it proper to order a reference, in order that findings may be had and the proceedings finally determined. It is therefore ordered that the matter of ascertaining the truth of the allegations of fact hereinafter detailed be referred to Judge J. T. B. Warne, to take evidence and make findings thereon, at such time and place as he may direct, and to transmit his findings to this court for further proceedings. The questions of fact thus referred are: The number of individual certificates, if any, wrongfully rejected by the respondent under the separate headings specified in paragraph XIX of the petition, and the total number of valid certificates filed with the respondent in addition to those certified as valid by him, as admitted in the pleadings, and the total number of withdrawals thereof. It is further ordered that said referee take such evidence as may be offered upon the issue pleaded, that respondent's rejection of any of said certificates was wrongful, arbitrary, or fraudulent, and that all the evidence on that issue be transmitted to this court for further proceedings.

Pending the report of said referee, and until the further order of this court, the submission of all other matters connected with this proceeding is set aside. The clerk of this court is directed to transmit to said referee a certified copy of this order.

We concur: WARNE, Presiding Justice pro tem.; STURTEVANT, J.

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93 Cal. App. 320

ENGELHARDT v. SUPERIOR COURT IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6424.)★

District Court of Appeal, First District, Division 2, California. July 27, 1928.

Hearing Denied by Supreme Court Sept. 24, 1928.

1. Insane persons ⟹33(2)—Order appointing guardian of estate of incompetent residing outside county was reviewable by certiorari to test jurisdiction.

Order appointing guardian of estate of incompetent person not residing in county was reviewable by certiorari for alleged want of jurisdiction.

2. Insane persons ⟹33(1)—Failure of petition for letters of guardianship of incompetent adult to allege ward's residence in county held not to prevent court's exercise of jurisdiction (Code Civ. Proc. §§ 1763–1767, 1793; Pol. Code, § 4483).

Failure of petition for letters of guardianship of estate of incompetent adult to allege that ward was resident of county *held* not to prevent exercise of jurisdiction by superior court, under Code Civ. Proc. §§ 1763–1767, 1793, though jurisdiction as to appointment of guardians for minors extends only to inhabitants or residents under section 1747; question not being determined under entire chapter, sections 1747–1810c, in view of Pol. Code, § 4483, which requires that provisions of each article must prevail as to matters arising out of the subject-matter of such article.

3. Certiorari ⟹64(2)—Only jurisdictional errors are reviewable on application for certiorari (Code Civ. Proc. § 1068).

Errors committed by trial court other than jurisdictional errors may not be reviewed on application for certiorari, under Code Civ. Proc. § 1068.

Application by Ernestine Engelhardt for certiorari to review an order of the Superior Court in and for the City and County of San Francisco, Department No. 9 thereof, and

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★Hearing denied by Supreme Court.

Hon. Frank H. Dunne, Judge. Order affirmed.

Carl W. Mueller, of San Francisco, for petitioner.

Marion Vecki, of San Francisco, for respondents and Zentini.

STURTEVANT, J. [1] This is an application for a writ of review. The petitioner is attacking an order made by the trial court appointing a guardian of the estate of the petitioner, an alleged incompetent person of the age of 79 years.

In her point and authorities, the petitioner devotes much time in arguing that she has adopted the correct procedure. We think that she has. Grinbaum v. Superior Court, 192 Cal. 528, 221 P. 635.

[2] The gravamen of her complaint is that the trial court exceeded its jurisdiction when, under the facts, it made any order except to dismiss the application. This point rests on the claim that this petitioner was a resident of Alameda county at the time the order complained of was made in the city and county of San Francisco. The petitioner contends that the petition for letters should have alleged that the ward was a resident of San Francisco, and that such fact should have been sustained by the evidence. She claims the petition contained no allegation regarding her residence, that no evidence was adduced on the subject, and that the trial court therefore exceeded its jurisdiction.

The evidence taken in the trial court on the hearing of the application for letters has not been brought up, but she has brought up copies of the files in the guardianship proceeding. The respondents admit that in the petition there is no allegation as to the residence of the ward at the time the petition was filed, and respondents assert that such an allegation is not a necessary part of a petition for letters of guardianship of an alleged incompetent adult person, and they cite and rely on the provisions of article 2, c. 14, tit. 11, pt. 3, of the Code of Civil Procedure; that is, sections 1763–1767. The petitioner, on the other hand, claims that we should read together all of the sections of the entire chapter; that is, sections 1747–1810c. The chapter deals generally with the procedure applicable to proceedings entitled "Guardian and Ward." The first article deals with proceedings entitled "Guardians of Minors." The second article deals with proceedings entitled "Guardians of Insane and Incompetent Persons." Both articles are a codification of the Act of April 19, 1850 (Stats. 1850, p. 268), and the several acts amendatory thereof (1 Hittell's General Laws 487). Since 1850 it has been the law that the power of the probate court to appoint a guardian of the estate of a minor was limited to minors who were "inhabitants or residents" of the county in which the court was held, except, as we will note, during the same period there has been no such limitation as to the power to appoint a guardian of the estate of an insane or incompetent person. The exception existed in 1907. On March 23, 1907, two sections, each numbered 1763, were enacted. One of those sections (Stats. 1907, c. 514) contained a limitation as to residence. That law was of short duration. The length of its life need not be determined. Long before this case arose, it was repealed by amendment. Stats. 1909, p. 329. It is patent that article 1, supra, treats of the subject of the appointment of guardians of minors. It is equally patent that article 2, supra, treats of the subject of the appointment of guardians of insane and other incompetent persons. We are commanded to so construe both articles that "* * * the provisions of each article must prevail as to all matters and questions arising out of the subject-matter of such article." Pol. Code, § 4483. It is clear that, if we apply the latter rule, and we are commanded to do so, we must hold that the law did not require that the petition for letters of guardianship should allege that the ward was a resident of the city and county of San Francisco.

As stated above, the petitioner contends we should read together sections 1747–1810c, and that in doing so her contention is made clear. It is not. The reverse would be so. As to minors, the jurisdiction extends to "inhabitants or residents." Code Civ. Proc. § 1747. As to incompetents, the jurisdiction is not limited (Code Civ. Proc. § 1763), and, as to wards, whether minors or incompetents, who do not reside in the state, the court has jurisdiction, under certain circumstances, to appoint guardians of the estate and/or person of the ward (Code Civ. Proc. § 1793). The petitioner's contention therefore is not helpful.

However, there is a sound reason for the distinction which the Legislature has made. Presumptively a minor is not in possession of his estate, but an incompetent adult is. and, moreover, presumptively he has at least some of his personal property on his person, and is thus in need of the protection of the law whether in the location of his domicile or elsewhere. Apparently it is the theory of the law that the courts should be open to the friends of the incompetent to protect the latter in the possession of his property, whether the incompetent be a resident or "a stranger within your gates."

In her petition, the petitioner alleged that no citation was served upon her. The record shows it was. The real point is that, at the time the trial court made its order appointing a guardian of the estate of the petitioner, the records of the clerk of the trial court did not *show* that the citation had been *served.* That fact was later called to the attention of the trial court, and since February 16, 1928, the said record has been full and complete on the subject.

[3] The petitioner asserts that the trial court made certain other alleged errors. She does not claim that any one of them was jurisdictional. Conceding, solely for the purpose of this decision, that such errors, were made, they may not be reviewed on this application. Code Civ. Proc. § 1068. It does not appear that in any respect the trial court exceeded its jurisdiction in the proceedings resulting in the order appointing a guardian of the estate of the petitioner, and the proceedings are therefore affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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93 Cal. App. 346

CRAVIOTTO v. ALL PERSONS, etc., et al.

(Civ. 6086.)

District Court of Appeal, First District, Division 2, California. July 28, 1928.

1. Ejectment ⚿1, 3—Ejectment, though generally possessory action, may become means of trying title.

Action of ejectment is generally confined to cases where claimant has right of entry, but may become means of trying title where right to possession is based on claim of title.

2. Judgment ⚿725(4)—Judgment in ejectment action is res judicata of issue of title only to extent that adjudication thereof was essential.

Where title is alleged by either party as basis of his right to possession in ejectment suit, ejectment becomes res judicata on issue of title to the extent that adjudication thereof was essential, but not otherwise.

3. Judgment ⚿725(4)—Judgment in ejectment action that plaintiff therein, claiming title under both reversion and leasehold, take nothing as against defendant asserting right to possession under lease, held not res judicata of plaintiff's reversionary interest (Code Civ. Proc. § 1911).

Where plaintiff in former ejectment action claimed title to tidelands as owner of state's reversionary interest under Act of May 18, 1853 (Laws 1850-53, p. 767), and as owner of 99-year term given the city of San Francisco and conveyed by it under Act of March 26, 1851 (Stats. 1851, p. 307, Laws 1850-53, p. 764), and under Stats. 1851, p. 387, § 12, and answer of defendant asserted claim under the city's title as part owner entitled to possession, judgment that plaintiff take nothing *held* not res judicata of issue of plaintiff's title to the state's reversionary interest in the property, under Code Civ. Proc. § 1911, since possession depended on the right under the 99-year lease, and successor to plaintiff's interest was therefore not estopped to assert claim to state's title, in action under McEnerney Act (St. 1906 [Ex. Sess.] p. 78), to establish title.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Agostino Craviotto against Emma Rose and others. Judgment for defendant named, and plaintiff appeals. Affirmed.

John J. Mazza and Henry E. Monroe, both of San Francisco, for appellant.

Garret W. McEnerney, of San Francisco (Andrew F. Burke, of San Francisco, of counsel), for respondent.

PRESTON, Presiding Justice pro tem. Plaintiff, Agostino Craviotto, brought this action under the privisions of the McEnerney Act (St. 1906 [Ex. Sess.] p. 78) to establish his title to two parcels of land situate along the water front in the city and county of San Francisco. Defendant Emma Rose answered, alleging that she was the owner in fee simple of the reversionary interest in one of the lots described in plaintiff's complaint, and that as to this lot the plaintiff was only the owner of a leasehold interest therein, which will expire in the year 1950.

The case was tried by the court, and judgment was entered in favor of defendant Emma Rose, quieting her title in accordance with the allegations of her answer. From this judgment, plaintiff, Agostino Craviotto, prosecutes this appeal.

The record before us discloses these facts:

The land in controversy was originally tideland, and owned by the state of California by virtue of its sovereignty, and was conveyed in separate interests. On March 26, 1851, the Legislature of California passed an act granting to the city of San Francisco the "use and occupation of the tidelands of San Francisco for a term of 99 years" from the date of said act. Stats. 1851, p. 307; Laws 1850-53, p. 764. The interest thus conveyed to the city of San Francisco is known, and will be hereafter referred to as the city title. The city title will expire by its own limitations on March 25, 1950. In May, 1851, scarcely more than a month after the enactment of the act just mentioned, the Legislature passed another act, entitled, "An act to authorize the funding of the floating debt of the city of San Francisco and to provide for the payment of the same." Stats. 1851, p. 387. The latter act appointed five persons as "commissioners of the funded debt of San Francisco," and gave them power, among other things, to lease or sell the property of the city which might be conveyed to them for that purpose. Section 12 of the act required that a commission theretofore created by an ordinance of the common council of San Francisco for the purpose of liquidating the debts of the city, and known as "commissioners of the sinking fund," should convey to the "commissioners of the funded debt of San Francisco," created by the statute, all the property and all the right, title, and interest in property belonging to the city. Pursuant to this provision of the statute, the "commissioners of the sinking fund," by deed dated May 24, 1851, conveyed to the "commissioners of the funded debt," appointed by the statute of May 1, 1851, all the interest of San Francisco in the tidelands, including the parcel in controversy in the case at bar. The effect of said deed was to *divest* the city of San Francisco of the city title to the land in dispute in this action, which was the only interest that the city had therein, and to vest the same in the said "commissioners of the funded debt." Board of Education v. Fowler, 19 Cal. 22; Friedman v. Nelson, 53 Cal. 596; Le Roy v. Dunkerly, 54 Cal. 458.

By deed dated September 20, 1852, the said "commissioners of the funded debt," the owners of the city title, conveyed to one Charles D. Carter "all their right, title, and interest" in and to the said land in controversy, and other lands. By deed dated June 25, 1853, the said Charles D. Carter conveyed to John R. Carroll an undivided one-half interest in the same land. By deed dated August 10, 1853, the said Charles D. Carter and John R. Carroll, conveyed to John R. Snyder all their right, title, and interest in and to said lands.

It is conceded by all parties to this action that the plaintiff, Agostino Craviotto, has succeeded to and acquired all the interest of John R. Snyder in the lands in question, which is known as the city title.

By an act of the Legislature, approved May 18, 1853 (Laws 1850–53, p. 767), provision was made for the appointment of five persons, styled the "board of California land commissioners," as commissioners to dispose of the remaining interest of the state of California in and to said tidelands, which interest will be hereafter referred to as the state title, and which consisted of the reversion in fee after the expiration of the 99-year interest embraced within the city title. By deed, dated November 21, 1854, said "board of California land commissioners," being then vested with the state title, conveyed the same to Stephen B. Whipple. It is stipulated that Stephen B. Whipple was the predecessor in interest of the defendant and respondent Emma Rose. Therefore it appears that on November 21, 1854, the date of the last-mentioned conveyance, said Stephen B. Whipple (Emma Rose's predecessor) was the owner of the state title in the land, and said John R. Snyder (plaintiff's and appellant's predecessor) was the owner of the city title therein.

The title continued in this condition until April 10, 1860, on which date the said Stephen B. Whipple commenced, in the fourth district court, a suit in ejectment against Jacob Peterson, John Oschwald, George W. Guthrie, G. Murhard, A. Heeser, and John R. Snyder. The complaint alleged that the plaintiff was the owner *in fee simple*, and entitled to the possession of certain lands, including the land involved in this action. The complaint further alleged that, "while so seized and possessed and entitled to the possession of all that certain block or parcel of land above described, the defendants, on or about the ——— day of ———, A. D. 185—, unlawfully, and without title or right, entered upon the same and ousted the plaintiff from the possession thereof, and said defendants are now in possession and claim the exclusive right to the said piece or parcel of land, and now wrongfully and unlawfully retain and withhold possession of said lot and premises and exclude the plaintiff from the possession of the same, or any part thereof."

The complaint further alleged that plaintiff had suffered damages in the sum of $1,000 by the wrongful and unlawful ouster, retention, and witholding of possession of said land by defendants.

The prayer of the complaint was as follows:

> "Wherefore, the plaintiff demands judgment against the said defendants, that they may be adjudged to surrender the possession of said real estate to him, the said plaintiff, and pay to him, said plaintiff, the said sum of $1,000, and also the cost of this action, together with such other order or further relief as the court can give."

On April 30, 1860, the defendant John R. Snyder filed an answer in said action, in which it is alleged:

> "That as to the ownership or right of possession of said plaintiff to a portion of the land described in complaint, this defendant knows nothing, and not knowing he neither admits nor denies, but leaves plaintiff to his proofs. For further answer the defendant says that 'he is the part owner and in possession' of certain land" (describing only the land in controversy).

The answer further alleges:

> "* * * But defendant denies that plaintiff was the owner and in the possession or entitled to the possession of the above-described premises on the ——— day of ———, 185—, or at any other time, or that this defendant wrongfully and unlawfully ousted plaintiff or that plaintiff sustained any damage. Further answering, defendant admits that he is now and for a long time past has been in the possession of the premises hereinbefore described, but he denies that he is so possessed wrongfully and unlawfully or that he has no title therefor or that plaintiff is damaged thereby."

The prayer of said answer was as follows: "Wherefore defendant prays judgment in his favor for his costs."

On April 30, 1860, an answer was filed by the defendant George W. Guthrie. This answer was similar in form to the answer of Snyder, except that Guthrie alleged that he was the owner of *all* the land described in the complaint. The prayer was similar to that in the answer of the defendant Snyder. The record does not reveal any answer by any of the other defendants.

On August 8, 1861, judgment was entered in said action as follows:

> "It is hereby ordered, adjudged, and decreed, that Stephen B. Whipple, plaintiff, do take nothing by this proceeding against G. W. Guthrie and J. R. Snyder, defendants, but that said defendants recover their costs."

The effect of this judgment is the sole question presented on this appeal. Appellant contends that this judgment is an estoppel against respondent, Emma Rose, who is the successor in interest of Stephen B. Whipple.

It will be remembered that Whipple claimed that he was "the owner in fee" of the land in dispute, which would include the city title, and his attempt to oust Snyder, who was the real owner of the city title, was undoubtedly based upon the following facts: On January 30, 1852, Whipple purchased all the right, title, and interest of the city of San Francisco in the land in controversy, on execution of two judgments against the city, one entered on December 8, 1851, and the other on December 11, 1851. On May 29, 1854, the sheriff issued to Whipple a deed to said land in consummation of the said two execution sales. The only interest which it could be claimed that the city of San Francisco had in the land on December 8 and 11, 1851, was the city title, granted by the Act of March 26, 1851, and Whipple undoubtedly believed that said execution sales and sheriff's deed in consummation thereof vested him with the city title to the land. Whipple subsequently acquired the state title by deed dated November 21, 1854; therefore, when Whipple subsequently, and on April 10, 1860, brought said ejectment suit against Snyder et al. he undoubtedly did so on the belief that he owned the *entire* title to the land in question, and therefore, in his complaint, alleged that he was the "owner in fee simple" of the land in controversy. The defect, however, in Whipple's claim to the entire title, was that at the date of the two judgments in execution, under which the land was sold to him—that is, on December 8 and 11, 1851—the city of San Francisco had *no* interest in said land, because on May 24, 1851, more than six months previously, the city had conveyed all its interest in said land to the commissioners of the funded debt, appointed under the Act of the Legislature of May 1, 1851. The effect, however, of the various statutes and conveyances had not been judicially determined in April, 1860, when Whipple brought said ejectment suit against Snyder et al., and was not determined until October, 1861, when the decision in Board of Education v. Fowler, supra, was rendered. In the Fowler Case, it was held that the deed dated May 24, 1851, had *divested* the city of San Francisco of its interest in said land.

It follows, therefore, that Whipple received no interest in the city title by virtue of his deed under execution, and only owned the state title when the ejectment suit was commenced, and the real owner of the city title was John R. Snyder and Snyder's ownership of the city title entitled him to the possession of the land until the expiration of the 99-year term, which would be until March 25, 1950.

Under this unusual situation regarding the title, the above-quoted judgment in the ejectment suit of Whipple v. Snyder et al., was rendered, "that Whipple take nothing against Snyder and Guthrie, but that Guthrie and Snyder recover their costs."

[1-3] This judgment undoubtedly concluded Whipple from any further claim to the city title, but the all-important question is, Did this judgment also conclude Whipple with respect to the state title? Or, in other words, when Whipple lost his ejectment suit, did he at the same time and by the same judgment also lose his reversionary interest, or state title, to the land in question? We think not. Generally speaking, the action of ejectment is merely a possessory action, and is confined to those cases where the claimant has a possessory title; that is to say, a right of entry upon the land. Payne v. Treadwell, 5 Cal. 310, 311; Montgomery v. Railway Co., 104 Cal. 197, 37 P. 786, 25 L. R. A. 654, 43 Am. St. Rep. 89; Garner v. Marshall, 9 Cal. 268, 270; 9 R. C. L. 827–853; 2 Cal. Juris. 973, 974; Wells v. Steckelberg, 52 Neb. 597, 72 N. W. 865. "It may, however, and frequently does, become the means of trying title, since either party may base his right to possession entirely upon some claim of title. Where title is alleged by either party as a basis of his right to possession, the judgment becomes res judicata to the extent that *an adjudication of it was essential to the judgment, but not otherwise.*" Freeman on Judgments (5th Ed.) vol. 2, §§ 866, 867, pp. 1830, 1832; Wehle v. Price (Cal. Sup.) 260 P. 878, and cases there cited.

Therefore Whipple, by alleging in his complaint in ejectment that he was "the owner in fee simple and entitled to possession" of said lands, undoubtedly put in issue both title and right of possession, but Snyder, by his answer, says:

> "He is part owner and in possession of said lands, but denies that plaintiff was the owner and in possession or entitled to possession on the ——— day of ———, 185—, and, further answering, defendant admits that he is now, and for a long time past has been, in the possession of the premises, * * * but denies that he is so possessed wrongfully or unlawfully or that he has no title therefor. Wherefore defendant prays judgment in his favor for his costs."

This is a very unusual form of answer, and we must assume that it was so framed intentionally, and it cannot be said that it does more than deny Whipple's right to possession and set up Snyder's right to possession. If we are correct in this, then the only issue that was before the court in said ejectment suit was whether Whipple or Snyder was entitled to the immediate possession of said land, and on this issue Snyder must necessarily have prevailed, because he was at the time *rightfully in possession under the 99-year lease.* Whipple's claim to the city title had failed because, as we have seen, his deed under execution conveyed nothing, and he was out of possession and at the time only the owner of the reversionary interest in the land.

Under such a situation the question of possession was all that it was essential for the court to determine, and it was all that the judgment, upon its face, shows that the court did, in fact, determine. The ownership of the reversionary interest, or, as we have called it, the state title, was wholly immaterial in determining *who was presently entitled to the possession of said land*, which was the sole question in said ejectment suit. The right to possession depended entirely upon the ownership of the 99-year leasehold interest, and not upon the ownership of the land after the 99-year leasehold interest had expired.

Section 1911 of the Code of Civil Procedure provides:

> "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

This section, although not enacted until 1872, is nevertheless a statement of elementary principles relative to estoppel by judgment, which was in effect in this state at the time of the entry of the judgment in said ejectment suit. When we apply the rules of law embodied in this section to the facts in the case at bar, we find, as already stated, that the judgment in said ejectment case does not, upon its face, purport to adjudicate the reversionary title of Whipple in the property; neither was this reversionary title actually and necessarily included in said ejectment judgment or at all necessary thereto.

It seems clear that, if an express adjudication, relative to the reversionary title, had been made in said ejectment suit, the court would have been compelled, under the admitted facts, to have adjudicated the same in favor of Whipple, but had this been done, still, it would not have entitled Whipple to a judgment for the *present possession* of the land, because the *right of present possession was dependent entirely* upon the ownership of the 99-year lease, or city title.

Appellant strenuously contends that the decision of the Supreme Court in Wehle v. Price, supra, is conclusive in his favor of the case at bar. We are unable to agree with this contention. Wehle v. Price was a suit to have a deed executed by Wehle to Price declared to be a mortgage and to quiet the title of Wehle to the land involved in the action. By way of defense, Price pleaded the judgment in a former action brought by him against Wehle. The complaint in said former action was an ordinary complaint in ejectment, in which the plaintiff alleged that he was "the owner of and entitled to the land involved." The defendant, after filing a demurrer to this complaint, which was overruled, *defaulted.* Thereupon a trial was had before the court without a jury and judgment was entered in favor of the plaintiff. By the judgment it was adjudged:

> That the "plaintiff *is the owner in fee simple* and entitled to the possession of the premises described in the complaint. * * * That the defendant, together with all persons claiming under him, shall be forever barred of a recovery of said premises *and all claim of title thereto, and the title to said premises is absolutely vested in the plaintiff*, and that the plaintiff be not molested in the possession of said premises by the defendant, or by any person claiming under said defendant."

From the foregoing it appears that the judgment, which was the basis of the estoppel asserted in Wehle v. Price, *was a judgment decreeing that the party asserting the estoppel was the owner in fee simple of the land in controversy, and that the other party had no interest of any kind in said land;* in effect, a judgment quieting Price's title to the land against Wehle.

The judgment in the ejectment suit of Whipple v. Snyder et al., however, is entirely different. The plaintiff, Whipple, admittedly owned the reversionary title to the land in controversy when he commenced his suit. He also claimed the 99-year leasehold interest by virtue of his deed under execution. The defendant Snyder was in possession of the land, claiming to be the owner of the 99-year leasehold interest, which carried with it the right of possession. The court rendered judgment in favor of Snyder, undoubtedly for the reason that Whipple's deed under execution *did not vest* him with any interest in the 99-year leasehold interest, and the court *did not decree or adjudge* that Whipple was not the owner of the reversionary or state title. It *did not decree* that Snyder was the owner of the state title. The judgment was merely "that plaintiff take nothing by his action and defendant recover his costs"; that is, Whipple should not recover possession of the property.

From what has been said, it follows that we are of the opinion that the judgment in the ejectment suit of Whipple v. Snyder et al., is not res judicata with respect to the ownership of the reversionary interest or state title, and does not create an estoppel against respondent Emma Rose, who is the successor in interest of Stephen B. Whipple.

The judgment is therefore affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

SAXTON v. BOARD OF EDUCATION OF LOS ANGELES CITY SCHOOL DIST. et al. (Civ. 5582.)★

District Court of Appeal, Second District, Division 1, California. Aug. 16, 1928.

Hearing Granted by Supreme Court Oct. 15, 1928.

1. Trial 🔑404(4)—Specific findings control when in conflict with general findings.

Specific findings, when in conflict with general findings, control on appeal.

2. Appeal and error 🔑907(3)—Appellate court must assume evidence was sufficient to sustain findings, in absence of bill of exceptions.

In absence of bill of exceptions, appellate court must assume that evidence was sufficient to sustain the findings.

3. Mandamus 🔑4(5)—Teacher having been discharged after hearing, notice, and proceedings conforming to law, granting writ of mandate compelling her reinstatement, held error; her legal remedy by appeal being adequate (Pol. Code, §§ 1609, 1698, 1699; Code Civ. Proc. § 1086).

Where "permanent" teacher in public schools, within Pol. Code, § 1609, was discharged by city board of education after charges against her had been legally made, notice of hearing given, and proceedings in strict conformity with the law had, superior court erred in granting writ of mandate to compel her reinstatement; her remedy being by appeal to county superintendent of schools and to superintendent of public instruction, under sections 1698, 1699, which provide a plain, speedy, and adequate remedy, within Code Civ. Proc. § 1086.

4. Mandamus 🔑71—Mandamus will not lie to control exercise of quasi judicial powers, except for abuse of discretion or excess of jurisdiction.

Mandamus will not lie to control the discretion vested in an inferior board or person exercising quasi judicial powers, except where there has been an abuse of discretion or excess of jurisdiction.

Appeal from Superior Court, Los Angeles County; P. E. Keeler, Judge.

Action by Lois S. Saxton against the Board of Education of Los Angeles City School District and others for a writ of mandate to compel reinstatement of plaintiff as permanent teacher in the public schools of the City of Los Angeles. From a judgment granting the writ, defendants appeal. Reversed.

Everett W. Mattoon, County Counsel, and C. B. Penn, Deputy County Counsel, both of Los Angeles, for appellants.

W. A. Alderson, of Los Angeles, for respondent.

YORK, J. [1] Respondent, a "permanent" teacher in the public schools of Los Angeles city school district, as defined in section 1609, Political Code, brought this action against the school board of said school district and the members of said school board for writ of mandate against defendants, who are appellants here, to reinstate her and permit her to continue to serve in said public schools as a permanent teacher, and to pay her $286, alleged to be due her as such teacher, and for a judgment that the act of defendants discharging her is null and void. She had been discharged for cause, after a full and fair hearing before said school board, where she was represented by counsel. After a trial in the superior court, it was found by the court in a general finding that the allegations in respondent's petition that she had been discharged wrongfully, illegally, and without cause were true; but specific findings followed showing that a charge against her had been legally made, that a time was legally set for hearing, that legal notice of the hearing was given, and that all of the proceedings leading up to her discharge were in strict conformity with the law. Specific findings, when in conflict with general findings, control, and hence should be considered as the only findings in determining the appeal of defendants herein.

Under section 1609 of the Political Code, it is provided that boards of education shall have power and it shall be their duty, to dismiss "permanent" teachers for unprofessional conduct—persistent violation or refusal to obey the school laws of California or reasonable rules prescribed for the government of public schools. The dismissal can be made on the proof of any one or more of the charges and by an affirmative vote of a majority of the board present at the hearing.

[2] The superior court, on a hearing on an alternative writ of mandate, made its findings and ordered a peremptory writ of mandate to issue, commanding defendants to reinstate plaintiff as a "permanent" teacher in the public schools of the Los Angeles city school district, and to permit her to continue in the service of said public schools as a teacher, and to pay her $286 accrued salary. The case comes here on the judgment roll. In the absence of a bill of exceptions, we must assume that the evidence was sufficient to sustain the findings.

[3] The principal question to be decided on this appeal is as to whether the superior court, after such a hearing before the board of education and findings by said board (on substantial, though conflicting, evidence), and the teacher's discharge upon such findings, can by writ of mandate compel a board of education to reinstate said teacher and permit her to continue as a teacher in the schools. Respondent contends that the superior court has that power under the following clause of section 1609 of the Political Code:

> "Nothing in this act shall be construed in such manner as to deprive any teacher of his rights and remedies in a court of competent jurisdiction on a question of fact and law."

★Superseded by opinion of Supreme Court, 276 P. 998.

But it does not appear that a teacher at any time has the right to continue as a teacher in the public schools after a legal discharge by the board of education, or that among the "remedies" to which she is entitled is that of obtaining a *writ of mandate* to overrule the board of education and compel it to reinstate her. None of the cases cited by respondent go to that extent. This case differs from an action for damages for breach of contract, in that the action to recover damages pertains to a property right of a teacher, and the plaintiff's remedy therein does not interfere with the control and management of the public schools. It is unlike the case of Grigsby v. King et al. (Cal. Sup.) 260 P. 789. In that case a teacher had been discharged without a hearing, and an action for an injunction was held to lie against the school board, the court saying:

> "The action becomes, in effect, not one to enforce a contract for personal services, but to restrain action by the board of trustees *in excess* of its power to the detriment and damage of plaintiff."

In the instant case, the school board did not act in excess of its powers, nor in bad faith.

[4] The action of the superior court, putting it bluntly, was a substitution of the court for the school board in the legitimate exercise of the functions enjoined upon the board by law. The public is entitled to an honest, fair, and efficient exercise of the duties of the school board so imposed upon it, and the law does not contemplate that the board shall be hampered in the exercise of its powers in the interests of the public schools, while acting within the scope of those powers. Where the action of a public officer partakes of a judicial nature and that officer has passed upon the question in good faith, though on substantially conflicting evidence, the writ of mandate will not be granted. It has been settled law in this state for more than seventy years that mandamus will not lie to control the discretion vested in an inferior board or person exercising quasi judicial powers, except where there has been an abuse of discretion of excess of jurisdiction. Declarations to that effect have been sustained from the case of Thomas v. Armstrong, 7 Cal. 286, to the present day. Inglin v. Hoppin, 156 Cal. 483, 105 P. 582; Pacific P. Ass'n v. Huntington Beach, 196 Cal. 211, 237 P. 538, 40 A. L. R. 782. Courts should not assume to control the discretion of school boards where the right of such boards to exercise discretion exists. People ex rel. Frank v. Board of Supervisors of City and County of San Francisco, 21 Cal. 697. The teacher had the right to appeal from the action of the school board in ordering her discharge to the county superintendent of schools (section 1698, Pol. Code); and she had a right to appeal from its action in withholding her salary to the superintendent of public instruction (section 1699, Pol. Code).

Although section 1609 of the Political Code provides that nothing in this *act* shall be construed, etc. (as above quoted), the Code of Civil Procedure provides (section 1086) that a writ of mandate must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. Under the facts of this case, such remedy was provided, and the writ of mandate should not be granted.

The judgment is reversed.

We concur: CONREY, P. J.; HOUSER, J.

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93 Cal. App. 539

STANLEY W. SMITH, Inc., v. PILGRIM.★

(Civ. 3529.)

District Court of Appeal, Third District, California. Aug. 17, 1928.

Hearing Denied by Supreme Court Oct. 15, 1928.

Replevin ⚷93—Failure to find plaintiff owned automobile when claim and delivery complaint was filed held fatal to judgment for plaintiff.

Ownership, either general or special, and right to possession, are the material matters presented for consideration in actions in replevin, hence trial court's failure to find that plaintiff in claim and delivery action owned automobile involved on date of filing of complaint required reversal, where such question was put in issue by defendant's answer.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Action by Stanley W. Smith, Inc., against W. M. Pilgrim. Judgment for plaintiff, and defendant appeals. Reversed.

Harold C. Morton, Claude A. Shutt, and Joe Crail, all of Los Angeles, for appellant.

Overton, Lyman & Plumb, of Los Angeles, for respondent.

BARTLETT, Justice pro tem. This is an appeal from a judgment in a claim and delivery action, awarding plaintiff possession of a Peerless automobile, and damages for its detention. The complaint alleges that at the time of its filing, which was on November 30, 1925, plaintiff owned the automobile in question; that it was in possession of defendant; that plaintiff had demanded possession before bringing its suit; that defendant refused to deliver possession; that the car was of a value of $1,000; and that plaintiff had been damaged through defendant's detention of the automobile in the sum of $250. Defendant, by an amended answer, filed on February 16, 1926, denied that plaintiff, when the complaint was filed, or at any time subsequent to August 5, 1925, owned the automo-

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★Hearing denied by Supreme Court.

bile, or was entitled to its possession; alleged that its value was $2,000; denied any damage to plaintiff by reason of defendant's detention of the car; and, as an affirmative defense asserted a damage to defendant of $1,000 occasioned through plaintiff taking possession of the car in the action; and asked that the car be redelivered to him or for judgment in his favor of $2,000 in the event the car could not be redelivered.

The trial court found that plaintiff was on July 30, 1924, the owner of the automobile in question, and was on September 1, 1925, and ever since then entitled to the immediate possession of the same; that defendant was in possession of the property when the complaint was filed; that, before the action was commenced and while defendant was in possession, plaintiff demanded possession of the property from defendant; that defendant refused and continued to refuse to deliver possession of the property to plaintiff; that, when possession was demanded, plaintiff was entitled to the immediate possession of the property; that the property has been delivered by the sheriff of Los Angeles county to plaintiff under process issued in the action; that it is not true that the taking of possession by plaintiff was without right; that it is not true that defendant is entitled to judgment for the return of the property or for $2,000 or any other sum; and that it is not true that defendant has been damaged in the sum of $1,000 or any other sum.

Except as to the ownership in plaintiff on July 30 1924, the findings are silent upon that question, as are also the conclusions of law announced, these being that plaintiff is entitled to the possession of the personal property described, and to judgment for the sum of $150 and costs of suit, and that defendant take nothing in the action.

There is no direct finding of the trial court upon the ownership of the automobile on November 30, 1925, the date of the filing of the complaint; nor is any direct finding made upon the averment in defendant's affirmative defense that since August 5, 1925, he has been the owner of the property. The answer to the complaint put the question of ownership in issue, as did also the affirmative defense. In this case the question of who was entitled to the possession turns entirely upon a determination of which of the parties owned the property when the action was commenced. Ownership, either general or special, and right to possession, are the material matters presented for consideration in actions in replevin.

> "It may be stated as the well-settled general rule that it is necessary to allege both the ownership, either general or special, and the right to immediate possession in a complaint for replevin, and, where it is alleged merely that the plaintiff is entitled to the immediate possession of the property, without alleging either general or special ownership in the property, the complaint is not sufficient, for the reason that the allegation of the right to immediate possession standing alone is a mere legal conclusion." 23 R. C. L. p. 925, § 93.

That this is the rule obtaining in California is established by many decisions of the Supreme and appellate courts of this state.

In Garcia v. Gunn, 119 Cal. 315, 51 P. 684, the doctrine is thus stated:

> "Replevin is based on the supposition that plaintiff has a general or special property in the goods in dispute and a right to their immediate possession, and that defendant stands in the way of the exercise of this right."

In Boles v. Stiles, 188 Cal. 304, 204 P. 848, an action brought to recover possession of an automobile, it is said:

> "It has long been the settled rule in this state, as in other jurisdictions, that, in order to sustain an action in claim and delivery, a plaintiff must have the right to immediate and exclusive possession of the property at the time of the commencement of the action (People's Sav. Bank v. Jones, 114 Cal. 422, 426 [46 P. 278]), and one who has the right to the use of property at will may replevy it (Garcia v. Gunn, 119 Cal. 315, 322 [51 P. 684]; Tandler v. Saunders, 56 Mich. 142 [22 N. W. 271]). One who is the owner of or has some special property in a chattel, coupled with a right to the immediate possession thereof, may maintain the action.—Fredericks v. Tracy, 98 Cal. 658, 660 [33 P. 750]."

In Alchian v. MacDonald, 40 Cal. App. 505, 181 P. 77, the court says:

> "The plaintiff did not, at the time of the commencement of the action, have any interest in, or right of possession of, the automobile. He was therefore not in a position to commence or maintain it. Garcia v. Gunn, 119 Cal. 315 [51 P. 684]; Fredericks v. Tracy, 98 Cal. 658 [33 P. 750]."

In Sidney v. Wilson, 67 Cal. App. 282, 227 P. 672, which was a replevin case concerning an automobile, the court says:

> "As set forth in the case of Beggs v. Smith, 26 Cal. App. 532 [147 P. 585], where many authorities are cited, mere possession of the subject-matter of a claim and delivery action will not suffice. In order that an action of such character may be sustained, it is necessary not only that plaintiff show possession of the property, but as well, that he is entitled to such possession."

In Normart v. Safer, 67 Cal. App. 507, 227 P. 943, it is said:

> "In the present case, the plaintiff's claimed right to the possession of the property in controversy is founded solely upon his alleged ownership thereof. He failed, according to the trial court's decision, to establish his ownership of said property, and with such failure necessarily his claim of right to the possession of the property also failed."

In Parke v. Franciscus, 194 Cal. 284, 228 P. 435, the statement therein that, "in an action of claim and delivery, the claimant is not called upon to establish ownership, merely a right to the possession of the thing," is not at variance with the general doctrine hereinbefore stated that ownership, either general or special, must be established by a claimant to warrant recovery of the property. In the decision in Parke v. Franciscus, supra, it is said, on page 289 (194 Cal., 228 P. 437) of the opinion:

> "The court found that Parke and Browne were not, and that they had not been, the owners or entitled to possession of the automobile in controversy, and that Franciscus was the owner and entitled to possession thereof."

There was no failure of the court to find on the question of ownership raised by the pleadings, like that presented in this action.

In the case of Connell v. Hogg, 181 Cal. 730, 186 P. 134, it was held that one holding a lien on an automobile for repairs had at most no more than a lien upon the machine for the balance due him for the repairs made. He had a special ownership in the property by virtue of his lien, and the judgment was reversed, with directions to determine the amount due him for the repairs he had made.

In the case at bar, plaintiff was required to prove ownership of the automobile on November 30, 1925, and right to its possession on that date, to entitle it to a judgment. The claim of defendant that he then owned the property and had owned it from August 5, 1925, if established by the evidence offered on the trial, was a complete defense to plaintiff's action. Which of the parties owned and was entitled to possession of the automobile on November 30, 1925, was the ultimate fact for determination by the trial court. Both parties were entitled to findings on the material issues raised by the pleadings. No finding on the vital question of ownership on the date the complaint was filed was made. That findings on the issue of ownership in actions in replevin are material and must be made to warrant a judgment where presented, as they are by the pleadings in this case, cannot be questioned.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

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93 Cal. App. 512

COUNTY OF LOS ANGELES v. PACIFIC ELECTRIC RY. CO. et al. (Civ. 5515.)★

District Court of Appeal, Second District, Division 1, California. Aug. 16, 1928.

Rehearing Denied Sept. 11, 1928. Hearing Denied by Supreme Court Oct. 15, 1928.

1. Adverse possession ⟹95—In absence of showing taxes were levied against land, presumption was none were levied, as respects adverse possession.

Where no taxes were shown to have been levied during certain years against land to which defendant claimed title by adverse possession, presumption was that no taxes were levied during said years.

2. Limitation of actions ⟹19(1)—Where defendant claimed title by adverse possession, statutes requiring seizin in actions involving title to realty held inapplicable.

Where defendant, for more than five years after execution of tax deed, continued to plant, cultivate, and harvest crops on land condemned by county for public use, without seeking permission from any one and without interference or molestation from any person, Code Civ. Proc. §§ 318, 319, requiring seizin by plaintiff within five years before commencement of action to recover realty or to maintain defense thereto, *held* inapplicable.

3. Adverse possession ⟹114(1)—Cultivation and harvesting of crops for over five years and payment of taxes held to give title by adverse possession.

Where defendant, in action to condemn land for public use, for more than five years after execution of tax deed continued to plant, cultivate, and harvest crops on land during the appropriate seasons of each year without seeking permission of any one, and with knowledge of purchaser at tax sale, and paid all taxes levied on property, he acquired title by adverse possession.

4. Adverse possession ⟹21—To obtain title by adverse possession, it is enough if claimant be present at all times and seasons appropriate to regular and usual cultivation of land.

The continuity of adverse possession necessary to maintenance of claim of title based thereon does not require that claimant be constantly present on the land, but it is enough that he be present at all times and seasons appropriate to regular and usual cultivation of the land.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Condemnation action by the County of Los Angeles against the Pacific Electric Railway Company, James T. Dunn, Grace P. Warden, and others. From that part of an interlocutory judgment in favor of defendant Warden, defendant Dunn appeals. Affirmed, as modified.

Wm. T. Kendrick and Victor H. Kendrick, both of Los Angeles, for appellant.

Grace P. Warden and J. Everett Brown, of Los Angeles, for respondent.

CONREY, P. J. This action was instituted by the county of Los Angeles to condemn certain property for public use. In the property sought to be condemned was lot 13, block K, of the townsite of Howard, in said county. James T. Dunn and Grace P. Warden are among the defendants. Each of these two defendants claims to be the owner of said lot. The court found that it was the prop-

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★Rehearing denied. Hearing denied by Supreme Court.

erty of Grace P. Warden, and that she was entitled to receive $1,700, the value thereof, on the condemnation thereof. The interlocutory judgment was entered March 1, 1926. James T. Dunn appeals from that part of the judgment which runs in favor of said Warden.

Appellant, in his brief, concedes that "on the 31st day of January, 1910, C. D. Warden became the owner of lot 13, block K, Howard townsite, by virtue of a deed from the state," and "shortly prior to the commencement of this action, said Warden conveyed all his right, title, and interest to defendant and respondent, Grace P. Warden, who thereupon became the holder of the legal title and remains so unless subsequently divested of the same by the adverse possession of appellant, James T. Dunn." The deed from the state to C. D. Warden, and the previous deed to the state, were based upon a sale for nonpayment of taxes, and those proceedings are conceded to have been regularly conducted according to law.

[1, 2] The controversy herein, therefore, involves only the validity of appellant's title, claimed to have been acquired by adverse possession after the date of the tax deed. The evidence shows, without conflict, that for more than five years next after that date, appellant continued to plant, cultivate, and harvest crops of barley on this and adjoining land during the appropriate seasons of each year, without seeking permission from any one, and without interference or molestation from any other person, although respondent Warden was well aware of these facts; also that during the years 1911, 1912, 1913, 1914, 1915, and 1916 appellant paid all taxes levied against the land. No taxes are shown to have been levied in 1911 or 1912; therefore it is presumed that there were none. Monroe v. Pleasants, 41 Cal. App. 144, 182 P. 330, and cases there cited. In addition, appellant, ex industria, produced evidence that no taxes were levied against said land during those two years. Appellant continued in like manner as before, to use said land, until the time of trial of this action. This being so, sections 318–319 of the Code of Civil Procedure, cited by respondent, do not apply to the case.

Adverse possession may be founded upon a written instrument, or under claim of title exclusive of any other right, but not founded upon a written instrument, judgment, or decree. Code Civ. Proc. §§ 323, 324. "For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only: 1. Where it has been protected by a substantial inclosure. 2. Where it has been usually cultivated or improved. * * *" Code Civ. Proc. § 325.

[3, 4] The facts clearly proved by the evidence, without contradiction, as above stated, positively establish in appellant a title acquired by adverse possession, and the court should have so found. Unger v. Mooney, 63 Cal. 586, 595, 49 Am. Rep. 100. The continuity of adverse possession, necessary to the maintenance of such a claim, does not require that the claimant be constantly present on the land. It is enough if he be present at all times and seasons appropriate to the regular and usual cultivation of the land. Montgomery, etc., Co. v. Quimby, 164 Cal. 250, 254, 128 P. 402; Myers v. Berven, 166 Cal. 484, 490, 137 P. 260. The manner in which appellant held possession, and his payment of taxes levied against the property, establish the adverse character of his possession. Goodrich v. Mortimer, 44 Cal. App. 576, 581, 186 P. 844; Baum v. Reay, 96 Cal. 462, 466, 29 P. 117, 31 P. 561.

It is hereby ordered that the findings of fact be and they are hereby amended, by striking from paragraph IV thereof the following: "That the defendant Grace P. Warden is the owner of the parcel of land herein designated as parcel No. 9, and more particularly described in paragraph 1 above;" and substituting therefor the following: "That the defendant James T. Dunn is the owner of the parcel of land herein designated as parcel No. 9, and more particularly described in paragraph 1 above." It is further ordered that that part of the judgment entered on March 1, 1926, which provides for the taking by plaintiff for the uses set forth in the complaint of said lot 13, block K, of the townsite of Howard (being the lot designated in the decree as "parcel No. 9"), upon paying therefor to the defendant Grace P. Warden, or into court for her benefit, the sum of $1,700, be and the same hereby is amended by striking out the following part thereof: "Parcel No. 9. The sum of one thousand seven hundred and no/100 dollars ($1,700.00) to the defendant Grace P. Warden;" and substituting therefor the following: "Parcel No. 9. The sum of one thousand seven hundred and no/100 dollars ($1,700.00) to the defendant James T. Dunn." As thus amended, the judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

93 Cal. App. 529

PEOPLE v. BACHMAN. (Cr. 1692.)

District Court of Appeal, Second District, Division 2, California. Aug. 17, 1928.

Licenses ⚷42(4)—Evidence held to support conviction for violating Corporate Securities Act, by selling corporation stock without permit.

Defendant, being charged with crime of violating the Corporate Securities Act (St. 1917, p. 673), evidence that he sold stocks in a corporation not yet organized, without first having secured necessary permit authorizing such sale, *held* sufficient to support verdict of guilty.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

O. B. Bachman was convicted of violating the Corporate Securities Act, and he appeals. Affirmed.

Robert W. Daniels and George F. Lord, both of San Bernardino, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

THOMPSON, J. The defendant was charged by information with the crime of violating the Corporate Securities Act (St. 1917, p. 673) in the following respect: That he did, on November 15, 1926, sell to and take a subscription of J. P. Kemmerer for 10,000 shares of the Bonanza King Extension Mines Company for the sum of $1,000, without first having applied and secured from the corporation commissioner a permit authorizing the sale of such stock. There was another count, but the defendant was not tried for the offense therein contained. The jury returned a verdict of guilty, and this appeal is from the judgment and order denying defendant's motion for a new trial.

But one point is urged as a reason for reversal, to wit: The insufficiency of the evidence to sustain the verdict. Appellant's counsel recognize the rule that it is not the function of the appellate tribunal to weigh testimony, but they insist that in the instant cause there is a failure to show that the stock which was the subject of the sale was not the personal stock of the appellant, or, to reframe it, that there is no showing that the subscription was for treasury stock. It is not disputed that the subscription was in fact taken and $1,000 paid by Kemmerer, nor is it denied that there was never at any time a permit. The only question concerns the ownership of the stock which was the subject of the sale. The subscription was taken, $500 was paid, and a receipt was executed in the following words:

> "Bonanza King Consolidated Mines and Reduction Works, Fenner, California. O. B. Bachman, President and Treasurer. Wade Hampton Williams, Vice President. A. E. Kinney, Secretary. Secretary's office, Las Vegas, Nevada. All agreements are contingent upon strikes, accidents, and other delays unavoidable or beyond our control and subject to declaration of trust recorded March 10, 1923, in Clark county, Nevada.
>
> "Trustee Receipt, Bonanza King Extension Mines Company.
>
> "This certifies that J. P. Kemmerer has paid the sum of one thousand dollars, $500.00 cash and 90-day note for $500.00 for ten thousand shares of the Bonanza King Extension Mines Company, organizing.
>
> "This subscription is accepted by the trustee upon the understanding and agreement that this receipt shall be exchanged for an interim certificate representing * * * shares, upon the completion of the corporation under the laws of the state of Nevada.
>
> "O. B. Bachman, Trustee.
>
> "November 15th, 1926."

The incorporation of the company did not take place until March 9, 1927. Mr. Kemmerer testified that the appellant told him of several prominent men who were connected with the company, and that "he wanted just a few men in it"; that appellant also informed him that a Mr. Smale had gone out and looked at the great quantities of ore and then had "wanted in on it," as had also Jim and Mat Amos, who "had already signed up"; that then he "signed this piece of paper, the same as the other men had done," for "10,000 shares of Bonanza King Extension Mines Stock"; that the money was to be used for development work; that the company was "incorporated for 2,000,000 shares at 50 cents a share; 250,000 shares at 20 cents each to be sold now"; that he "was purchasing the stock of the corporation, issued by the corporation itself"; and that under no circumstances would he have bought any individual stock. A witness, J. C. Amos, who has been mentioned as Jim Amos, testified that appellant came to his office and told him that "he was organizing a Bonanza King Extension Company, and offered for sale stock; in other words, he offered to sell some stock of the Bonanza King Extension Company, for the development of the ground. * * *" This same witness also testified that, after he had told appellant that he never bought mining stock, appellant wanted either him or his brother to become an officer and take some organization stock, and that they signed an agreement whereby the witness was to receive something like 20,000 shares. Another witness also testified that at about the same time appellant offered to take his subscription for stock in the same company, which offer the witness declined when he was informed that the organization was not yet perfected.

The testimony which we have recited not only warranted the jury in returning a verdict of guilty but also, in the absence of any evidence to the contrary, compelled the conclu-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

sion that the appellant owned no stock which could be the subject of sale, and was, in fact, acting through the designation of himself as trustee, endeavoring to, and was actually, selling stock for cash in a corporation not yet organized. We are of the opinion that the evidence establishes a clear and palpable violation of the Corporate Securities Act.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; HAZLETT, Justice pro tem.

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93 Cal. App. 544

PEOPLE v. CURRIE. (Cr. 1028.)

District Court of Appeal, Third District, California. Aug. 17, 1928.

1. Criminal law 🔑1202(4)—Failure to require jury's determination as to place of imprisonment of defendant, convicted of second offense of rape under conflicting evidence, held error (Pen. Code, §§ 17, 261, subd. 1, § 667, subd. 1, and § 264, as amended by St. 1913, p. 213, and St. 1923, p. 271).

In prosecution for rape of girl under 18, under Pen. Code, § 261, subd. 1, failure of trial court to instruct jury in event of conviction to recommend whether defendant should be punished by imprisonment in county jail or in state prison, as required by section 264, as amended by St. 1913, p. 213, and St. 1923, p. 271, *held* error, where evidence as to commission of act was conflicting, notwithstanding defendant's previous conviction for same offense and section 667, subd. 1, requiring maximum penalty on second conviction where first offense was felony punishable by death or imprisonment in state prison as defined by section 17.

2. Criminal law 🔑1211—Where jury in rape prosecution fixes imprisonment in county jail, subsequent conviction of defendant does not necessarily carry maximum sentence (Pen. Code, § 261, subd. 1, § 667, subd. 1, § 264, as amended by St. 1913, p. 213 and St. 1923, p. 271).

Where jury in prosecution for rape of girl under 18, under Pen. Code, § 261, subd. 1, fixes imprisonment in county jail as punishment under section 264, as amended by St. 1913, p. 213, and St. 1923, p. 271, defendant is not thereby convicted of felony, and such conviction cannot be pleaded against him in an information charging the commission of a subsequent offense so as to require maximum penalty on subsequent conviction, under Pen. Code, § 667, subd. 1.

3. Criminal law 🔑1211—Subsequent conviction does not carry maximum penalty unless on first conviction defendant was required to serve term in state prison (Pen. Code, § 667, subd. 1).

Crime of which defendant is subsequently convicted does not come within Pen. Code, § 667, subd. 1, requiring imposition of maximum imprisonment in case of second conviction of felony, unless upon first conviction defendant was required to serve some term in the state prison.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Steve Currie was convicted of rape, and he appeals. Reversed.

M. B. Moore, of Oakland, and Oliver J. Northup, of Redding, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BARTLETT, Justice pro tem. The defendant was tried and convicted in the superior court of Shasta county, Cal., upon an information charging him with the crime of rape, and also charging him with a prior conviction of a similar offense; the charging part of the information being as follows:

> "The district attorney of the county of Shasta, state of California, hereby accuses Steve Currie of a felony, to wit, rape, in that the said Steve Currie, on or about the 2d day of December, 1927, at Ingot, in the county of Shasta, state of California, did willfully, unlawfully, and feloniously, have and accomplish an act of sexual intercourse on and with one ——, a female human being, under the age of eighteen years, to wit, of the age of fifteen years, the said —— not then and there being the wife of said Steve Currie.
>
> "That the defendant, Steve Currie, before the commission of the offense charged in this information, was in the superior court of the state of California, in and for the county of Plumas, convicted of a felony, to wit, rape."

On his arraignment, defendant pleaded not guilty of the crime charged in the first count contained in the information, and guilty of the prior conviction contained in the second count of the information.

A trial was then had before a jury in said superior court, on which trial the jury failed to agree on a verdict, and defendant was again tried; the jury on this second trial rendering the following verdict:

> "We, the jury in the above-entitled action, hereby find the defendant, Steve Currie, guilty as charged in the information on file herein.
>
> "E. D. Cross, Foreman."

When the verdict was rendered, the foreman of the jury stated to the court that the jury recommended that leniency be granted the defendant.

On being arraigned for judgment, defendant moved the court for a new trial on the following grounds: (1) That the court at and during the trial of said action misdirected the jury in matters of law; (2) that the court erred in the decisions of law arising during the course of the trial of the defendant; (3) that the verdict of the jury is contrary to law; (4) that the verdict of the jury is contrary to the evidence adduced at the trial; (5) that new evidence has been discovered by the defendant material to his defense and which he could not with reasonable diligence have discovered and produced at the trial.

At the time of presenting his motion for a new trial, defendant asked that seven days be allowed him to file affidavits in support of his claim of newly discovered evidence, which request was denied by the trial court. Thereupon the court denied defendant's motion for a new trial, and pronounced judgment that the said Steve Currie be punished by imprisonment in the state prison of the state of California at Folsom for the term prescribed by law, for the period of 50 years.

Thereupon defendant gave oral notice of appeal to this court from the judgment of conviction, and from the order denying the motion for a new trial, and from the order refusing an extension of time in which to procure and produce affidavits on his motion for a new trial; the appeal being presented upon a complete record of the proceedings had in and before the trial court on the trial of the action.

Many reasons are assigned by defendant for a reversal of the judgment and the granting of a new trial, but of these there is but one of material importance, which arises out of the failure of the trial court to instruct the jury of its duty, in the event of a conviction of defendant of the crime charged, to recommend whether defendant should be punished by imprisonment in the county jail, or by imprisonment in the state prison.

The only instructions given by the trial court relative to the verdicts which the jury could find in the case were as follows:

> "If you believe from the evidence in this case beyond a reasonable doubt and to a moral certainty that the defendant, Steve Currie, at Ingot, in the county of Shasta, state of California, did accomplish an act of sexual intercourse with said ———, and that said ——— was then and there a female under the age of eighteen years, and was not then and there the wife of the defendant, Steve Currie, as charged in the information, you will find the defendant guilty as charged in the information filed in this action.
>
> "There will be two forms of verdict submitted to the jury, one form (omitting title of court and cause): Verdict of the jury. We, the jury in the above-entitled action, hereby find the defendant, Steve Currie, guilty as charged in the information on file herein. Form two (omitting title of court and cause): Verdict of the jury. We, the jury in the above-entitled action, hereby find Steve Currie not guilty of the offense as charged in the information on file herein."

The testimony of the prosecuting witness is substantially as follows: That she was born at Walla Walla, Wash.; that she was 15 years of age on August 6, 1927; that she first met defendant about 2 miles north of Willows on either the last day of November or first day of December, 1927; that, when she first met him, she and a girl friend were walking along the highway towards Portland, Or.; that defendant was driving a car on the highway going north, no one being with him; that he stopped and asked plaintiff and her companion if they wanted a ride, to which they answered that they did, and thereupon entered defendant's car; that they informed defendant they were going to Portland, and that he told them he was going to Ingot; that the meeting with defendant was about 8:30 a. m.; that they reached Ingot about 10:30 or 11 o'clock a. m.; that they went to a Mrs. Amery's who conducted a kind of boarding house at Ingot; that two men were there when they arrived, Lance Philp and Vern Currie, a brother of defendant; that they had dinner; that then Vern Currie and the girl companion of plaintiff left for Alturas; that after they left she and the defendant went to bed in the afternoon, the exact time of which she did not remember because of her having drunk liquor given her by defendant; that, after going to bed, she and the defendant had sexual intercourse; that she and defendant stayed that night in the room downstairs off the barroom; that after 8 o'clock that evening Mr. and Mrs. Amery and their daughter came to the place; that she remained at the Amery place most of the time for two weeks, sleeping downstairs in the front bedroom with defendant; that during this time she made two trips to Sacramento with defendant, the trips being made at defendant's suggestion, and they occupying each time while in Sacramento room 25 in a hotel on Twelfth and K streets; that the first trip was on the 4th of December; that the second trip was made on the 11th of December; that a number of Mexican laborers were with them on both trips; that they had sexual intercourse at the hotel where they stayed on both trips to Sacramento; that after the second trip to Sacramento and their return to Ingot she and defendant occupied a room together upstairs at the Amery house at Ingot until they were arrested on December 17, 1927.

Lance Philp, called on behalf of the people, testified that he was at the Amery place when the defendant and ——— and her girl companion arrived there about noon of November 30th; that he was in and about the place all the afternoon; that ——— was not intoxicated; that the door to the room in the front part of the house was not closed to his knowledge; that they were playing the graphophone and seemed to be having a good time.

Defendant, testifying as a witness in his own behalf, admitted picking up the two girls on the highway and taking them to Ingot, but denied any acts of sexual intercourse with the prosecuting witness at any time; stated that he had gone from Ingot to Sacramento the evening preceding the date he picked them up, that he had had no sleep, that he arrived at Ingot about 10:30 or 11 a. m., had lunch, and then went to bed and slept until 5 or 6 in the afternoon, and fixed the date of picking up the girls as December 2, 1927. He denied giving the prosecuting witness any liquor on the day they arrived at Ingot or at any other time. He stated that he went from Ingot to Sacramento on December 4th with some Mexican passengers and ——— and a Mr. Alberson in his car, arriving at Sacramento about midnight; that one of the Mexicans paid ———'s fare, $10 for the round trip; that she and the passengers alighted on Second street between K and L; that he and Alberson went to a place on T street, and that from there he went to a hotel at Twelfth and K streets and occupied room 25 therein by himself that night; that he did not again see ——— until the next morning about 10 or 11 o'clock when he and Mr. Alberson met her at a battery place on I street between Fourteenth and Fifteenth, and that in the evening they returned to Ingot, arriving there about midnight. Defendant denied making any trip with the complaining witness to Sacramento on December 11th. He stated that he went from Ingot to Sacramento on the night of December 10th with a load of Mexican laborers, arriving at Sacramento about 3 a. m. of December 11th, that he went to the hotel at Twelfth and K streets, registering there under the name of S. E. Freeman, and occupying room 25. He testified that he told the prosecuting witness, at the time they went to Sacramento on December 4th, that he was stopping at the hotel at Twelfth and K streets, and to inquire for him there under the name of S. E. Freeman, that he told her this because she wanted to know what time he would leave for Ingot the next day, and that he told her he did not know, on account of the work he had to have done on his car.

The housekeeper and manager of the hotel at Twelfth and K streets was called as a witness for the defendant, and testified that she was manager of the hotel during the month of December, 1927, that defendant registered there on December 4th and on December 11th under the name of S. E. Freeman, occupying room 25 on both dates, and that no one was with him on either occasion.

The sheriff of Shasta county testified that the complaining witness gave him the number of the hotel she claimed to have stopped at in Sacramento with the defendant, that he took her with him to that city, and that she pointed out to him the hotel at Twelfth and K streets, which defendant stated he stayed at, and room 25 therein, as the place she claimed to have stopped at with defendant in Sacramento.

[1] The foregoing résumé of the evidence illustrates its conflicting character, and shows clearly that the case is one in which the jury is called upon to designate by its verdict on the conviction of a defendant whether he shall be punished by imprisonment in the county jail or in a state prison, by virtue of the provisions of section 264 of the Penal Code.

It is the contention of the people on this appeal that the jury did not lawfully have any power to determine that punishment in this case on conviction should be by imprisonment in the county jail, by reason of subdivision 1 of section 667 of the Penal Code, which provides that, where there has been a prior conviction of a felony, "if the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender would be punishable by imprisonment in the state prison, such person is punishable by imprisonment in the state prison for the maximum period for which he might have been sentenced, if such offense had been his first offense." To justify this contention would require that it be determined that a conviction for the crime of rape committed in violation of subdivision 1 of section 261 of the Penal Code is conviction of a felony, for subdivision 1 of section 667 of the Penal Code providing for a maximum period of punishment on second convictions cannot be construed as applying to any crimes except in cases where the first conviction was for a felony, which is a crime punishable with death or by imprisonment in the state prison as defined in section 17 of the Penal Code.

Prior to the amendment of section 264 of the Penal Code, approved May 19, 1913 (Stats. 1913, p. 213), rape was punishable by imprisonment in the state prison for not less than 5 years. The enactment of May 19, 1913, made rape punishable by imprisonment in the state prison not more than 50 years, except where the offense was under subdivision 1 of section 261 of the Penal Code and the female was over the age of 16 years and under the age of 18 years, in which case it was provided that the punishment should be by imprisonment in the county jail for not more than one year or in the state prison for not more than 50 years, and in such case it was provided that the jury should determine by their verdict whether the punishment should be by imprisonment in the county jail or in the state prison. In 1923, by an Act approved May 8th of that year (Stats. 1923, p. 271), section 264 of the Penal Code was amended to read:

> "264. Rape is punishable by imprisonment in the state prison not more than fifty years, except where the offense is under subdivision one of section 261 of the Penal Code, in which case the punishment shall be either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years, and in such case the jury shall recommend by their verdict whether the punishment shall be by imprisonment in the county jail or

in the state prison; provided, that when the defendant pleads guilty of an offense under subdivision one of section 261 of the Penal Code the punishment shall be in the discretion of the trial court, either by imprisonment in the county jail for not more than one year or in the state prison for not more than fifty years."

That it is the duty of the jury in a case of rape coming within the provisions of subdivision 1 of section 261 of the Penal Code to determine by their verdict whether the punishment therefor shall be by imprisonment in a county jail or in a state prison is declared by the decisions in the cases of People v. Rambaud, 78 Cal. App. 685, 248 P. 954, and People v. Sachau, 78 Cal. App. 702, 248 P. 960, the decisions in which were filed on July 14, 1926, and in both of which hearings in the Supreme Court were denied.

In People v. Rambaud, supra, the verdict of the jury was as follows:

> "We, the jury in the above-entitled cause, find the defendant, Louie Rambaud, guilty of the crime of rape, as charged, and recommend that he be punished by imprisonment in the county jail."

The trial court disregarded the recommendation of the jury and sentenced the defendant to imprisonment in state prison. On appeal the judgment was set aside and the cause was remanded to the lower court, with directions to resentence the defendant to the county jail of San Joaquin county for a period not exceeding that provided in the Code.

In People v. Sachau, supra, defendant was charged with rape under subdivision 1 of section 261 of the Penal Code, and the jury returned the following verdict:

> "We, the jury in the above-entitled cause, find the defendant Joe A. Sachau, guilty of rape, a felony, as charged."

At the time fixed for pronouncing sentence, the defendant moved that he be discharged from custody on the ground that the verdict of the jury was a nullity. The motion was denied, and defendant was sentenced to imprisonment in state prison. Defendant appealed, assigning as reasons for a reversal of the judgment: (1) That the court did not fully instruct the jury as to the law applicable to the case; (2) that the jury did not return a verdict fixing the degree of the crime. The instructions given the jury in the trial court relative to the verdicts it might render were the same as those which are complained of in the case at bar. The judgment was reversed and a new trial ordered. At page 711, 78 Cal. App. (248 P. 964) of the opinion the court says:

> "As we have said, the trial court in the case at bar did not instruct the jury as to what it should or should not do under the provisions of section 264 of the Penal Code. That section does not read that the jury may do so and so, but it is mandatory in form and directs that the jury shall make certain recommendations. The defendant was entitled to have the jury correctly instructed as to its powers with relation to the verdict. That it was incumbent upon the jury to make recommendations, that it might recommend either incarceration in the state prison or the county jail, and that this is a substantive right which may not be disregarded appears to us to be beyond question. These are matters which the Legislature has seen fit to intrust to the determination of the jury, whenever and wherever the female has given actual consent, though denied the power of giving legal consent. As said in many of the cases, the circumstances under which the crime mentioned in subdivision 1 of section 261 of the Penal Code is committed are such that the ends of justice are subserved by a modified degree of the extent of the punishment."

[2] The contention of respondent that the words, "punishable by imprisonment in the state prison," used in section 667 of the Penal Code, make the provisions in section 264 of the Penal Code relative to the duty of the trial jury to fix the place of punishment in rape cases under subdivision 1 of section 261 of the Penal Code inapplicable where there is a second conviction of the crime of rape cannot be sustained. The crime of rape under subdivision 1 of section 261 of the Penal Code is a felony or misdemeanor according to the determination of the trial jury, where trial by jury is had, or by the court where a plea of guilty is interposed. Rape of the class here charged, on a first conviction is punishable in state prison or county jail as the jury determines where there is a trial by jury, and the jury must determine the defendant shall be punished by imprisonment in state prison before he can be sentenced to a state prison on a conviction in this class of cases of rape. When the jury in such cases of rape fixes imprisonment in a county jail as the punishment, a defendant is not thereby convicted of a felony, and such conviction could not be pleaded against him in an information charging the commission of a subsequent offense.

[3] Unless it prescribes that upon a first conviction a defendant must serve some term in a state prison, the crime of which he is subsequently convicted does not come within subdivision 1 of section 667 of the Penal Code, requiring the imposition of a maximum imprisonment as has been imposed in this case, unless the jury determines on the second conviction that the defendant shall be punished by imprisonment in a state prison. The controlling factor making conviction of a subsequent offense necessarily punishable with a maximum term of imprisonment in state prison by reason of subdivision 1 of section 667 of the Penal Code is what is the maximum imprisonment in a state prison that could be inflicted on the conviction if it was a first conviction.

It is plain that, on a first conviction of rape under subdivision 1 of section 261 of the Penal Code, the maximum term of imprisonment, where there is a conviction by a jury, turns on what the jury recommends as to the place of punishment. There could be no term in state prison inflicted unless the jury so recommended.

It cannot be held that subdivision 1 of section 667 of the Penal Code either justifies or warrants a sentence for the maximum period of 50 years in cases of conviction of rape coming under subdivision 1 of section 261 of the Penal Code unless the trial jury recommends imprisonment in the state prison, or the trial judge so adjudges upon a plea of guilty.

The judgment and the order denying a new trial are reversed.

We concur: FINCH, P. J.; PLUMMER, J.

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93 Cal. App. 256

SCOTT v. DONAHUE et al. (WRINKEL, Intervener; two cases).

COLLINS et al. v. SCOTT (two cases).

(Civ. 6202.)

District Court of Appeal, First District, Division 2, California. July 25, 1928.

1. Attorney and client 🔑75(1)—Member of lodge, suing for himself and other members, had burden to show other members joined in application for substitution of attorneys (Code Civ. Proc. § 284).

Member of lodge of Brotherhood of Railroad Trainmen, suing in behalf of himself and other members, on his application for substitution of attorneys, had burden of proof to show that parties associated with him as plaintiffs joined in the application, under Code Civ. Proc. § 284.

2. Abatement and revival 🔑41—Assignment of his interest by member of lodge, suing for himself and other members, deprived member of control of litigation (Code Civ. Proc. § 385).

Where member of lodge of Brotherhood of Railroad Trainmen, suing in behalf of himself and other members to recover bonds belonging to lodge, had assigned his individual interest, he had no further control or direction of the litigation, and the other members were the real parties in interest, though action could still be continued in his name as nominal plaintiff, under Code Civ. Proc. § 385.

3. Attorney and client 🔑75(1)—Lodge member, suing for himself and other members, held without authority, after assignment of his individual interest, to substitute attorney adverse to others' interests (Code Civ. Proc. § 284).

Member of lodge of Brotherhood of Railroad Trainmen, suing in behalf of himself and other members to recover bonds claimed to be property of lodge, who assigned his individual interest in the litigation, *held* without power to substitute attorney adverse to interest of his associates, under Code Civ. Proc. § 284, since the other members were the real parties in interest.

Appeals from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Separate actions by Robert C. Scott, in behalf of himself and all members of the San Francisco Lodge No. 198 of the Brotherhood of Railroad Trainmen, against J. J. Donahue and others, in which J. S. Wrinkel intervened, and in which plaintiff applied to the superior court for orders substituting attorneys. From orders granting motions for substitution, G. D. Collins, Jr., as a member of San Francisco Lodge No. 198, and all of plaintiffs other than the plaintiff first named, appeal. Reversed, with directions.

George D. Collins, Jr., of San Francisco, for appellants and in pro. per.

J. H. Morris, of San Francisco, for respondent.

NOURSE, J. Plaintiff brought two separate actions in the superior court on behalf of himself and other members of San Francisco Lodge No. 198 of the Brotherhood of Railroad Trainmen. One action was in replevin to recover bonds claimed to be the property of the members of the local lodge. The other action was in assumpsit to recover money which was also claimed to be the property of the members of this lodge. In both actions a complaint in intervention was filed on behalf of a minority of the members of the lodge claiming the property to be held in trust for the benefit of the minority alone. The actions were tried together, and resulted in judgments in favor of the intervener; the trial court finding that all the property was a trust fund held for the benefit of the minority members represented by the intervener. On appeal to this court, these judgments were reversed upon the ground that the property was found to be a trust fund for all the members of the local who were in good standing at the time of its dissolution. Scott v. Donahue (Cal. App.) 269 P. 455; Id. (Cal. App.) 269 P. 458. After the entry of the judgments in the superior court and pending the appeal therefrom, Scott applied to the superior court for an order substituting J. H. Morris as his attorney in place of George D. Collins, Jr. These motions were resisted, and in support of the opposition affidavits were filed from which it appears that Collins was employed by Scott at the instance of 259 other members of Local No. 198 to prosecute the actions to final determination upon a specified contingent fee to be paid him upon recovering the property, and to be paid solely out of the property recovered. It also appears that, prior to the attempted substitution of attorneys, Scott assigned all his interest in the property to an association known and designated as Local No. 52, and, that the other members of Local 198 in whose behalf the actions were commenced, as well as Scott's assignee, oppose the substitution of attorneys, and desire Collins to continue to represent them. Upon the oral argument, it was stated by counsel for respondents on the main appeals that the purpose of the substitution was to obtain an attorney who would consent to a dismissal of those appeals.

[1-3] In our opinion on the main appeals we pointed out that both actions were really tried upon the complaints in intervention, which transformed them into actions in equity for the purpose of discovering a trust fund. Though Scott was the nominal plaintiff upon the original complaints, he was in fact the representative of all the other members of Local 198, and upon the complaint in intervention he in effect became their representative as parties defendant. Respondent concedes that the other members of Local 198 are parties plaintiff with Scott and entitled to oppose his substitution of attorneys, but argue that this opposition could be voiced only by a formal meeting and ballot taken for that purpose. The burden of proof was on the respondent to show that the "client" referred to in section 284 of the Code of Civil Procedure (here the associates of Scott as parties plaintiff) had joined in the application for a substitution of their attorney. The only proof before the trial court on the hearing of the motions was that all the other members of the local as well as Scott's assignees opposed the substitution and desired Collins to continue to represent them. The other members of Local 198 were the real parties in interest. When Scott assigned his individual interest, the action could still be continued in his name (section 385, Code Civ. Proc.), and, having assigned his interest, he had no further control or direction of the litigation. Walker v. Felt, 54 Cal. 386. His attempt to defeat the interests of his associates by the substitution of an attorney adverse to their interests was a flagrant breach of good faith and wholly beyond his power. Walker v. Felt, 54 Cal. 386, 388.

The two orders appealed from are reversed, with directions to the trial court to set aside the orders and deny the motions.

We concur: KOFORD, P. J.; STURTEVANT, J.

205 Cal. 54

CONSOLIDATED PEOPLE'S DITCH CO. et al. v. FOOTHILL DITCH CO. et al. ★

(Sac. 4027.)

Supreme Court of California. Aug. 24, 1928.

Rehearing Denied Sept. 20, 1928.

1. Waters and water courses ⚷152(3)—Temporary injunction against defendants, who were extensively preparing to divert water, could not be denied because no water was then in river.

Plaintiffs, seeking to quiet title to use of waters of river, and to restrain threatened diversion of water by defendants, could not be denied temporary injunction on ground that preliminary injunction was not presently necessary, since no available water was then flowing in river, where defendants were engaged in expensive program of enlarging ditch for diverting water, and plaintiffs, if remaining passive until water rose in river, would run risk of charge of laches.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied Sept. 20, 1928.

2. Waters and water courses 🔑152(3)—Order temporarily restraining defendants from proceeding with threatened diversion of water, to maintain status quo until trial, held not broader than demanded.

Where complaint to quiet title to use of water contained prayer for both specific and general relief, and sought preliminary injunction against diversion of waters by defendants, based on affidavits and counter affidavits stating specifically conduct of defendants against which plaintiffs sought immediate relief, and stating specific claim of right asserted by defendants, order relating to particular situation specifically presented, restraining defendants from proceeding with threatened diversion, which aimed to maintain status quo until trial on merits, was not broader than situation demanded.

3. Injunction 🔑163(7)—Trial court could modify restraining order, if during trial it developed that order was broader than demanded.

Trial court, issuing temporary injunction, would have power to modify order as justice required, if in its actual operation pendente lite it should develop that order was broader than situation required.

4. Action 🔑50(3)—Plaintiffs, having divergent water rights dependent on common source, could join to restrain wrongful interference working common injury.

Where rights of several plaintiffs to use of waters of river, though individual, derived from various unrelated situations and divergent as to method, amount, and time of exercise, were all dependent on their relation to common source of supply, any wrongful interference, which would work common injury, would entitle plaintiffs to unite in effort to enjoin.

5. Waters and water courses 🔑145—Irrigation district, acquiring stock in corporations owning water rights, could not divert water higher up in river than points of intake of corporations, in amount equaling stock interests acquired.

Where irrigation district purchased shares of stock in number of corporations owning rights of appropriation of waters of river, in which stockholders had only right in mutuality with other stockholders to have proportionate shares of distributable waters owned by corporation supplied to such stockholder through corporate instrumentalities, such district could not, by virtue of stockholder's interest, acquire such direct ownership in waters as would permit it to go on river to point above several ditches of such corporations and divert by means of expanded ditch amount of water equaling sum of several amounts of water, which it would have been entitled to have distributed to it proportionately with other stockholders of each corporation.

6. Waters and water courses 🔑232—State corporations have powers and duties provided by by-laws, Constitution, and state statutes.

Corporations owning water rights in river, organized under laws of state of California, are invested with powers and duties, with respect to both properties thereof and stockholders therein, as Constitution and statutes of California and by-laws made in accordance therewith provide.

7. Waters and water courses 🔑232—Corporations in which capital stock is transferable and stockholders are equitable owners of property entitled to proportionate distribution of water appropriated, held not water companies under statute (Civ. Code, § 324).

Corporations, a capital stock of which is transferable in ordinary manner, and owners of which are equitable owners of proportion of properties of each corporation which their respective number of shares bear to entire prescribed capital, and are equitably entitled to proportionate distribution of such waters as corporation acquires by appropriation, *held* not such corporations as are referred to in Civ. Code, § 324, stock holdings in which have been made appurtenant to certain lands and are transferable only with such lands.

8. Waters and water courses 🔑252—Stockholders in corporation owning water rights held owners of water rights only as equitably entitled to proportionate distribution thereof.

In corporations, capital stock of which is transferable in ordinary manner, and stockholders of which are equitable owners of proportionate share of property, and equitably entitled to proportionate distribution of waters appropriated by corporation, stockholders are owners of water rights possessed by corporation only to extent of being entitled to proportionate distribution of water.

9. Waters and water courses 🔑252—Stockholders in corporations organized to distribute water have definite right to proportion of distribution of water which is enforceable.

Stockholders in corporation organized chiefly for purpose of acquiring and distributing water have definite right to their proportion of distribution of such water when so acquired, and may individually enforce right by appropriate proceedings in event of denial on part of officers of corporation.

10. Waters and water courses 🔑252—Stockholder in ordinary corporation owning water rights has no right to receive water in any other manner or place than provided by corporation for distribution.

Where sole right of each stockholder in corporation owning water rights is right in mutuality with other stockholders of having proportionate share of each in distributable waters owned by corporation supplied to such stockholder through property owned by corporation, stockholder possesses no legal right to receive water in any other manner or place than those supplied by corporation in exercising full control over distribution of waters covered by its appropriation.

11. Waters and water courses 🔑247(2)—Threatened danger of confusion by asserted right of stockholders different from that of corporation would justify use of injunction.

Creation of threatened danger of inextricable discord and confusion among owners of water rights along every river in state by asserted right of each stockholder of corporation owning water rights to proportionate distribution of water in manner other than provided by corporation would in itself be sufficient reason for use of injunctive processes of court in way of prevention.

12. Waters and water courses ⚷145—Irrigation district's inability to receive in body distributable shares of water of various corporations in which it became stockholder could not justify unlawful diversion at another point in river.

Where irrigation district acquired stock in several corporations possessing water rights in river, and none of such corporations denied it right as stockholder to receive full quota of water which it was entitled to in due course of distribution of each stockholder's share of water belonging to each corporation, fact that irrigation district would not be able to combine its several distributable shares in water of river to which it was severally entitled, so as to be able to deliver same in body on its properties, could not justify its attempt to make combination in unlawful method, by diverting water at point higher up river than points of intake of corporations in which it became stockholder.

In Bank.

Appeal from Superior Court, Tulare County; K. Van Zante, Judge.

Action to quiet title to water rights by the Consolidated People's Ditch Company against the Foothill Ditch Company and others. From an order granting a temporary injunction, defendants Lindsay-Strathmore Irrigation District and another appeal. Affirmed.

Sloss & Ackerman, of San Francisco, W. G. Irving, of Riverside, and Power & McFadzean, of Visalia, for appellants.

W. R. Bailey and Farnsworth, Burke & Maddox, all of Visalia, and Glenn L. Moran, of Tulare, for respondents.

RICHARDS, J. This action was commenced by the plaintiffs, 18 in number, to quiet the title of themselves and each of them in and to the use of the waters of the Kaweah river, located mainly in the county of Tulare, and to restrain a threatened diversion of such waters to the injury of said plaintiffs and each of them. The plaintiffs sought and obtained from the superior court in and for the county of Tulare a temporary injunction restraining certain of said defendants from proceeding to do the acts of diversion which it is averred in their verified complaint the said defendants are preparing to accomplish; the appeal or appeals herein being prosecuted on behalf of the defendants who were thus temporarily restrained. There are several appeals herein, owing to the state of the record, but they all present the same issue, viz. as to whether the trial court exceeded its power or abused its discretion in the issuance of such temporary injunction. The two defendants affected by such injunction are Lindsay-Strathmore irrigation district and H. R. Huebert, the secretary and managing agent of said district.

The plaintiffs allege that each of their number, with the exception of the Tulare irrigation district, is a corporation organized and existing under the laws of the state of California; that the Tulare irrigation district is a political subdivision of the state of California, organized under the act providing for the organization and government of irrigation districts and the acts supplementary thereto; that the defendant Lindsay-Strathmore irrigation district is also a political subdivision of said state, organized and governed under said act and the acts of the Legislature supplemental thereto; that the Kaweah river is, and from time immemorial has been, a natural water course, the waters of which flow from sources in the Sierra Nevada Mountains down into and through the county of Tulare; that at a certain point along said stream, known as "McKays Point," the river forks or divides into two channels, the northerly of which is thereupon known as St. Johns river, and the southerly of which as the Kaweah river; that these in their downward flow further divide and proceed under various names to discharge the waters of the river upon lower lands; that the various plaintiffs have long since acquired, some by appropriation and some by riparian ownerships, certain water rights in and to the flow of said river, and which they are wont to exercise by means of ditches which are connected with said river and the various channels thereof at indicated points below the point of its division at McKays Point; that the waters which these individual plaintiffs so own are diverted from the several channels of said river by means of these respective ditches, and are conveyed thereby to the point of ultimate consumption for irrigation, domestic, and other useful and beneficial purposes, the specific amount to which each of said plaintiffs is entitled to have and divert to such purposes being specifically set forth in said complaint.

The plaintiffs then set forth the existence of certain water rights in the defendants Foothill Ditch Company and Wallace Ranch Water Company, and to state the extent and limitations thereof. They then proceed to allege that the defendant Lindsay-Strathmore irrigation district claims to have acquired from these last-named defendants certain rights to the use of a certain ditch known as Foothill ditch, formerly owned by Wallace Ranch Water Company, and which is connected with the Kaweah river at a point above McKays Point, and that, having done so, it is proceeding by the aid of teams and a large force of men to enlarge the carrying capacity of said ditch and the flumes and aqueducts thereof to an extent much greater than the limited use of the same for the diversion of the waters to which the former owners thereof were

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

entitled would require, and to such a size as would enable the said Lindsay-Strathmore irrigation district to divert a quantity of water from the Kaweah river so large as to seriously endanger the rights of these several plaintiffs in and to the waters of said river, and as would deprive them and each of them of their rightful share thereof to their and each of their irreparable injury; that the acts of the said defendants in so doing, and in excess of their right so to do, would, unless restrained by the court, ripen into an easement to the irreparable injury, not only of said plaintiffs, but also to the stockholders of the plaintiffs, who are the owners of individual parcels of land upon which the beneficial uses of the waters to which their respective corporations are entitled are being applied.

Wherefore the plaintiffs prayed for a judgment quieting their title to their respective water rights as against the said defendants' threatened and continued trespasses thereon, and further prayed for the issuance of a temporary injunction pending the trial and final determination of the action, restraining the defendants and each of them from proceeding with the threatened diversion of the waters of such river at the point and in the manner being attempted, and in excess of their and each of their right so to do. In pursuance of the latter prayer the plaintiffs presently moved the trial court for such temporary injunction, supporting their motion with the affidavit of one H. H. Holley, expanding the averments of their verified complaint. Upon the hearing on said motion the defendants presented counter affidavits, setting forth certain reasons why a temporary injunction should not presently issue in said action, and also and in addition thereto setting forth the basis of the asserted right of the defendant Lindsay-Strathmore irrigation district, the detail of which will be stated later, to proceed with the enlargement of the said Foothill ditch and to the diversion thereby of certain specific amounts of water from the Kaweah river at the point of intake of said Foothill ditch with the said river.

The trial court proceeded to hear and determine said motion upon the showing thus presented by the respective parties, and to grant the same as to the defendants Lindsay-Strathmore irrigation district and H. R. Huebert in accordance with the prayer of the plaintiffs therefor. The appeals herein are prosecuted by the two defendants injuriously affected thereby. Four notices of appeal were filed by these out of excess of caution, but they amount to a single assault upon the effective order which the trial court finally signed and entered, and the record is embraced in a single transcript and set of briefs.

[1] As to the several assaults which the appellants make upon the order in question, other than their main objection, founded upon their basic claim of right to do the acts thereby enjoined, but brief consideration is required. The appellants' contention that a preliminary injunction was not presently necessary for the plaintiffs' protection against a threatened loss of water, for the reason that at this season of the year no available water was flowing in the Kaweah river, we deem to have no merit. The present acts of said appellants, of which complaint was made, consisted of an active and expensive program of preparation through the enlargement of the intake and capacity of the Foothill ditch for whatever flow of water might occur in said river. In the presence of such preparations, the plaintiffs could not afford to remain passive until such time as the water rose in the river to a height which would render its actual diversion by these appellants possible, without risk of the charge of laches in allowing the appellants' costly outlays, based upon a claim of right to proceed. Katz v. Walkinshaw, 141 Cal. 116, 136, 70 P. 663, 74 P. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; Conaway v. Yolo W. & P. Co. (Cal. Sup.) 266 P. 944.

[2, 3] As to the appellants' contention that the terms of the preliminary injunction granted are broader than and are inconsistent with the prayer of the complaint, it is also, we think, unmeritorious. The complaint as originally drawn is in the form of an action to quiet title, with a prayer for both specific and general relief. The case as made out upon the plaintiffs' motion for the issuance of a preliminary injunction is predicated upon affidavits and counter affidavits on behalf of the respective parties, setting forth specifically the acts and conduct of the defendants against which the plaintiffs seek immediate relief, and setting forth, also, the specific claim of right asserted and being acted upon by the defendants, and upon which they rely for a denial of the plaintiffs' motion. The order of the trial court relates to the particular situation as thus specifically presented and aims to establish and maintain a status quo until the trial of the cause upon its merits. We do not deem the order of the trial court to be broader than the situation requires, but if, in the actual operation pendente lite, it should develop that it is so, the trial court would have power to make such modification therein as justice to the litigating parties from time to time required.

[4] As to the appellants' contention that the plaintiffs have no common cause of action for injunctive relief, it is also without merit, for, while the rights of the several plaintiffs to the use of the waters of the Kaweah river are individual, derived from various and unrelated situations and divergent as to the method, amount, and time of their exercise, they are all, though perhaps not all equally, dependent upon their relation to a common source of supply, and any wrongful interference which would work a common injury would entitle them to unite in an effort to en-

join. Barton v. Riverside Water Co., 155 Cal. 509, 101 P. 790, 23 L. R. A. (N. S.) 331.

[5] We are thus brought to the appellants' main contention upon this appeal. The history of the litigation which has heretofore arisen involving the assertion on the part of the Lindsay-Strathmore irrigation district of certain rights to the use of the waters of the Kaweah river is to be read in the cases of Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056, and Tulare Irr. Dist, v. Superior Court, 197 Cal. 649, 242 P. 725. After the determination by the superior court upon a retrial of the main cause with respect to which the two above-cited decisions were made, the Lindsay-Strathmore irrigation district, acting in the main through its secretary and manager, H. R. Huebert, in about the year 1925, began purchasing shares of stock in a number of corporations holding and owning accrued rights of appropriation of the water of the Kaweah river or its branches, and possessed of ditches for the diversion and distribution of such of said waters as each corporation appropriator had become entitled to among the owners and holders of the capital stock of each in proportion to their said ownerships and upon such lands as might be designated by the holders of such shares of stock. Most of the corporations with respect to which such stock purchases were made were plaintiffs in the former action and are plaintiffs in the present one.

Having thus acquired the amount of the capital stock of each of said corporations which its several purchases thereof represented, the Lindsay-Strathmore irrigation district entered into a contract for the purchase of an interest in the upper portion of the so-called Foothill ditch, which had its original point of intake from the Kaweah river at a place upon said river above McKays Point and hence above the respective points of intake of the several ditches of the corporations, chiefly plaintiffs herein, stock in which had been made the subject of the aforesaid purchases of the Lindsay-Strathmore irrigation district. Having thus become the owner of the several blocks of stock bought by it from former stockholders of these several corporations, with whatever rights of ownership inhered therein, and having thus acquired the right to utilize the Foothill ditch at and below its point of intake from the river, the Lindsay-Strathmore irrigation district proceeded, at large outlays for men and materials, with the enlargement of said Foothill ditch at and below its said point of intake to the extent of a water-carrying capacity which, if permitted to be proceeded with, would have enabled it to take and divert from the waterflow of the Kaweah river an amount of water equaling in acre feet the aggregate amount of water to which, by virtue of its several stock ownerships in the said corporations acquired as above stated, it would have thus become entitled to have proportionately received in the course of the distribution by each of such corporations of the water to which it and its stockholders had become entitled by virtue of the appropriation thereof by each from the sum total of the waters of the Kaweah river.

The Lindsay-Strathmore irrigation district insists, in this action and upon this appeal, that it is entitled by virtue of its aforesaid stockholder's interest in the stock of these several corporations to such a definite and direct ownership in the waters of the Kaweah river as would permit it to go upon said river to a point above the several points of intake of the several ditches of the several corporations in which it has become a stockholder, and there extract, and divert by means of said expanded Foothill ditch an amount of water equaling in the aggregate the sum of the several amounts of acre feet of water which it would otherwise have been entitled to have distributed to it, proportionately with the other stockholders of each of such corporations in the course of the utilization of the amount of water to which each corporation was entitled by virtue of its individual appropriation of the waters of the Kaweah river. We are unable to give our assent to such a contention.

As to the appellants herein it is conceded that H. R. Huebert, in his activities in the way of acquiring stock holdings in the several corporations in which the Lindsay-Strathmore irrigation district has become a stockholder, and in whatever he has done in the way of expanding the capacity of the Foothill ditch, has been acting throughout merely as the agent and representative of said district, which is the only real and actual party in interest upon this appeal. It is also conceded that whatever rights the Lindsay-Strathmore irrigation district is presently asserting in justification of its proposed diversion of water from the Kaweah river at the point of intake of the Foothill ditch are those which it has acquired by virtue of its recent purchases of portions of the capital stock of the several corporations in which it has thus become a stockholder. The several corporations, the stock of which it has thus purchased, and which are plaintiffs herein, are the following: Lakeside Ditch Company, Tulare Irrigation Company, Elk Bayou Ditch Company, Consolidated People's Ditch Company, Farmers' Ditch Company, Persian Ditch Company, Evans Ditch Company, Uphill Ditch Company, Fleming Ditch Company, and Modoc Ditch Company. The said appellant has also acquired and owns stock in the Goshen Ditch Company and the Wutchumna Water Company, which are not plaintiffs herein. The individual share holdings of said appellant in each of said corporations is not given, but it is asserted in the supporting affidavit of H. H. Holley, and is not controverted by the counter affidavits, that the shares of stock acquired by the said appellant in the several corporations would entitle the holder thereof to an aggregate of 100 cubic feet of water per second at certain stages of the flow of the Kaweah river, and that the appellant has enlarged the Foothill ditch to a sufficient capacity for diverting that amount of water at the head of said ditch.

It is also asserted in the affidavit of said Holley, but denied in the counter affidavits presented on behalf of the defendants, that "to attempt to segregate and take into the head of said Foothill ditch or into the head of any other ditch above the heads of the ditches owned by the plaintiffs herein any quantity of water purporting to be the amount of water represented by the ownership of certain shares of stock in said plaintiff ditch companies, would disrupt and interminably confuse the system of the administration of water rights on said Kaweah river and on its branches and continuations, and would make it impossible to administer the distribution of water from said river and from its branches and continuations to the respective persons and corporations who are entitled to such waters."

[6-8] The several corporations, in which the said appellant has thus become a stockholder to the extent above set forth, are corporations organized under the laws of the state of California, and as such are invested with the powers and duties with respect to both the properties thereof and the stockholders therein as the Constitution and statutes of California and the by-laws of such framed in accordance therewith provide. They are not, however, such corporations as are referred to in section 324 of the Civil Code, the stock holdings in which have been by the by-laws thereof made appurtenant to certain lands and are to be transferable only with such lands. The capital stock of the foregoing corporations is transferable in the ordinary manner provided by law, and the owners thereof are the equitable owners of that proportion of the properties of each of such corporations which their respective number of the shares of stock thereof bear to the entire subscribed capital stock of the corporation, and as such equitable owners of the properties of the corporation are also equitably entitled to the proportionate distribution of such waters as such corporation acquires by appropriation or otherwise for the various uses for which such waters are acquired. Such stockholders are in that sense and to that extent, but to none other, owners of the water and water rights which the corporation possesses, and over the distribution of which it exercises under general laws and under its particular by-laws full and exclusive control. The term "mutual water company," much stressed by the appellants herein as defining these several corporations, has no defined legal meaning which would serve to differentiate corporations, organized for the acquiring of water rights and the distribution of water, from other corporations owning and administering property for the benefit of their stockholders, nor have the stockholders in that class of corporations any other or further rights than have those of corporations in general with respect to the administration of the affairs and properties of the corporation.

[9-12] The stockholders in corporations organized chiefly for the purpose of acquiring and distributing water have, it is true, a definite right to their proportion of the distribution of such water when so acquired, and the cases are uniform to the effect that they may individually enforce that right by appropriate proceedings in the event of its evasion or denial on the part of the officers of the corporation. Miller v. Imperial Water Co., 156 Cal. 27, 103 P. 227, 24 L. R. A. (N. S.) 372; McDermont v. Anaheim, etc., Co., 124 Cal. 112, 114, 56 P. 779. There are cases, such as the case of Thayer v. California Development Co., 164 Cal. 117, 128 P. 21, and Hildreth v. Montecito Water Co., 139 Cal. 22, 72 P. 395, and Stratton v. Railroad Commission, 186 Cal. 119, 198 P. 1051, wherein the landowners of riparian rights have organized a corporation for the sole purpose of facilitating the distribution of their water upon their lands, and in so doing have expressly reserved the ownership of such water in themselves. But the corporations above named, and in each of which the main appellant herein is a stockholder, are none of them of that character. The sole right of each and every stockholder in each of said corporations is the right in mutuality with its fellow stockholders of having the proportionate share of each in the distributable waters owned by such corporation supplied to such stockholder through the instrumentalities, including the system of dams, intake, and ditches provided by the corporation for such proportionate distribution of the waters of the Kaweah river covered by its particular appropriation thereof, and it would seem to be too clear for argument that neither one nor any number of such stockholders would or could possess the legal right to take or to receive the amount of water to which such stockholder or stockholders may be entitled by another manner or means than those supplied by the corporation itself in the exercise of its full and legal control over the reception and distribution of such of the waters of the Kaweah river as is covered by its appropriation, and is receivable in the amounts and at the points of intake designated in the very acquisition of its appropriative rights in the water of such river.

To adopt the views of the main appellant herein as to its right, derived solely from its holdings of stock in these several corporations to go higher up the river than the points of intake of each and all of the corporations of which it is a stockholder, and establish there an intake and system of ditches sufficient in capacity to enable it to extract and carry away the amount of water represented in its aggregated holdings of corporate stock, would necessarily be to admit the possession of similar rights in each and every stockholder in each of said corporations to go and do likewise, and it is too plain for argument that such an admission would result in a state of inextricable discord and confusion among the owners of water rights of various sorts along the course, not only of the Kaweah river, but of every other river and stream of water in California where similar rights, by appropriation or otherwise, in the flowing waters of these streams are in the course of acquisition and exercise. The creation or threatened danger of such a consequence would of itself supply a sufficient reason for the use of the injunctive processes of the court in the way of its prevention.

It appears affirmatively herein that none of the several corporations in which the main appellant herein has become a stockholder has in any wise denied or interfered with the right of said appellant, as such stockholder, to receive the full quota of water which it is entitled to in the due course of the distribution of each stockholder's share of the water belonging to each said corporation. That said appellant may not be able to so lawfully combine its several distributive shares in the waters of the Kaweah river to which it is thus in severalty entitled as to be able to deliver the same in a body upon its orchard properties cannot be held to justify its attempt to make such combination in the clearly unlawful method which has given rise to the present action.

For the foregoing reasons, we are of the opinion that the order of the trial court, granting and issuing a temporary injunction herein, should be and the same is hereby affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SEAWELL, J.; SHENK, J.; LANGDON, J.

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205 Cal. 71

HAINES et al. v. COMMERCIAL MORTG. CO. et al. (L. A. 10688.)

Supreme Court of California. Aug. 24, 1928.

1. Appeal and error 🔑801(4)—Motion to dismiss appeal should be denied, where examination of record and appeal on its merits would be necessary to determine motion.

Motion to dismiss appeal as being sham and frivolous, and because points urged had been previously determined on a former appeal adversely to appellants, should be denied, where to determine allegations of motion it would be necessary to examine record and the appeal on its merits.

2. Appeal and error 🔑1126—Motion for affirmance should be granted, where appellants' briefs set out insufficient of record to justify reversal (Code Civ. Proc. § 953c).

Motion for affirmance of judgment appealed from should be granted, where appellants failed to print in their opening brief, or any supplement thereof, in accordance with Code Civ. Proc. § 953c, any part of record sufficient to justify a reversal of the judgment.

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Francis S. Haines and another against the Commercial Mortgage Company and others. From the judgment, and an order, plaintiffs appeal. On motion to dismiss appeal, and for affirmance of judgment. Motion to dismiss denied. Judgment and order affirmed.

See, also, 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A. L. R. 725.

George L. Sanders and Hugh Day, both of Los Angeles, for appellants.

Schweitzer & Hutton and Frank S. Hutton, all of Los Angeles (B. R. Ware, of Los Angeles, of counsel), for respondent Commercial Mortg. Co.

Ralph H. Spotts, Lawrence L. Otis, Charles I. Baker, and R. E. Parr, all of Los Angeles, for respondent Title Ins. & Trust Co.

Earl S. Patterson, of Los Angeles, for receiver Oscar Moss.

PER CURIAM. Respondents move to dismiss the appeal, and to affirm the judgment and order appealed from. The motions are identical, except as to the relief requested, and respectively specify as grounds therefor that the several points urged upon the appeal have heretofore been determined by this court adversely to the appellants' contentions, that the appeal is frivolous and prosecuted for purposes of delay, and that the appellants have not printed in their opening brief, or any supplement thereto, as required by section 953c of the Code of Civil Procedure, any part of the record sufficient to justify a reversal of the judgment and order.

[1, 2] The motion to dismiss must be denied, for to determine whether the appeal is frivolous and sham, and to ascertain whether the points urged by the appellants have already been decided by this court on a former appeal, would require an examination of the record and the appeal on its merits. Such examination will not be undertaken upon a motion of this character. However, it appears that the motion to affirm for failure to comply with the provisions of section 953c, supra, is good. The appellants' opening brief, consisting of but six pages, makes no attempt

to set forth any part of the record. It contains but an outline of the appellants' several contentions upon appeal, from which it is difficult to even ascertain the facts giving rise to the litigation. Upon the authority of Dahlberg v. Dahlberg (Cal. Sup.) 260 P. 290, the motion to affirm is granted.

The motion to dismiss the appeal is denied. The judgment and order appealed from are, and each is, affirmed.

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205 Cal. 73

CALIFORNIA RENDERING CO. v. PACIFIC ELECTRIC RY. CO. (L. A. 9028.)

Supreme Court of California. Aug. 27, 1928.

1. Street railroads 🔑117(7)—Proof of high speed of electric car does not establish negligence per se.

Though proof of given high rate of speed of electric car in absence of statute or ordinance does not establish negligence per se, yet a car traveling at same high rate of speed is not necessarily operated in a manner free from negligence, and rate of speed which in some circumstances would be regarded as reckless might, in other circumstances, be held to be proper.

2. Street railroads 🔑114(9)—Evidence held to sustain finding of negligence in operation of electric car colliding with truck.

In action for damage in collision of truck with electric car, evidence *held* to sustain finding of negligence in operation of car.

3. Street railroads 🔑114(14)—Truck driver's evidence that he did not seasonably look in direction of approaching electric car held to establish contributory negligence as matter of law.

In action against electric railway for damages sustained when plaintiff's truck collided with electric car, evidence *held* to establish that driver of truck was guilty of contributory negligence as matter of law.

4. Negligence 🔑136(9)—Contributory negligence is question of law where only one reasonable conclusion can be drawn from evidence.

Though, generally, question of contributory negligence is one for the determination of the trial court, question becomes one of law rather than of fact where only one reasonable conclusion can be drawn from the evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank H. Dunne, Judge.

Action by the California Rendering Company against the Pacific Electric Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Adopting opinion of the District Court of Appeal, for which see 265 P. 1019.

Frank Karr, E. E. Morris, C. W. Cornell, and R. E. Wedekind, all of Los Angeles, for appellant.

Martin Forrest, of Los Angeles, for respondent.

PER CURIAM. After a further and more complete consideration of the opinion herein rendered by the District Court of Appeal, we are of the opinion that it correctly states the views of this court upon the questions therein determined. This opinion, written by Justice pro tem. Wood, and concurred in by Presiding Justice Conrey and Justice York, we hereby adopt as the opinion of this court, and it is as follows:

Plaintiff recovered a judgment for damages sustained when its truck collided with a car of the defendant company. The accident occurred at about 11:30 o'clock in the morning at a point at which the rails of defendant company cross Cypress road on the interurban electric line between Los Angeles and Redondo Beach. The defendant was operating two sets of tracks and the car in question, traveling from Los Angeles to Redondo Beach, struck the right rear wheel of the truck as it crossed the westbound tracks. The driver of the truck, one Schultz, approached the intersection traveling on Cypress road in a northerly direction. At his right, the direction from which the car was coming, a number of cypress trees planted close to the road obstructed his view to such an extent that he could not see an approaching car from any point from which he would have to look through the trees. A line extended from the trees across Cypress road would be 32 feet from the nearest rail of the tracks on which the car was traveling. Except at the intersection defendant's cars were operated on its right of way. A wigwag was in operation, and the customary railroad sign had been erected. The territory about the intersection was described as "truck garden country," and the intersection itself was described by Schultz as a "regular country road crossing." He had frequently driven over it before the day of the accident.

[1, 2] Defendant contends that the evidence is insufficient to support the finding that it was negligent in the operation of the car, and cites Bilton v. Southern Pacific Co., 148 Cal. 443, 83 P. 440, and Larrabee v. Western Pacific Ry. Co., 173 Cal. 749, 161 P. 750, both holding that, in the absence of a statutory regulation on the subject, a given rate of speed is not negligence as a matter of law. These cases do not change the general rule that the question of negligence is for the trial court to determine in view of all the circumstances surrounding the collision. While it is well established that proof of a given high rate of speed, in the absence of a statute or

ordinance, does not establish negligence per se, it is equally well established that a car traveling at the same high rate of speed is not necessarily operated in a manner free from negligence. Tousley v. Pacific Electric Co., 166 Cal. 457, 137 P. 31. A rate of speed which in some circumstances would be regarded as reckless might, in other circumstances, be held to be proper. Here there was evidence from which the court could reasonably infer that the car was traveling at a rate of speed 50 miles per hour at a crossing frequently used where the drivers of vehicles could not see approaching cars until they arrived at a point 32 feet from the point of danger; and that the whistle on the car was not blown until the truck in question reached this point. In view of these circumstances, it cannot be said that the findings of the trial court on this subject were not supported by the evidence.

[3, 4] Defendant further contends that the evidence establishes that the driver of the truck was guilty of contributory negligence as a matter of law. This contention must be upheld. Schultz testified that he approached the intersection at the rate of about 5 miles per hour, and that he could stop his truck in about 2 or 3 feet. He further testified:

> "I stopped about where that 'X' is [referring to the map], and looked down to the east of me. I could see down to the east approximately 300 feet. I did not see any car approaching, and then I started up and looked to my right as I proceeded ahead. * * * When I stopped I was right on a line with those trees and I could see about 300 feet down the track. That is as far as I could see. I looked to the west between the time I started up and the time I drove onto the track. I looked to the east again after I hit the track. When I looked to the east again one wheel was on the track. *I did not look to the east between the time I started up and the time I hit the track.* * * * When I first saw the car, the front wheels of my truck were on the track. At that time the car was about 300 feet away. Had I looked to my right, or to the east, at any time between the point X and the point A [point of collision], I suppose I would have been able to see this car coming. There was nothing to obstruct my view."

While as a general rule the question of contributory negligence is one for the determination of the trial court, it has been frequently held that where the only reasonable conclusion that can be drawn from the evidence is that the driver was negligent the question becomes one of law rather than one of fact. In Herbert v. Southern Pacific Co., 121 Cal. 227, 53 P. 651, it is said:

> "But the cases arising from injuries suffered at railroad crossings have been so numerous, and upon certain points there has been such absolute accord, that what will constitute ordinary care in such a case has been precisely defined."

The rules applicable to the present case are the same as those governing collisions at crossings of steam roads. New York L. Oil Co. v. United Railroads, 191 Cal. 96, 215 P. 72; Billig v. Southern Pacific Co., 192 Cal. 357, 219 P. 992. In Griffin v. L. A. & S. L. R. R. Co., 170 Cal. 772, 151 P. 282, L. R. A. 1916A, 842, it was impossible for the driver of the automobile "to get a clear view of the railway track to the south until he passed a corner of the fence 17 feet from the track. * * * If, therefore, he had stopped at a point where his head would have been 16 feet from the track there would have been 5 feet between the front of his car and the zone of danger from a locomotive and he could have obtained from that point an unobstructed view of the rails for a distance of approximately 1200 feet. Instead of stopping to look when he reached this first available place for seeing, Mr. Griffin chose to bring his automobile to a standstill at a point about 35 feet east of the track where it would be impossible to see a train approaching from the south. At this point he stopped to listen and to look for smoke. Hearing no noise and perceiving no smoke he started to cross the track." In holding the plaintiff was guilty of contributory negligence as a matter of law, the court said:

> "From these facts it is clear that Mr. Griffin neglected the simplest and plainest precautions for the safety of himself and the others in the automobile. It is the duty of a traveler on a highway approaching a railroad crossing to use ordinary care in selecting a time and place to look and listen for coming trains."

In Jones v. Southern Pacific Co., 34 Cal. App. 629, 168 P. 586, the court said:

> "When the taxicab reached the property line of Webster street there was a space of 30 feet in which the plaintiff had opportunity to look for an approaching train. He testified that he looked for a train at this point, also when he passed the curb line, at which point he would have been 18 feet from the nearest rail of the track, with an unobstructed view for many blocks of the approaching train. * * * Plaintiff must look at a point where such looking would be effective. * * * If plaintiff had looked for a train where he said he looked, he must have seen it, for the uncontradicted testimony is that he had a clear view, and that the train was in sight with headlight burning. If he did see it, he was guilty of contributory negligence as a matter of law in attempting to cross. If he did not see it, it was because he did not look, and in that case he likewise was guilty of contributory negligence."

The facts in the case at bar establish contributory negligence on the part of the plaintiff as positively as in either of the two cases last referred to. By the testimony of the driver it was shown that he traveled a distance of 32 feet (making allowance for the distance between the driver's seat and the front of the truck) during which he had an unobstructed view of the approaching car. During this time he either failed to look to the right at all or if he did so he must have looked heedlessly. In either case his negligence is apparent. New York L. Oil Co. v. United Railroads, 191 Cal. 96, 215 P. 72, supra. He cannot be cleared of the charge of negligence by a showing that he stopped the truck on a line with the trees and there looked to the right. It was his duty to look for approaching cars at such point and in such a manner as would enable him to determine if he could proceed in safety. No circumstances were shown in evidence which tended to excuse him from discharging this duty. His failure so to do, although ample opportunity was afforded, must inevitably lead to the conclusion that he was guilty of contributory negligence as a matter of law.

The judgment is reversed.

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205 Cal. 82

PEAK v. SPITZER et ux. (S. F. 12456.)

Supreme Court of California. Aug. 29, 1928.

Vendor and purchaser ⚿186—Purchaser's failure to make initial payment, on receipt of report of title as required, held not excused, because report disclosed mortgage.

Where land contract, originally providing for down payment of $1,000 by purchaser, was changed by him before it was signed, so as to recite that initial payment should be made "upon report of title," *held*, that purchaser was not excused from making such payment, on receipt of report of title, by fact that report showed a $9,000 mortgage against premises, and that vendor's wife who had interest therein had not signed contract, and he was therefore not entitled to specific performance after receiving notice of vendor's election to rescind because of his failure to make required initial payment; time being of essence of contract.

Department 2.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by George Peak against Felix H. Spitzer and wife. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Knight, Boland & Christin, of San Francisco, for appellant.

Milton Marks, of San Francisco, for respondents.

SHENK, J. Appeal from a judgment of nonsuit in an action for specific performance.

The defendants were the owners as tenants in common of an improved lot in St. Francis Wood, San Francisco. The plaintiff desired to purchase the property, and, under date of October 19, 1926, signed and delivered to the defendant Felix H. Spitzer a written offer, as follows:

"$16,000, payable $1,000 down, $1,000 January 1, 1927, balance payable at $100 or more per month. * * * I will deposit $1,000 with the City Title Insurance Company and order of search immediately."

On the same day the plaintiff presented to the defendant Felix H. Spitzer, for his signature, a document in the form of a receipt and contract of sale and purchase of said property. The opening paragraph of this document recited:

"Received from Geo. Peak, hereinafter described as the purchaser, the sum of one thousand dollars."

The terms of purchase were stated or set forth in the letter of October 19, 1926. The document was a stock form of receipt, purchase, and sale, but it was modified in the handwriting of the plaintiff, before it was signed by the defendant Felix H. Spitzer, so as to provide that "initial payment to be paid direct to seller upon report of title." This modification tended to confuse the provisions of the contract as to the terms of payment. It is apparent from the whole record, however, that it was the intention of the parties that a down payment should be made by the plaintiff at least as soon as a report of the title should be received from the title company. This report was issued by the title company under date of October 25, and was received by the plaintiff on October 30, 1926, but the initial payment was never made by him. On November 6th following the plaintiff received from the defendant Felix H. Spitzer a letter rescinding the agreement, on the ground that the initial payment had not been made as provided in the contract; that the plaintiff had promised to be at the office of the defendant on November 4th and provide for the initial payment, but had not done so. On the same day the plaintiff notified said defendant by letter that he intended to fulfill the terms of his contract, that the report of title disclosed defects in the title, and inferring that he was required by the contract to make no payment thereunder until he received a "clear title report." The defects referred to appear to have been that the record showed that the defendant's wife had an interest in the property and she had not signed the contract, and that there was a $9,000 mortgage against the premises.

The plaintiff contends that under the contract he was to receive a title report showing title in the defendant Felix H. Spitzer, free and clear of all incumbrances, before he was obligated to put up any money. He cites many cases to the effect that, when an abstract of title or a certificate of title is called for, the same must show clear title in the vendor, unless the contract of purchase specifically provides otherwise. It may be assumed that generally such is the law, but that rule is not controlling here. The original form of the contract here in question provided for a down payment, which was never made. It would be unreasonable to say that by the modification of the printed form of contract the parties intended that the seller should clear the title of the $9,000 mortgage before the purchaser should be required to pay any money whatsoever. Under the facts shown by the record it is reasonable to conclude, as the trial court did, that the report of title issued and delivered to the plaintiff satisfied the requirements of the contract, and that, as time was made the essence, the plaintiff had not made out a case.

The judgment is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

GROSS v. HAZELTINE et al. (L. A. 10722.)★

Supreme Court of California. Aug. 24, 1928.

Rehearing Granted and Submission Order Set Aside Sept. 20, 1928.

1. New trial ⟹116(2)—Notice of intention to move for new trial, having been filed before receiving notice of entry of judgment, held timely (Code Civ. Proc. § 659).

Where defendants filed notice of intention to move for new trial before receiving notice of entry of judgment, defendants not having filed notice of appeal or taken any other step that might be construed as waiving service of notice of judgment entry, *held* that new trial proceedings were timely, under Code Civ. Proc. § 659.

2. New trial ⟹139—Parties by conduct cannot waive court's jurisdiction to pass on new trial dependent on notice (Code Civ. Proc. § 660.)

In view of Code Civ. Proc. § 660, providing that service of notice of the entry of judgment is necessary to start the time running within which a trial court may pass on new trial proceedings, the parties cannot by their conduct waive the court's jurisdiction in respect thereto.

3. Appeal and error ⟹345(1)—Appeal taken before termination of new trial proceedings, where notice of intention to move for new trial had been made, but motion never was, held timely (Code Civ. Proc. §§ 660, 939).

Defendants gave notice of intention to move for new trial before being served with notice of entry of judgment, and before they filed notice of appeal. Motion for new trial was not made, and defendants thereupon filed notice of appeal from the judgment. *Held*, in view of Code Civ. Proc. § 660, providing that service of notice of the entry of judgment is necessary to start time running within which a trial court may pass on new trial proceedings, that appeal was timely, under section 939, providing for taking of appeal from judgment within 30 days after termination in trial court of new trial proceedings.

4. Appeal and error ⟹345(1)—Bill of exceptions on appeal, filed before termination of new trial proceedings, held timely, no way existing to determine limitation (Code Civ. Proc. § 650).

Bill of exceptions on appeal, filed before termination of new trial proceedings, *held* timely, under Code Civ. Proc. § 650, providing for filing bill of exceptions within 10 days after notice of decision denying motion for new trial or other termination of the new trial proceedings, for reason that there is no way to determine limit of time within which bill should have been prepared and served, in the absence of termination.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by D. Gross against C. E. Hazeltine and another. Judgment for plaintiff, and defendants appeal. On motions to dismiss appeal and to exclude bill of exceptions from the record. Motions denied.

Leonard, Surr & Hellyer, of San Bernardino, for appellants.

Harry W. Horton, of El Centro, for respondent.

PER CURIAM. [1-3] Respondent presents a motion to dismiss the appeal herein and to exclude the appellants' bill of exceptions from the record. The action was brought to recover a money judgment and to foreclose a mechanic's lien for services performed. Judgment was entered for the plaintiff on December 18, 1926. Thereafter, and on January 3, 1927, the defendants filed their notice of intention to move for new trial, but a motion for new trial was never actually made. In passing, it might be said that the respondent failed to serve notice of the entry of judgment, and the new trial proceedings were therefore timely instituted, under the provisions of section 659 of the Code of Civil Procedure, for the appellants at the time had not filed their notice of appeal, or taken any other step that might be construed as a waiver of service of notice of the entry of judgment. The notice of appeal from the judgment was filed March 9, 1927.

Respondent now moves to dismiss the appeal, upon the ground that it was not taken within the time prescribed by law. The motion is without merit. Under the provisions of section 660 of the Code of Civil Procedure service of notice of the entry of judgment is necessary to start the time running within which a trial court may pass upon new trial proceedings. The parties cannot by their conduct waive the court's jurisdiction in this respect. Strehlow v. Mothorn, 197 Cal. 112, 239 P. 850; Moore v. Strayer, 175 Cal. 171, 165 P. 530. In view of the respondent's failure to serve notice of the entry of judgment, it cannot now be said that the time within which the trial court might have passed upon

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★Superseded by opinion, 273 P. 550.

the new trial proceedings has expired. This being so, the appeal is within time, for section 939 of the Code of Civil Procedure provides for the taking of an appeal from a judgment within 30 days after termination in the trial court of new trial proceedings.

However, even if it be assumed that notice of entry of judgment had been served in the instant case on the very day judgment was entered, it would avail the movant nothing, for the trial court would have had 2 months thereafter, or until February 18, 1927, within which to dispose of the new trial proceedings. Section 660, supra. The appellants, under section 939, supra, would then have 30 days additional or until March 20, 1927, within which to prosecute their appeal. The appeal, having been taken on March 9, 1927, was, therefore, well within time, and the motion to dismiss will have to be denied.

[4] The motion to exclude the bill of exceptions from the record is grounded upon the assertion that the proposed bill was not served within time. In our opinion this motion must also be denied, for section 650 of the Code of Civil Procedure provides, among other things, for the preparation and service of a proposed bill of exceptions within 10 days after notice of decision denying motion for new trial or other termination of the new trial proceedings. If, as already shown, there has been no termination in this case of the new trial proceedings there is no way to determine the limit of time within which the proposed bill should have been prepared and served. Moreover, the respondent's motion, made under section 473 of the Code of Civil Procedure to vacate the settlement and allowance of the bill of exceptions was denied by the trial court, and apparently no appeal has been prosecuted from the order denying the requested relief.

For the foregoing reasons, the motions to dismiss and to exclude the bill of exceptions from the record are and each is denied.

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205 Cal. 65

ATLANTIC FISH CO. v. DOLLAR S. S. LINE. (S. F. 12788.)★

Supreme Court of California. Aug. 24, 1928.

Rehearing Denied Sept. 20, 1928.

Shipping ⚷104—Modification of contract of shipment being without consideration, before acted on by carrier, revocation thereof left original contract in full force (Civ. Code, § 1605).

Plaintiff, as purchaser of fish, arranged for seller to contract for its carriage by defendant from Boston to San Francisco under refrigeration. Seller made contract. Refrigeration system having become disabled, plaintiff agreed to modification of contract, allowing transportation under ventilation only. Before ship started voyage, plaintiff revoked change, by notifying defendant directly. Defendant's agent assured plaintiff refrigeration system would be repaired, and fish would be carried as originally contracted. However, they were transported under ventilation, which resulted in spoilage. *Held*, modification of contract was without consideration, since not acted on by defendant to its detriment, in view of Civ. Code, § 1605, and therefore revocation of change restored original contract to full effect.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. T. B. Warne, Judge.

Action by the Atlantic Fish Company, a copartnership composed of H. M. Colety and others, against the Dollar Steamship Line. Verdict and judgment for plaintiff. A new trial was granted, and plaintiff appeals. Reversed.

Superseding former opinion in 261 P. 729.

Milton L. Schmitt and Andros, Hengstler & Dorr, all of San Francisco, for appellant.

Nathan H. Frank, Irving H. Frank, and Keith Ferguson, all of San Francisco, for respondent.

PRESTON, J. This is an action to recover damages for detriment to a shipment of dried fish. The complaint pleads a contract between the parties whereby defendant agreed to carry said shipment under refrigeration from Boston to San Francisco, and its failure through negligence so to do, as a result of which plaintiff sustained damages in the sum of $1,738.51. The answer denies these averments, and sets up as a defense a contract to carry said goods under ventilation only. Made an exhibit thereto is a bill of lading to this effect, with the requirements of which faithful compliance is pleaded. Verdict and judgment were for plaintiff in the amount claimed, but upon motion of defendant a new trial was granted predicated upon alleged insufficiency of the evidence. Defendant offered no testimony. The facts are these:

In July, 1924, plaintiff through correspondence, purchased from Gorton-Pew Fisheries Company, Limited, of Gloucester, Mass., 300 cases of codfish, upon the express understanding that the goods would be shipped under refrigeration to Boston, there to be transshipped under like refrigeration to the purchaser at San Francisco on board the steamship President Hayes, one of defendant's vessels, which touched at Boston and New York and was scheduled to sail about August 12, 1924. On August 4th and 8th space was reserved on said vessel by the shipper for plaintiff, which reservation read as follows:

"Please arrange to store under refrigeration at a temperature of 35–40 degrees, sending forward on collect basis, sending bills of lading to

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★Rehearing denied.

us at Gloucester. * * * Will you kindly make notation on the bill of lading showing at what temperature these goods are stored?"

On August 8th the goods were shipped to Boston, and on or about August 12th they were received by defendant on board the President Hayes, and bill of lading was issued and delivered to the shipper in accordance with instructions and providing for shipment under refrigeration.

Following the issuance and delivery of said bill of lading, and after the goods were on board and bound for San Francisco, via New York, to wit, on August 13, 1924, the shipper wired plaintiff at San Francisco as follows:

"Dollar Line advise refrigerator compartment on Hayes disabled. Unable to handle shipment under refrigeration. Goods now on board bound for New York. Can store where it will receive ventilation. Shall we authorize or have shipment held at New York for next steamer? Answer quick."

In reply to this message plaintiff wired on August 14th:

"Authorize Hayes shipment to come through under ventilation."

The last-mentioned wire was dispatched by Mr. Colety, Jr., of the firm of plaintiff, a copartnership. Mr. H. M. Colety, the senior member of the firm, was absent at the time, but returned the same evening, and the next morning, August 15, 1924, at 9 a. m., he called at the office of defendant in San Francisco and addressed himself to a Mr. Herman in the freight office, through whom he had previously transacted considerable business with defendant. He displayed the message he had received and the reply that had been sent, and stated to Mr. Herman that at that season of the year these goods could not be safely shipped through the Panama Canal under ventilation, but in order to preserve them it was necessary that they be shipped under refrigeration, whereupon, after consultation, Mr. Herman stated to Mr. Colety, Sr., that the refrigeration plant on the President Hayes would be repaired in New York and the goods would be shipped under refrigeration as theretofore ordered.

Upon various occasions subsequent to said date and prior to the arrival of said shipment Mr. Colety was assured by the said Herman that the goods were en route under refrigeration. Some 10 days after the shipment left, plaintiff received in the mail from the shipper a bill of lading, which showed that the goods were coming under ventilation. Mr. Colety again saw Mr. Herman, and was assured that this bill of lading had come from the Boston office of defendant, as his arrangements for refrigeration had been made with the New York office; hence there was no cause for alarm, for the goods were coming under refrigeration as promised. At the time of the first conversation between Mr. Colety and Mr. Herman, the steamer was either on the high seas or about to land at the port of New York, where she was to remain for several days before weighing anchor bound for San Francisco.

On August 15, 1924, the shipper wrote defendant's agent at Boston as follows:

"Agreeable to your request we are returning bill of lading, No. 1084, covering * * * salt fish. * * * We also wish to confirm our conversation while in your office yesterday, instructing you to forward both of these shipments via the steamship President Hayes, between decks where the goods will receive ventilation. We are writing the consignees to-day explaining to them fully just why it was necessary to take these steps, and feel sure that they will see it in the right way. Please mail us corrected bill of lading at your early convenience, so that we can arrange to forward them to our customers."

From this letter it is clear that the date borne by the bill of lading is erroneous, it being dated August 14, 1924, for the first bill of lading could not have been corrected or amended until subsequent to August 15, 1924. It is also apparent that the only difference between the bill of lading first issued and the amended or second bill of lading was as to the manner of shipment. The first bill called for refrigeration, and the other for "cool stowage—not refrigeration."

We regret to say, after careful study of the record, that we believe that neither counsel has given consideration to the controlling legal problem presented thereby. The efforts of counsel have been directed towards discussion of the sufficiency of the evidence to support novation claimed to arise from the oral arrangement made between Mr. Colety and Mr. Herman. They have also discussed at great length the rule against parol testimony to vary the terms of a written contract. An extended discussion has also been made of the question as to whether or not local statutes and rules of law are applicable, the contract being maritime, and of other questions.

Under our view of the case, as above intimated, these questions are not involved. When defendant issued to the shipper for the benefit of plaintiff its first bill of lading, providing for refrigeration, and accepted said goods under such contract on board its vessel, it then and there covenanted on sufficient consideration to carry said goods from Boston to San Francisco under refrigeration. The subsequent consent of plaintiff to a change in the character of the stowage, secured through the wires of August 13 and 14, was revoked or withdrawn before the consent to modification had been acted upon and a new bill of lading issued. The consent to the modification of the former valid and already issued bill of lading was without any consideration to support it, until it had been acted upon by the carrier and was, therefore, subject to withdrawal at any time before the defendant had suffered any detriment resulting therefrom. In other words, plaintiff received no consideration for the consent secured from it, and defendant suffered no detriment on account thereof. The senior member of the firm, acting for plaintiff, withdrew such consent within 24 hours after same was given, and clearly before the change was acted upon by defendant to its detriment. Therefore the first bill of lading, from and after its issuance, remained the true contract between the parties, and defendant was required thereunder to transport said goods under refrigeration. Having failed to do so, the verdict and judgment against it were proper. Civ. Code, § 1605; Western Lith. Co. v. Vanomar Producers, 185 Cal. 366, 369, 197 P. 103.

There being no basis for exercise of the discretion of the trial court, the order granting a new trial is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; LANGDON, J.

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205 Cal. 78

WHALEN v. STRESHLEY. (Sac. 3983.)

Supreme Court of California. Aug. 27, 1928.

Master and servant ⟹230(6)—Sixteen year old boy, injured while riding employer's mule for amusement, held negligent.

Plaintiff, a boy 16 years of age, was hired by defendant as a hay hand. He was skilled in riding unbroken horses, and knew it to be dangerous. He attempted to ride his employer's unbroken mule for his own amusement, and was injured. *Held*, that plaintiff was guilty of negligence, as a matter of law.

In Bank.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Action by Dennis Whalen, Jr., by D. E. Whalen, his guardian ad litem, against J. M. Streshley. Judgment for plaintiff, and defendant appeals. Reversed.

Barry & Barry, N. J. Barry, and Hardin Barry, all of Susanville, for appellant.

Ervin S. Best, of San Francisco, for respondent.

LANGDON, J. This is an appeal by the defendant from a judgment against him for $5,000, damages for personal injuries sustained by plaintiff while riding an "unbroken" mule upon a stock ranch owned by the defendant.

J. M. Streshley, the defendant, was engaged in the business of conducting a ranch, upon which he raised hay and cattle, in Willow Creek valley, Lassen county, Cal., and employed a number of people in this work. In July, 1924, the plaintiff was employed by said defendant to work on the ranch as a hay hand by the day. For some time prior to August 10, 1924, the hay hands and other employees of defendant had been riding calves, steers, cows, and unbroken horses for their own amusement. To aid them in this pastime, two of the employees, after their working hours and on Sundays, had built a chute for putting the "rigging" on the stock intended to be ridden. This chute opened into a large corral, into which the animals, with their riders, were turned from the chute. Different members of the hay crew rode cattle and range horses frequently after supper and on Sundays.

Plaintiff rode with the others, and was present and watched the others ride. Among the boys the plaintiff was considered a good rider. He states that he rode well, and that he took great pride in riding, and that on the occasion of his injury he "just wanted to ride and show off." At the time of the accident he was a boy 16 years of age, and had had experience in riding cattle and unbroken horses. The riding was outside the scope of his employment and was for his own entertainment and amusement. The defendant had been present on some of the occasions, when his employees had had these "shows," which were "handled" by Johnny Rhodes, one of the employees.

On the day of the accident, Sunday, August 10, 1924, cattle were brought into the corral and were ridden by plaintiff and other employees, and later plaintiff asked one of the younger boys to go into the field and get some horses for riding. This was done, and several of the employees rode the horses, the plaintiff riding a bay yearling from the chute. This animal failed to "buck," as expected and desired by the riders, but made a run through the fence. Plaintiff grabbed the fence as the animal went through and escaped injury. The defendant was present and watched the performance. Other horses were used, and later a mule was put into the chute for riding. According to the undisputed testimony, one of the employees, called "Rusty," was to ride this animal; but, while he had gone to the barn for a drink, plaintiff decided to ride the mule. He adjusted the "bull rigging" to satisfy himself, and then mounted the mule freely and voluntarily, and without any persuasion from any one. He knew the mule was put into the chute to make him "buck." He expected him to buck. He had seen many animals ridden from the chute in the same manner; he knew this mule was "unbroken"; and, according to the special verdict of the jury, he had had sufficient experience to know the danger of riding this mule.

Plaintiff shouted to turn the mule out and proceeded to ride him around the corral. The mule was crippled, and walked upon the side of one hoof. The mule "bucked" for a time, and plaintiff spurred him and urged him on. The mule soon ceased to "buck," and attempted to get away by jumping over the gate leading into the corral, but caught his foot in the gate and fell to the ground, throwing plaintiff over his head. The plaintiff struck his head on the ground and broke both jawbones. Plaintiff was experienced in riding unbroken horses, and knew the conditions surrounding such a hazardous pastime.

Special interrogatories were submitted to the jury, upon which it found: That the defendant had employed the plaintiff to work on the ranch during the hay season; that plaintiff was not performing any service for defendant as a hay hand, or within the scope of such employment, at the time of his injury; that the riding of the mule was no part of his duty as an employee; that the defendant did not direct the plaintiff to ride the mule; that defendant was present at the time of plaintiff's injury, and knew he was going to ride the mule; that defendant knew the mule was vicious; that plaintiff had sufficient experience to know the danger of riding the mule; that he rode the mule of his own free will; and that he had not been told that he could not ride the stock on the ranch. Notwithstanding these special findings, the jury returned a general verdict for the plaintiff in the sum of $5,000.

There are some errors in the record with reference to the ruling on the demurrer, directed to the improper joinder of causes of action and other matters, but we shall not consider these matters, because we are of the opinion that, under the authorities in this and other jurisdictions, the facts found by the jury demand a judgment for the defendant.

The plaintiff in the instant case was not a child of tender years, but an alert, active, intelligent boy 16 years of age. He was experienced in the sport in which he engaged, and took the chance of injury because of the exhilaration of the exercise and the skill in riding it developed. In the case of Consolidation Coal Co. v. Pratt, 169 Ky. 494, 184 S. W. 369, L. R. A. 1916D, 1229, the court stated: "The kicking propensity of the mule is a matter of common knowledge." And after discussing the facts of the case, which showed that the injured man had placed himself in a position to be kicked by a mule, and had then lashed the mule, the court stated: "An employee cannot court danger by inviting and provoking a mule to kick him, and then recover of the master for a consequent injury."

In the instant case the injury occurred outside of the scope of the employment and on a holiday, when the plaintiff, with sufficient mentality, experience, and maturity to understand the possible consequences of his acts, mounted an unbroken mule, spurred, frightened, and angered it, until it attempted to leap over a gate. His action was his free and voluntary act. Unless the case falls within the doctrine of the turntable cases—a doctrine which this court and others have refused to extend—the plaintiff may not recover, and we are of the opinion that there is no analogy between those cases and the instant one.

In the case of Peters v. Bowman, 115 Cal. 345, 47 P. 113, 598, 56 Am. St. Rep. 106, this court refused to extend the rule of the turntable cases to a pond of water, and characterized that rule as an exceptionally harsh rule of liability. In the case of Studer v. Southern Pac. Co., 121 Cal. 400, 53 P. 942, 66 Am. St. Rep. 39, a boy of 12 years of age was held guilty of contributory negligence, barring a recovery for personal injuries, when he attempted to cross between the cars of a train which was blocking a crossing. The court said:

> "The same act which would be negligence in an adult may not be such if done by a child; but a child is required to exercise the same degree of care that would be expected from children of his age, or which children of his age ordinarily exercise, * * * and the court is as fully authorized as a jury to determine what this degree of care is. Children, as well as adults, should use the prudence and discretion which persons of their years ordinarily have, and they cannot be permitted with impunity to indulge in conduct which they know, or ought to know, to be careless."

It is true, of course, that the plaintiff in this case was not a trespasser, but nevertheless the defendant was not an insurer of his safety, and under the circumstances presented by the record we think the plaintiff was guilty of negligence, as a matter of law, proximately causing his injury.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; PRESTON, J.; SEAWELL, J.

205 Cal. 84

RITTERBUSCH et al. v. CITY OF PITTSBURG, and eighteen other cases.★

(Sac. 3860.)

Supreme Court of California. Aug. 30, 1928.

Rehearing Denied Sept. 27, 1928.

1. **Waters and water courses 🔑209—Evidence held sufficient to support recovery against city for death from typhoid fever, caused by city officials negligently serving unchlorinated impure water through mains.**

Evidence that epidemic of typhoid fever and dysentery was caused by city officials negligently allowing unchlorinated water to be served from an impure source of supply through city water mains to inhabitants *held* sufficient to justify judgment against city for death from typhoid fever.

2. **Waters and water courses 🔑209—Evidence of epidemic, in actions against city to recover for typhoid fever caused by city water, held admissible.**

Several actions were brought against the city of Pittsburg to recover damages for deaths and illness caused by typhoid fever contracted through use of impure and unchlorinated city water supply. It was stipulated that all testimony introduced in any one trial should be considered as having been introduced in all of them, so far as the same might be applicable to each case. *Held*, that admitting evidence of typhoid fever epidemic was not error, since evidence in each case, showing individual plaintiff was but one of large number of persons similarly affected, would be competent to show that each affection was traceable to a common source.

In Bank.

Appeals from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Action by Conradine Ritterbusch and others against the City of Pittsburg, heard with eighteen other cases. Judgments for plaintiff in each case, and defendant appeals. Affirmed.

R. N. Wolfe, of Pittsburg, and J. E. White and Wm. J. Locke, both of San Francisco, for appellant.

Ostrander & Carey, of Oakland, for respondents.

RICHARDS, J. This action was commenced by the plaintiff Conradine Ritterbusch and her two children on February 23, 1921, against the defendant, city of Pittsburg, a municipal corporation of the sixth class, to recover damages for the death of Carl D. E. Ritterbusch, husband and father, respectively, of the plaintiffs, alleged to have been caused through typhoid fever contracted by reason of the negligence of the said defendant in permitting its municipal water supply furnished to the inhabitants of said city to become impure, unwholesome, unpotable, polluted, and dangerous to the health of its inhabitants drinking and using said water. On the date of the commencement of said action 20 other separate actions were commenced against the same defendant, based upon the same statement of facts, and differing only in the elements of damage and amount of recovery. The defendant, upon being duly served, moved in each of said actions to have the same transferred to another county for trial, and upon stipulation of the parties plaintiff each and all of said actions were transferred for trial to the county of San Joaquin, and on the 24th day of October, 1922, were called for trial in the superior court in and for said county before the court sitting without a jury, whereupon it was further stipulated that each of said cases should be separately tried, but that all testimony introduced in any one of the trials should be considered as having been introduced in all of them, so far as the same might be applicable to each case, and subject to all legal objections that might be urged against such testimony, had it been originally offered in the particular case.

Nineteen of said cases were then tried successively. At the conclusion of the plaintiff's testimony in each case, the defendant made a motion for nonsuit, which motion the court denied. At the conclusion of the trial, each of said causes was submitted for decision, and the court, on April 30, 1923, filed its findings of fact and conclusions of law in each of said 19 cases, and judgment was thereupon entered in favor of the plaintiffs and against the defendant in each of said cases. A motion for new trial in each being denied, the defendant appealed from the judgment in each and all of said 19 cases, and by stipulation of the parties and order of this court these 19 appeals have been consolidated and are to be considered upon a single transcript and set of briefs. The main case to be considered upon these appeals is that of Ritterbusch v. City of Pittsburg. In the other cases the respondents are, respectively, Ralph R. Laederick, Agnes Ginty, D. F. Bothwell et al., Thomas F. Shannon, Harold De Haven, John G. Bishop, Patricia Haynes, Robert Bishop, James Griffin, Catherine Jane Shannon, Rosalia Haynes, Edgar M. De Haven, John G. Bishop, Jr., Ursula Haynes, Olive Haynes, Thomas Bishop, Phillip Griffin, H. H. Haynes, and the defendant in each is the city of Pittsburg.

[1] The main question to be considered upon these appeals is that of the sufficiency of the evidence to justify the findings and conclusions of law in each of these cases. There are also certain errors of law alleged to have been committed by the trial court in the admission of evidence in the main case, applicable to all the other cases, and also certain alleged errors affecting one or other of the individual appeals.

★Rehearing denied.

The city of Pittsburg has for some years maintained and operated a municipal water supply system for the purpose of furnishing water for domestic uses and drinking purposes to the citizens and inhabitants of said city, for which it charges and collects water rates. The water which the city thus supplies was derived from a certain slough putting off from the San Joaquin river at a point opposite said city and known as New York slough. It is an undisputed fact in these cases that this water in its natural state in said slough is not suitable nor safe for human consumption without being first treated by a purifying process, for the purpose of ridding it of typhoid and other bacteria which render it dangerous to the health of consumers. In order to purify said water for its aforesaid proprietary uses the city of Pittsburg, prior to the year 1920, established what is known as a chlorination plant, a process for the purification of said waters before delivery to its inhabitants through its service mains. It was sufficiently shown upon the trial that this particular purifying process was efficient, when in operation, to remove practically all bacterial contamination from said water and render the same safe for human consumption. It was, however, shown by the testimony of certain witnesses for the plaintiff in the main case that upon a certain night in the early part of June, 1920, the chlorination plant in question was inoperative during a period of about 12 hours, and that during said time unchlorinated water was, by the agents of said municipality in charge of its water system, permitted to be let into the water mains of said city, and to be therefrom furnished to the inhabitants thereof for drinking and other domestic uses.

There is ample medical and expert evidence in these cases to show that these waters in their thus unpurified condition would be so surcharged with typhoid and other dangerous germs as to render those persons drinking the same liable to attacks of typhoid fever and dysentery as a direct result of its consumption. The trial court permitted evidence to be introduced which strongly tended to show that an epidemic of typhoid fever and dysentery broke forth in said city within the period of about 3 weeks following the admission of said unchlorinated water into the water mains thereof, and that as a direct result of the existence of such epidemic Carl Ritterbusch became afflicted with typhoid fever, from which he presently died; that each of the other plaintiffs in said actions who sue directly became similarly afflicted; and that the children of the plaintiffs in said actions who sue for damages incurred in the nursing and care of their offspring became similarly ill during the same period from one or the other of the above disorders. Evidence was also introduced on behalf of the plaintiffs tending to show that the period during which these illnesses of typhoid fever and dysentery occurred corresponds to the time within which epidemics of typhoid fever and dysentery follow upon the use of germ-infected water.

On behalf of the defendant it was sought to be shown that some effort was made by its agents and officials during the brief period when its chlorination process was not in use to purify said water by other means, such as the introduction of lime into its content; but this evidence was unsatisfactory through the failure to show that the substituted method either would or did have the effect of purifying said water.

Considering the evidence in each of these cases as a whole, the deduction seems to be inescapable that the epidemic of typhoid fever and dysentery which broke forth in the city of Pittsburg within the aforesaid period after its agents and officials in charge of its water system had permitted unchlorinated water to be served through its water mains to its inhabitants was directly traceable to that cause, and that the cases of death or illness which form the basis of each of these actions were the direct result of the negligence of the agents and officials of said municipality in the foregoing regard.

The argument put forward by the appellant to the effect that the epidemic in question might have had its origin in other sources, such as the use of water from wells in various parts of the city, creates at best but a conflict in the evidence as to the source of infection, and this evidence is weakened as to its inferences by the fact that, while these other sources of water supply had existed for a considerable period of time prior to the month of June, 1920, no epidemic had resulted until the particular period following the pollution of the municipal water supply.

[2] Under the head of errors committed by the trial court in the admission of testimony, the appellant makes the contention that it was error to permit the introduction of evidence of an epidemic; the argument in that regard being that there was no sufficient pleading in each or any of said cases to justify the admission of such evidence. We are of the opinion that this objection to the introduction of such evidence is without substantial merit, since even with regard to each individual case evidence tending to show that the individual plaintiff was but one of a large number of persons similarly affected would be competent for the purpose of showing that each individual affection was traceable to a common source.

In so far as the appellant's assignments of error have relation to the evidence introduced affecting one or other of the aforesaid individual cases, we have examined the record in that regard, and do not find that these are of sufficient merit to require particular comment, or to justify a reversal of the judgment in the particular action to which such alleged errors relate.

Treated by and large, we are of the opinion that the judgment rendered and entered by the trial court in each of the foregoing cases is sufficiently supported by the findings of fact and conclusions of law applicable to each of said cases, and that as to each, the evidence was amply sufficient to justify the findings of fact and conclusions of law of the trial court.

It follows that the judgment in each of the foregoing cases must be and the same is hereby affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; PRESTON, J.; LANGDON, J.

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205 Cal. 89

McNETT v. VOLFI. (Sac. 4059.)

Supreme Court of California. Aug. 30, 1928.

1. **Automobiles ⟹244(11)—Evidence supported finding that automobile driver was negligent in failing to look to right at intersection, resulting in collision.**

In an action to recover for personal injuries and property damage resulting from automobile collision, evidence that defendant, in approaching intersection, did not look to his right, as a result of which he did not see car in which plaintiff was riding, *held* sufficient to justify finding that he was guilty of negligence, causing collision and injury to plaintiff.

2. **Negligence ⟹93(1)—Negligence of driver of automobile in which plaintiff was riding as guest could not be imputed to her.**

Where plaintiff was injured while riding in her own automobile as guest of driver she had loaned it to for his own use in taking load of turkeys to market, such driver having full charge of car, *held*, that any concurring negligence of the driver in causing collision with defendant's car was not imputable to her.

3. **Appeal and error ⟹1033(8)—Inconsistency in verdict awarding plaintiff $5,000 for personal injuries received in automobile collision, and finding for defendant regarding damage to car, was not available to defendant on appeal.**

In action to recover for personal injuries and damage to automobile, resulting from collision with defendant's car, where jury returned verdict of $5,000 for personal injuries, but found for defendant regarding damage to the automobile, *held*, that defendant on appeal could not avail himself of the inconsistency.

Department 2.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Blanche Husa McNett against John Volfi. Judgment for plaintiff, and defendant appeals. Affirmed.

Irving D. Gibson, of Sacramento, for appellant.

J. Oscar Goldstein, of Chico, and Wm. H. Hatfield, of Sacramento, for respondent.

LANGDON, J. [1] This action was one for personal injuries as a result of a collision between an automobile owned by the plaintiff and in which she was riding, according to her contention, as a guest, and one owned and operated by the defendant, John Volfi. The collision occurred at the intersection of Thirty-Sixth street and Fourth avenue, in the city of Sacramento, which cross each other at right angles. Sacramento boulevard, running from the northwest to the southeast, includes within its boundaries the northwest corner of the said intersection. At the time of the collision the automobile in which the plaintiff was riding was proceeding north on Thirty-Sixth street and the defendant was driving his Ford delivery truck east on Fourth avenue. The following extract from the testimony of the defendant will explain the accident:

"I was coming from the west, going east on Fourth avenue. When I got down about the crossing, a machine was going across Sacramento boulevard. I was going southeast—going east. So I was turning my eyes on the car there, kind of sideways, watching the car coming up. When I got about 3 feet, I saw the Taylor car, and I applied my brakes; but it was too late, so we came to a crash.

"Q. In other words, you mean to tell the jury you never saw Mr. Taylor's car crossing until you were within 3 feet? A. Three feet of him.

"Q. Did you at any time look towards Thirty-Sixth street to your right, to see if a car was entering this intersection? A. I did not.

"Q. Did you ever see Mr. Taylor's car being driven over Thirty-Sixth street as you were coming into the intersection until the time you were within three feet of him? A. No.

"Q. Why didn't you see his car before he came into the intersection after he passed into— A. I told you I was watching the car that was crossing Sacramento boulevard."

A portion of the transcript of the defendant's testimony, given in another action growing out of this same accident, was read into the record in the instant case, as follows:

"I was going east, and he was going north. I was about—coming down this way between the curb and the car track; as I made the mark—I should judge between 15 and 17 miles an hour. I was looking ahead, right straight ahead, more to the left. I did not look to the right. I did not see Mr. Taylor's car until I was a few feet away from him. I did not have time to apply my brakes or nothing."

This testimony, regardless of anything else appearing in the record, justified the jury in finding, as it did, that the defendant was guilty of negligence, and we shall not discuss further the arguments of the appellant to the contrary. And this testimony, together with the other evidence in the record, justified the conclusion that the defendant's negligence was the proximate cause of the collision and injury to plaintiff.

Taylor, the driver of plaintiff's automobile, testified (and in this he was corroborated by the two other occupants of the automobile) that as he reached about the south curb line of Fourth avenue and looked to the left, he saw defendant's automobile coming up the street about 10 feet outside of the intersection and the defendant was looking around; that Taylor started to blow his horn, thinking defendant would see him; that defendant did not look ahead of him at all until he struck Taylor's automobile; that Taylor was going about 6 miles an hour; that he had just started his motor, and it was cold, and would not "pick up" to allow him to escape; that defendant was looking back into his own automobile and was crossing the intersection at about 25 or 30 miles an hour.

[2] It is contended by appellant that Taylor was negligent in not stopping his automobile when he saw defendant approaching heedlessly and blindly at a rapid rate of speed. Certainly it may not be successfully contended that Taylor's negligence, if any, was the sole proximate cause of plaintiff's injury. If it be conceded to appellant that the negligence of Taylor was a concurring cause of plaintiff's injury, the judgment for plaintiff would nevertheless be a proper one; for we think the record discloses that she was a guest in her own automobile at the time of her injury, and therefore any concurring negligence of Taylor was not imputable to her.

The testimony was uncontradicted to the effect that plaintiff owned the automobile; that Taylor was the husband of plaintiff's sister; that Taylor asked to use plaintiff's automobile to take some turkeys he had raised to San Francisco to market. Plaintiff consented. She was not interested in any way in the turkeys, or in the business of Taylor. Plaintiff's sister, Taylor's wife, was to accompany Taylor to San Francisco, and, when she was making her preparations, she asked plaintiff if she would like to accompany her (Mrs. Taylor) on a pleasure trip. Plaintiff accepted this invitation. At the time of the accident, plaintiff was riding in the automobile, together with Taylor and his wife, and she had placed a few articles of her wearing apparel in her sister's suitcase, which was being carried in the automobile.

The undisputed testimony shows that Taylor had full charge and control of the automobile on the journey to San Francisco, and that it was being operated in connection with his own business, and the facts and circumstances appearing in the record support the finding of the jury that plaintiff was a guest in her own automobile at the time of her injury.

[3] The only remaining question arises from appellant's contention that the verdict is void for inconsistency. The action was tried upon plaintiff's third amended complaint, which contained two causes of action; the first for damages for alleged personal injuries, and the second for alleged damages to plaintiff's automobile. The jury returned a verdict for plaintiff upon the first cause of action for $5,000, and upon the second cause of action the jury found in favor of defendant and against plaintiff.

It would seem that the plaintiff had grounds for complaint because of the finding upon the second cause of action; but assuredly the defendant has no such cause, and his appeal from the verdict upon the first cause of action is without merit.

The judgment appealed from is affirmed.

We concur: SHENK, J.; RICHARDS, J.

93 Cal. App. 532

PEOPLE ex rel. SWINDELL et al. v. CITY OF LOS ANGELES. (Civ. 3519.)★

District Court of Appeal, Third District, California. Aug. 17, 1928.

Rehearing Denied Sept. 15, 1928. Hearing Denied by Supreme Court Oct. 15, 1928.

1. Limitation of actions 🔑11(1)—State is not bound by limitations, unless by express words or necessary implication.

Limitations of actions do not bind state, unless made to do so by express words or necessary implication.

2. Quo warranto 🔑5—Validity of proceedings to annex territory to municipalities can only be determined in quo warranto.

Validity of proceedings for annexation of territory to municipalities can only be determined in quo warranto action.

3. Quo warranto 🔑1—Quo warranto proceedings are actions brought in name of state (Code Civ. Proc. §§ 803–810).

Under Code Civ. Proc. §§ 803–810, proceedings in quo warranto are actions brought in name of state.

4. Quo warranto 🔑1—Quo warranto proceeding contesting validity of annexation to city is civil action, not special proceeding of civil nature.

Quo warranto proceeding contesting validity of proceedings conducted in effecting annexation of certain outside territory to city is a civil action and not special proceeding of civil nature.

5. Municipal corporations 🔑33(9)—Three months' limitation, provided for actions contesting validity of annexation proceedings, held to apply to all such actions (Code Civ. Proc. § 349½, as added by St. 1923, p. 53).

Section 349½ of Code of Civil Procedure, as added by St. 1923, p. 53, entitled an act to add such section relating to limitation of time for commencing actions, in which validity of annexation proceedings is contested, and providing that validity of such proceedings shall not be contested unless action is brought within three months after completion of annexation proceedings or within three months after effective date of act, if proceedings are completed prior to time act takes effect, *held* to place three months' limitations on all actions contesting validity of annexation proceedings.

6. Quo warranto 🔑29—Three months' limitation placed on actions contesting validity of annexation proceedings applies to state, and barred quo warranto proceedings brought more than three months after completion of annexation (Code Civ. Proc. § 349½, as added by St. 1923, p. 53).

Section 349½ of Code of Civil Procedure, as added by St. 1923, p. 53, entitled an act to add such section relating to limitation of time for commencing actions in which validity of annexation proceedings is contested, and providing that validity of such proceedings shall not be contested unless action is brought within three months after completion of annexation proceedings, *held* to apply to state, and bars action in quo warranto brought more than three months after completion of annexation, since validity of annexation proceedings can only be determined in quo warranto action.

7. Statutes 🔑74(2), 76(2), 79(1), 80(1)—Act establishing three months' limitation for bringing action contesting consolidation proceedings, applying equally to all municipalities held valid (Code Civ. Proc. § 349½, as added by St. 1923, p. 53; Const. art. 1, § 11; art. 4, § 25, subds. 19, 33; art. 11, § 6).

Section 349½ of Code of Civil Procedure, as added by St. 1923, p. 53, requiring actions contesting validity of annexation proceedings to be brought within three months after completion of annexation and consolidation authorized by general statutes, being of general application and applying to every municipality throughout state with equal force, *held* not to violate Const. art. 1, § 11, article 4, § 25, subds. 19, 33, and article 11, § 6.

8. Statutes 🔑85(4)—Procedure is not special because peculiar to character of action with reference to which it is prescribed.

Procedure may not be said to be special because it is peculiar to character of action with reference to which it is prescribed.

9. Statutes 🔑80(1)—Legislature may distinguish between actions contesting validity of annexation proceedings and actions attacking original incorporation of municipalities as respects establishment of period of limitations.

Legislature has power to distinguish between actions contesting validity of annexation and consolidation proceedings and actions attacking original incorporation of municipalities; there being reasonable distinctions justifying different period of limitation for actions.

10. Statutes 🔑80(1)—Consequences of adding new territory to municipality justifies Legislature in prescribing limited time for contesting annexation proceedings.

That annexation or consolidation of new territory may result in election of particular officers, in attainment of necessary vote for bond issue, in bringing about litigation concerning validity of bonds for public improvement, or in unreasonably postponing municipal functions, furnishes sufficient ground for limiting period of time within which annexation and consolidation proceedings can be contested.

11. Limitation of actions 🔑43—Exercise of franchise over territory annexed does not constitute continuous offense and create new cause of action to contest annexation each day as regards limitations (Code Civ. Proc. § 349½, as added by St. 1923, p. 53).

In determining whether action contesting validity of annexation proceedings is barred by Code Civ. Proc. § 349½, as added by St. 1923, p. 53, requiring such action to be brought within three months after completion of annexation, claim that exercise of franchise by municipality over territory annexed is continuous offense and that each day new cause of action arises is without merit.

★Rehearing denied. Hearing denied by Supreme Court.

12. Quo warranto ⚬=29—Statute barring "any action" contesting annexation proceeding unless brought within three months applies to quo warranto (Code Civ. Proc. § 349½, as added by St. 1923, p. 53).

Code Civ. Proc. § 349½, as added by St. 1923, p. 53, providing that validity of annexation proceeding shall not be contested in "any action" unless brought within three months after completion of annexation, applies to quo warranto proceedings.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Any.]

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Quo warranto by the People, on the relation of Deane F. Swindell and another against the City of Los Angeles. From a judgment of dismissal, plaintiff appeals. Affirmed.

Hearing denied by Supreme Court: CURTIS and LANGDON, JJ., voting for a transfer.

Biby & Biby and John E. Biby, all of Los Angeles, and U. S. Webb, Atty. Gen., and Leon French, Deputy Atty. Gen., for appellant.

Jess E. Stephens, City Atty., and Lucius P. Green, Asst. City Atty., both of Los Angeles, for respondent.

BARTLETT, Justice pro tem. This appeal is from a judgment dismissing a quo warranto proceeding; a demurrer having been sustained by the trial court, on the ground that the action was barred by the provisions of section 349½ of the Code of Civil Procedure. The action is based upon an alleged invalidity in the proceedings conducted in effecting the annexation of certain outside territory, designated as Sunland addition, to the city of Los Angeles, in Los Angeles county, Cal. The various steps taken to annex the territory are fully set forth in the complaint, and the alleged grounds of their invalidity stated, and, as relief in the action, judgment is asked that it be decreed that defendant be enjoined from exercising any franchises, powers, privileges, or jurisdiction over the territory embraced in the Sunland addition, and for such other relief as is meet and proper.

The complaint was filed in the superior court of Los Angeles county on July 11, 1927. On the 19th of July, 1927, defendant served and filed its demurrer to the complaint; the grounds of demurrer being that the complaint does not, nor does any part thereof, state facts sufficient to constitute a cause of action and that said action is barred by section 349½ of the Code of Civil Procedure. The demurrer was heard on July 19, 1927, and ordered sustained, without leave to amend, and thereupon judgment was rendered and entered that plaintiff take nothing by the action, and declaring the same barred by section 349½ of the Code of Civil Procedure.

But one question is involved in the appeal, and that is whether the provisions of section 349½ of the Code of Civil Procedure apply to actions brought in the name of the state concerning annexation of outside territory to cities, under what is commonly designated as the Annexation Act of 1913. Stats. 1913, p. 587. The ordinance approving the annexation of Sunland addition to the city of Los Angeles, it is alleged in the complaint, was adopted by the council of the city of Los Angeles on June 28, 1926, the same was duly published, and a copy thereof duly certified was transmitted to the secretary of state of the state of California and received by him and filed in his office on August 5, 1926. It is not questioned that this filing completed the annexation proceedings, and no dispute is made that this action was instituted more than three months after the filing of the papers above mentioned in the office of the secretary of state.

The act enacting section 349½ of the Code of Civil Procedure was passed by the Legislature on April 24, 1923, and is to be found at page 53, Statutes of 1923. It reads as follows:

> "An act to add a new section to the Code of Civil Procedure to be numbered section three hundred forty-nine and one-half, relating to the limitation of the time within which actions, in which the validity of proceedings for the annexation of territory to municipal corporations, or the consolidation of municipal corporations is contested, can be commenced.
>
> "Section 1. A new section is hereby added to the Code of Civil Procedure to be numbered three hundred forty-nine and one-half and to read as follows:
>
> "Sec. 349½. The validity of any proceedings for the annexation of territory to a municipal corporation, or for the consolidation of municipal corporations, shall not be contested in any action unless such action shall have been brought within three months after the completion of such proceedings, or, in case such proceedings are completed prior to the time that this act takes effect, then within three months after this act shall have become effective."

Appellant contends that the cause of action alleged in the complaint is not barred by section 349½ of the Code of Civil Procedure, for the following reasons: (1) Limitations of actions do not bind the people of the state unless made to do so by express words or necessary implication. (2) Section 349½ of the Code of Civil Procedure is in violation of subdivisions 19 and 33 of section 25 of article 4 of the Constitution of the state of California, and the provisions of section 6 of article 11 and section 11 of article 1 of said state Constitution. (3) The exercise of the franchise in question is a continuous offense occurring each day, and each day a new cause of action arises. (4) A quo warranto proceeding is not an action of the character to which section 349½ of the Code of Civil Procedure applies. (5) Section 349½ of the Code of Civil Procedure has a reasonable meaning without applying its provisions to the state when it is plaintiff in a quo warranto proceeding.

[1] It cannot be disputed that it is a well-established principle of law that limitations of actions do not bind the state unless made to do so by express words or necessary implication. Russ & Sons Co. v. Crichton, 117 Cal. 695, 49 P. 1043; People v. Kings County Dev. Co., 48 Cal. App. 72, 191 P. 1004.

[2-4] The question involved in this action is of a purely political nature, and that the validity of the proceedings for the annexation of territory to municipalities can only be determined in a quo warranto action is clearly determined by the case of Coe v. City of Los Angeles, 42 Cal. App. 479, 183 P. 822, wherein are cited with approval as supporting this conclusion the following cases: People v. City of Los Angeles, 154 Cal. 220, 97 P. 311; Keech v. Joplin, 157 Cal. 1, 106 P. 222; Jaques v. Board of Supervisors, 24 Cal. App. 381, 141 P. 404; Reclamation Dist. No. 765 v. McPhee, 13 Cal. App. 383, 109 P. 1106; Williams v. Board of Supervisors, 65 Cal. 160, 3 P. 667; People ex rel. Warren v. York, 247 Ill. 591, 93 N. E. 400. That proceedings in quo warranto are actions brought in the name of the state is evident from the language used in sections 803 to 810 of the Code of Civil Procedure, where they are designated as actions in each of the sections. The case at bar, like all quo warranto proceedings, is a civil action and not a special proceeding of a civil nature.

[5, 6] While there are no express words in section 349½ of the Code of Civil Procedure making that statute applicable to the state, the necessary implication that it applies to and binds the state is manifested from the language of the act and the purpose declared in its title. The title announces that the purpose of the act is to add a new section to the Code of Civil Procedure, to be numbered 349½, relating to the limitation of the time within which actions, in which the validity of proceedings for the annexation of territory to municipal corporations, or the consolidation of municipal corporations, is contested, can be commenced. If quo warranto proceedings are the only actions in which the validity of annexation or consolidation proceedings can be determined, as held in Coe v. City of Los Angeles, supra, the three months' limitation provided by section 349½ of the Code of Civil Procedure bars the action under consideration, and the trial court ruled correctly in sustaining the demurrer without leave to amend. That the purpose of the act was to put a three months' limitation on all actions concerning the validity of annexation and consolidation proceedings is also apparent, and must be necessarily implied from the fact that section 349½ of the Code of Civil Procedure not only makes its limitation period of three months apply to all future contests, but also provides that it shall apply to all proceedings completed prior to the time the act took effect.

The general legislative policy of California that the state shall be bound by its statutes of limitation is well set forth in People v. Kings County Development Co., 48 Cal. App. 72, 191 P. 1004, where it is said:

> "Where the Legislature has established a particular policy with respect to a particular subject of legislative cognizance, which policy is in derogation of that of the rule of the common law, all the law or sections of the Code bearing upon or pertaining to that particular subject should be read and considered together, or as a whole, or by the light of each other, if the language of any one section or part of the law is so dubious or uncertain as to render its meaning or the Legislative intent at the bottom of it lacking in clearness and certainty."

Section 349½ of the Code of Civil Procedure establishes a particular policy with respect to a particular subject of legislative cognizance, and there is no reason for holding it as not applicable to the state and barring this action.

[7] The contention of plaintiff that section 349½ of the Code of Civil Procedure is violative of the provisions of the state Constitution cannot be upheld. Both annexation and consolidation proceedings are authorized by general statutes, clearly of general application; the municipalities authorized to take advantage of their provisions not being classified or limited in any respect, and the acts applying with equal force to every municipality throughout the state.

[8] "Procedure may not be said to be special because it is peculiar to the character of the action with reference to which it is prescribed." Title Ins. & Trust Co. v. Lusk, 15 Cal. App. 358, 115 P. 53; People v. Henshaw, 76 Cal. 436, 18 P. 413; Cohen v. City of Alameda, 168 Cal. 265, 142 P. 885; Mitchell v. Cal. Pac. Title Ins. Co., 79 Cal. App. 45, 248 P. 1035.

[9, 10] It was within the power of the Legislature to distinguish between actions contesting the validity of annexation and consolidation proceedings and actions attacking the original incorporation of municipalities. The fact that quo warranto would be an available remedy in both classes of actions is not important. There are reasonable distinctions that would justify a different period of limitation of the action. The addition of a newly annexed or consolidated territory may result in the election of particular individual officers, in the attaining of a required two-thirds vote for carrying bond issues for necessary municipal improvements, in bringing about litigation of questions concerning the validity of bonds for public improvements in the annexed territory, and in causing public functions of municipal government to be administered in a limited degree or to be held in abeyance over unreasonable periods of time. A consideration of such matters would furnish the Legislature with sufficient grounds to provide that the validity of annexation and consolidation proceedings should be asserted within some

definite period of time, and that, if the proceedings were not attacked within such time, the right to file such contesting action should be barred.

[11] The claim of appellant that the exercise of the franchise in question is a continuous offense recurring day after day, and that each day a new cause of action arises, is without merit, in view of the manifest purpose and intent of the provisions of section 349½ of the Code of Civil Procedure. Whether or not there is a right to exercise the franchise depends upon the validity of the annexation proceedings, and the statute prohibits any contest of those proceedings after three months have elapsed after the filing in the office of the secretary of state of the certified copy of the ordinance of the city to which the territory is annexed.

[12] The contention that a quo warranto proceeding is not an action of the character to which section 349½ of the Code of Civil Procedure applies cannot be sustained. The words "any action," taking into view the purposes and intent of section 349½ of the Code of Civil Procedure must be held to embrace and include any form of action that can present for adjudication questions involving the validity of annexation proceedings.

In view of the fact that the validity of annexation proceedings can be determined only in a quo warranto action, the only reasonable meaning that can be given section 349½ of the Code of Civil Procedure is that it applies to and binds the state, and bars the remedy sought by reason of the action at bar.

The judgment appealed from is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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93 Cal. App. 584

McALMOND v. TRIPPEL et al. (Civ. 3549.)

District Court of Appeal, Third District, California. Aug. 22, 1928.

1. False imprisonment 🔑20(1)—Complaint against several for false imprisonment need not allege whether they acted in concert or the particular act of each.

Complaint against several, alleging that they, without legal authority of any kind, arrested and imprisoned plaintiff, is sufficient, without any allegation as to whether or not they acted in concert or the definite part each performed.

2. False imprisonment 🔑6—Detention without any legal authority, though in juvenile detention home, is "imprisonment."

Though detention complained of in complaint for false imprisonment be in a juvenile detention home, it is "imprisonment"; the party having, without any legal authority, been arrested and placed there.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Imprison—Imprisonment.]

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Lucile McAlmond, by Maury H. McAlmond, her guardian ad litem, against A. A. Trippel and others. From a judgment entered against plaintiff on the sustaining of the demurrer to the complaint, plaintiff appeals. Reversed, with instructions.

Frank C. Scherrer and Chas. R. McCarty, both of Los Angeles, for appellant.

Everett W. Mattoon and R. C. McAllaster, both of Los Angeles, for respondent.

WEYAND, Justice pro tem. This appeal is taken from a judgment of the superior court of the county of Los Angeles, made and entered against the plaintiff upon her refusal to amend her complaint, in an action for false imprisonment and malicious arrest.

The complaint avers that the defendant Trippel was city attorney of Huntington Park, a city within Los Angeles county, defendant Leland was city marshal of said city, and the bonding company above named was the surety on his official bond, and the defendant Edna Mahan was the superintendent of Juvenile Hall, an institution in the city of Los Angeles, operated by the county of Los Angeles as a place for the detention of persons under the age of 21 years.

The vital portion of the complaint is in words as follows:

"That on the 1st day of July, 1925, the defendants A. A. Trippel, Harry E. Leland, Edna Mahan, John One, John Two, Jane One, and Jane Two maliciously, wrongfully, unlawfully, and without process or commitment or legal authority of any kind whatsoever, and with the intent to oppress the plaintiff, Lucile McAlmond, arrested and imprisoned the said plaintiff in said Juvenile Hall, and continued to and did wrongfully and unlawfully and maliciously confine said Lucile McAlmond in said Juvenile Hall until the hour of approximately 1 o'clock p. m. on July 4, 1925; that, by reason of being confined in said Juvenile Hall, the plaintiff, Lucile McAlmond, during said period of confinement was forced to associate and come in contact with prostitutes and persons of immoral and ill repute, and who were degenerate; that at all times herein mentioned Robert Black was and still is an attorney at law, duly admitted to practice before all the courts of the state of California; that during said confinement, to wit, on July 2, 1925, plaintiff engaged the services of said Robert Black to represent her in the matter in which she was being held in confinement, and that said Robert Black on said day presented himself at said Juvenile Hall, and stated to the defendants and in particular to the defendant Edna Mahan, that he was the attorney and had been engaged as the attorney to represent said Lucile McAlmond; that said Edna Mahan then and thereupon refused to permit and in fact prevented plaintiff, Lucile McAlmond, from conversing with her said attorney or consulting her said attorney, and denied to plaintiff the right of counsel during all of said period of confinement; that said arrest and confinement became a matter of common notoriety among friends and acquaintances of plaintiff, Lucile McAlmond, and the general public, and by reason thereof plaintiff, Lucile McAlmond, suffered great humiliation; that, by reason of the aforesaid wrongful imprisonment and arrest, plaintiff, Lucile McAlmond, suffered great physical pain and grievous mental anguish, and always will continue so to suffer, to her damage in the sum of $25,000; and that all thereof was caused by the aforesaid wrongful and malicious arrest and actions on the part of the defendants."

The demurrer of the defendant Edna Mahan consisted of a general demurrer, and two special assignments, one of ambiguity and one of uncertainty. The language of both special assignments are the same, and is as follows:

> "Said allegation does not show what part said defendant Edna Mahan is alleged to have taken in said alleged false imprisonment, and that it does not appear whether plaintiff intends to allege that all of the defendants named acted in concert or what the individual and several defendants are alleged to have done with reference to said alleged false imprisonment, and that such facts cannot be ascertained from said allegation, nor from any other allegation in said complaint."

It appears from the order made at the hearing of the demurrer that defendant Edna Mahan also had before the court a motion to strike out parts of the complaint. Whatever may have been the real merits of this motion is not now important, as the record discloses that this motion was ordered off the calendar. The demurrer was sustained, with leave to amend within the usual time. Plaintiff refused to amend, and the judgment appealed from was entered.

[1] Taking up the special assignments, they present the question as to the necessity of alleging whether or not the named defendants acted in concert, or to allege the particular part each defendant did perform with reference to said false imprisonment.

In the early case of Druex v. Domec et al., 18 Cal. 83, it was held:

> "The complaint states the joint liability of defendants, by averments general to the three defendants, and there can be a joinder of several defendants in an action for a malicious prosecution. 1 Chitty's Pleading, 85. It was unnecessary to aver and prove a conspiracy. * * * If two persons can jointly engage in a malicious prosecution, they can be sued for the act itself and not for a conspiracy to commit the act."

There can be no essential difference between the action for malicious prosecution and the action for false imprisonment in this respect.

In the case at bar, the allegation is to the effect that the three defendants, Trippel, Leland, and Mahan, "without legal authority of any kind whatsoever, * * * arrested and imprisoned the said plaintiff."

In Culver v. Burnside et al., 43 S. D. 398, 179 N. W. 490, it is said:

> "The first contention of appellants is that the acts alleged are such as could not be committed jointly. We are of the opinion that this contention is not tenable. We are of the view that all who take part in or assist or abet in the commission of false imprisonment are joint tort-feasors, without an allegation or proof of a conspiracy. 1 Cooley on Torts (3d Ed.) p. 319.
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> "* * * We are of the view that a complaint which states, in substance, that the defendants, at a specified time and place, unlawfully and maliciously detained plaintiff and restrained him of his liberty for the space of one hour without any right or authority so to do, and against his will, states a cause of action which is not subject to general demurrer. The action for false imprisonment is frequently alleged to have been committed by reason of some wrongful arrest under some pretended or void order of some court, in which class of false imprisonment cases it is incumbent on the plaintiff to allege facts showing or tending to show that such arrest, under such court procedure, was wrongful, unauthorized, and without any probable cause; but in a cause of action alleged as the one at bar there may have been no court procedure at all, and under such a complaint it is incumbent on the defendants, if they acted under lawful court procedure, to affirmatively allege and prove such facts as justification. Evidence of such a defense could not be admitted under a general denial. Neves v. Costa, 5 Cal. App. 111, 89 P. 860."

In the instant case the complaint specifically avers that the arrest was made without process or commitment.

In Corpus Juris, vol. 25, p. 531, it is said:

> "In an action against joint defendants, it is unnecessary to allege that the acts of defendants were 'willful and concerted,' etc., since it is not necessary to make out a conspiracy to maintain an action for false imprisonment. An allegation that a false imprisonment was committed by defendants in person may be supported by evidence that the acts were done by their agents."

We are of the opinion that it was unnecessary for plaintiff to allege a conspiracy to arrest the plaintiff, or to allege the definite part each defendant performed.

[2] The ruling of the lower court is defended by respondent on the ground that, admitting that the complaint was otherwise good, yet, because the alleged detention was in a juvenile detention home, the restraint did not amount to "imprisonment." With this contention we are unable to agree. It is true that the detention homes established under the Juvenile Court Law are largely in the nature of shelters for abandoned and mistreated children. Nevertheless, the law in

question lays down the procedure by which children may be placed therein. To initiate proceedings under the act in question, it is provided in section 3, Juvenile Court Law (St. 1915, p. 1225), that a verified petition shall first be filed. By subsequent sections it is further provided: That a citation shall be issued to cause the child to be brought before the court. There must be a summary hearing in court. That until final disposition of the case the person to be investigated may be held upon order of the court in some suitable place *as the court may direct.* Nowhere is there vested in any person any right whatsoever to take possession of and confine any person in any sort of detention home, except upon an order of the judge of the juvenile court.

Defendants may have acted for the best interests of said child, and may have done no damage to her by reason of her detention, or said officers may have even conferred upon her a favor and a benefit; yet these are all matters of defense as against the amount of damage claimed, or as answering the allegation of oppression. Any detention under pretended color of official right is imprisonment. Even a detention of a person outside of a public institution, against his will and without right, amounts to false imprisonment.

We can but conclude that the complaint stated a cause of action, and that to sustain the demurrer thereto was improper in the present case.

Respondent directs our attention to the case of Weber v. Doust et al., 84 Wash. 330, 146 P. 623, and contends that under the authority of that case there can be no false imprisonment when the detention was had under the juvenile court laws, and by juvenile court officers. That case was upon appeal to the Supreme Court of Washington after a trial on the merits in the lower court, and in which trial there was a judgment against the defendants. We think a careful reading of that case will disclose a quite different situation than the one here complained of. In the instant case the allegation is that the defendants "maliciously, wrongfully, unlawfully, and without process or commitment or legal authority of any kind whatsoever, and with the intent to oppress the plaintiff, * * * arrested and imprisoned the said plaintiff." It is here further alleged that these defendants kept her three days, not permitting her attorney to visit or consult her. Also, the present complaint contains the statement that during the said confinement plaintiff was forced to associate and come in contact with various types of degraded people.

Even had the defendant officers the right to take plaintiff into custody, they could not have warrant to do so "without any legal authority," and with intent to "oppress," nor would they have a right to compel an association with the unfit. From the case just mentioned, we quote as follows:

> "If an officer abuses his authority, he is a trespasser ab initio, and liable for false imprisonment. 1 Cooley on Torts (3d Ed.) p. 314. In other words, an officer, acting as such, stands in the same relation to the infant as would a guardian appointed by, and acting under, the due process of a court having jurisdiction to appoint guardians. The only question to occur is whether the officer has acted in furtherance of the law, in good faith, and has done that which he believed to be for the best interests of the child, bringing no willful harm to it, and being actuated by no ulterior purpose. 1 Cooley on Torts (3d Ed.) p. 356."

The judgment of the lower court is reversed, with instructions to the lower court to overrule said demurrer, and permit the defendant Edna Mahan to answer if she desires so to do.

We concur: FINCH, P. J.; HART, J.

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93 Cal. App. 566

PEOPLE v. BIHN. (Cr. 1048.)

District Court of Appeal, Third District, California. Aug. 21, 1928.

1. Criminal law 🔑911, 1156(1)—Trial court's determination on motion for new trial is discretionary, and is conclusive on appeal, where conflicting inferences may be drawn.

The trial court is vested with a wide discretion in passing on a motion for a new trial, and, where conflicting inferences may be drawn from the evidence, that drawn by the trial court is conclusive on appeal.

2. Criminal law 🔑913(1)—Granting new trial on ground evidence did not satisfactorily show forgery was committed in county in which defendant received check held not abuse of discretion.

Where check, indorsement on which was alleged to have been forged by defendant, was passed in another county than that in which defendant received it from his employer for specified purpose, *held,* that trial court's granting of defendant's motion for new trial, on ground that evidence did not satisfactorily show that crime was committed in county in which defendant received check, will not be reversed, even if evidence was sufficient to warrant inference that crime was committed in whole or in part in that county.

3. Criminal law 🔑112(1)—Uncertainty as to proper place of trial for forgery may be avoided by bringing charge in county where instrument was passed.

Uncertainty as to proper place of trial, under a charge of forging indorsement on check and uttering and passing the instrument and indorsement as true and genuine, may be avoided by bringing the charge in the county where the forged instrument was uttered and passed.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Clifford L. Bihn was convicted of forgery. From an order granting a new trial, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Charles Kasch, of Ukiah, for respondent.

FINCH, P. J. This is an appeal from the order of the trial court granting defendant's motion for a new trial after his conviction of the crime of forgery. The evidence is sufficient to show that the defendant committed the forgery, and the only question to be determined is whether the trial court was warranted in granting a new trial on the ground that the evidence does not satisfactorily show that the crime was committed in Mendocino county.

[1, 2] The defendant was the representative at Ukiah, Mendocino county, of the Peppers Fruit Company. That company was indebted to M. Guide in the sum of $75.58, and it delivered its check for that amount, payable to the order of Guide, to the defendant at Ukiah, to be by him delivered to Guide. Guide never received or indorsed the check. Several days after it was so delivered to the defendant, the check, with the name "M. Guide" written on the back thereof, and also indorsed by the defendant, was passed over the counter of the West American Finance Company, in San Francisco, in part payment of an automobile which the defendant was purchasing on the installment plan. The cashier of the company testified: "I can't say it was Mr. Bihn himself, but it was given over the counter for his credit." It appears that Bihn was a resident of Ukiah. There is no other evidence tending to show where the forgery was committed. If it be conceded that the evidence is sufficient to warrant the inference that the crime was committed, in whole or in part, in Mendocino county, it does not follow that the order should be reversed. The trial court is vested with a wide discretion in passing on a motion for a new trial, and where conflicting inferences may be drawn from the evidence, that drawn by the trial court is conclusive on appeal. People v. Knutte, 111 Cal. 453, 455, 44 P. 166; People v. Canfield, 173 Cal. 309, 312, 159 P. 1046. It is a fair inference from the evidence that the defendant himself passed the check at the office of the West American Finance Company in San Francisco. Under the circumstances shown, it cannot be held, as a matter of law, that the only reasonable inference from the evidence is that he forged the indorsement on the check in Mendocino county.

[3] The charge herein is that the defendant forged the indorsement on the check "and uttered and passed said instrument and indorsement as true and genuine." In such a case, uncertainty as to the proper place of trial may be avoided by bringing the charge in the county where the forged instrument was uttered and passed.

The order is affirmed.

We concur: HART, J.; PLUMMER, J.

GOTTSTEIN v. KELLY et al. (Civ. 5796.)★

District Court of Appeal, Second District, Division 1, California. July 21, 1928.

As Modified on Denial of Rehearing, Aug. 18, 1928.

Hearing Granted by Supreme Court Sept. 17, 1928.

1. Taxation ⚷415—Assessment, naming owner but once, not misleading as to owner of each lot assessed, complied with statute, regardless whether owner's name should have appeared opposite each lot (Pol. Code, § 3650).

Where assessment on several lots in tract of land contained name of owner but once, followed by name of tract or subdivision in which property was located, correct number of each of lots, together with valuation of each, in accordance with Pol. Code, § 3650, and no one could have been misled as to name of person purporting to be owner of each of several lots, assessment complied with statute, regardless whether name of owner of property should have been repeated on assessment book opposite each lot assessed.

2. Taxation ⚷734(2)—Error, if any, in overcharge of less than one cent in assessing land, held immaterial, in determining validity of tax deed (Pol. Code, § 3731).

Where alleged overcharge in making assessment against land, under Pol. Code, § 3731, if any, was less than one cent, defect was of no consequence, so far as validity of ensuing tax deed was concerned.

3. Taxation ⚷627—All taxes, penalties, and costs should be placed opposite each description of property separately assessed, rather than total assessment against all property (Pol. Code, § 3764, as amended by St. 1913, p. 556).

Under Pol. Code, § 3764, as amended by St. 1913, p. 556, requiring taxes, penalties, and costs to be placed opposite each name and description of delinquent property, all taxes, penalties, and costs applicable thereto should be placed opposite each description, rather than placing total amount due on several pieces of property separately assessed and described, and stating such amount in one aggregate sum.

4. Taxation ⚷734(2)—Owner held not required to compute assessment against each lot, but duty thereof was jurisdictional prerequisite to validity of tax deed.

Where lots in designated tract were separately assessed and described, owner did not

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★For opinion of Supreme Court adopting the opinion of the Appellate Court, see 276 P. 347.

have burden of ascertaining amount of assessment against each lot, but duty of stating separate amounts on separate lots was jurisdictional prerequisite to validity of tax deed dependent on assessment proceedings.

5. Taxation 🔑734(7)—Notice of sale for delinquent taxes, not referring to penalties, but to unauthorized "percentage," held defective, and tax deed conveyed no title (Pol. Code, § 3764, as amended by St. 1913, p. 556).

Notice of sale to state of delinquent property under Pol. Code, § 3764, as amended by St. 1913, p. 556, reciting taxes, "percentage," and costs after property, without referring to penalties, was defective, as containing unauthorized item of "percentage" which was not synonymous with word "penalty," and hence tax deed based on assessment proceedings conveyed no title.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Percentage.]

6. Appeal and error 🔑877(4)—Plaintiff, claiming under tax deed, possessing no legal title, could not complain of judgment on cross-complaint quieting title in defendant.

Where plaintiff, claiming title under tax deed in suit for partition, was legally possessed of no property, he could not complain of relief granted to defendant in cross-complaint to quiet title.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by John Gottstein against T. G. Kelly and another, in which defendant E. D. Brooks, Jr., filed a cross-complaint. Judgment for cross-complainant, and plaintiff and defendant Kelly appeal. Affirmed.

Herbert C. Kelly, of San Diego, for appellants.

Rolland C. Springer, of San Diego, for respondent.

HOUSER, J. This appeal originated in a suit brought by plaintiff against defendant Kelly and one Maud K. Messer for partition of real property. After the suit was commenced, one E. D. Brooks, Jr., with full knowledge of all the facts hereinafter set forth, acquired whatever interest said Messer owned in the property involved in the action, and thereupon was substituted as a party defendant therein. Thereafter defendant Brooks answered in the action and filed his cross-complaint therein, by which he sought to quiet his title to certain of the real property described in the complaint, and which formerly had been owned by the defendant Messer. Judgment was rendered in favor of defendant Brooks, and it is from such judgment that this appeal is prosecuted.

The property involved consisted of three several lots, numbered 10, 11, and 12, in a designated tract of land. The basis of plaintiff's claim of title was a tax deed, which by the lower court was held to be invalid. Concededly the question of the invalidity of the tax deed rested upon each of several contentions set forth in the brief herein, the first of which being that the statute (section 3770, Pol. Code) authorized the inclusion in the collection of delinquent taxes of an advertising charge of fifty cents for "each lot, piece, or tract of land separately assessed, * * *" and consequently, in view of the fact that the advertising charge herein was for three separate parcels at 50 cents each, making a total charge therefor of $1.50, a tax, with its incidents, had been imposed which was unauthorized by law, with the alleged result that a sale of the property for the amount of the original tax assessment, plus penalties and the advertising costs, as charged, was illegal, and carried with it no title to the purchaser.

[1] In substance, the form of the assessment was that the name of the owner of the property appeared but once. Thereafter followed the name of the tract or subdivison in which the property was located, the correct number of each of the lots, to wit, 10, 11, and 12 (each on a separate line), together with the valuation of each of them—all of which would appear to be in accordance with the provisions of section 3650 of the Political Code relating to the requirements of an assessment. With the exception that no direct ruling is made with reference to the feature that as to *each* of the lots the name of the owner must be repeated on the assessment book, in each of the following authorities substantially it is held that the assessment herein was in conformity with the requirements of the statute: Wells, Fargo & Co. v. Board of Equalization, 56 Cal. 194, 205; Emeric v. Alvarado, 64 Cal. 529, 605, 2 P. 418; Allen v. McKay & Co., 120 Cal. 332, 334, 52 P. 828; Hall v. Park Bank of Los Angeles, 165 Cal. 356, 358, 132 P. 452; People's Water Co. v. Boromeo, 31 Cal. App. 270, 272, 160 P. 574; Gottstein v. Holmes (Cal. App.) 264 P. 310.

An examination of the record in the case last cited discloses the fact that the form of the assessment was identical with that in the instant case, and it was there held that on the occurrence of the delinquency in the payment of the tax an advertising charge of 50 cents on each lot was "in exact conformity with the law." So far as concerns the question of the necessity for the name of the owner of the property to be repeated on the assessment book, so that it shall appear opposite each lot assessed, where, as in the assessment herein, from its form no one could have been misled as to the name of the person purporting to be the owner of each of the several lots, we think that a substantial, if not a literal, compliance with the terms of the statute was shown to exist.

The next alleged infirmity in the tax deed is that the sale was made for a greater amount of money than was legally due. By one form of computation, the sum for which the property was sold was the exact amount due thereon. By other methods of computation, dependent upon the recognition of fractions of a cent in the tax and the penalties, the difference between the amount for which the property was sold and the amount shown by such computation as actually due varied from two-tenths of a cent to as much as three cents.

[2] It is argued by respondent that, following the provisions of section 3731 of the Political Code, "fractions of a cent" must be rejected. On the other hand, appellant contends that by the plain terms of the statute the rejection of "fractions of a cent" applies to the computation of the *tax* only, and has no reference to computation of the penalties for delinquencies (Bell v. Fee Title Co., 69 Cal. App. 437, 231 P. 598), and that as so construed the amount for which the property was sold showed no variation from the correct computation of the amount which was legally due. On making the computation in accordance with the rule as announced in the case of Bell v. Fee Title Co., 69 Cal. App. 437, 231 P. 598, it appears that at most the overcharge, if any, was less that one cent. In such circumstances, at least by the great weight of authority, the defect was of no consequence, so far as the validity of the ensuing tax deed was concerned. Jacoby v. Wolff, 198 Cal. 667, 247 P. 195; Treadwell v. Patterson, 51 Cal. 637.

One of the reasons assigned for upholding the judgment herein is that the notice of sale to the state of the property affected by the judgment was defective. By the provisions of section 3764 of the Political Code, in force at the time the notice of sale was given (Stats. 1913, p. 556), the tax collector was required to "publish the delinquent list, which must contain the names of the persons and *a description* of the property delinquent, and the amount of taxes, penalties, and costs due. *opposite* each name and *description*. * * *" In this action, respondent's contention is that, while the notice contained a description of each of the lots 10, 11, and 12 of the described tract, the "taxes, penalties, and costs due" did not appear opposite each description as prescribed by the statute; that while the language of the statute calls for "taxes, penalties, and costs" applicable to each lot, the notice deviated therefrom, first, in that it recited the "taxes, *percentage*, and costs"; and, secondly, that, instead of the property, "taxes, penalties, and costs" being set "opposite" and made applicable to each lot as required by the statute, they were lumped together into one gross sum for *all* the lots.

At the time the notice of sale herein was published a further requirement of section 3764 of the Political Code, then in force, was that the delinquent list should contain the "taxes due on personal property, the delinquent state poll, road, and hospital tax, the taxes due each school, road, or other lesser taxation district, added to the taxes on real estate. * * * " It appears that, as affecting the property here involved, a tax of 71 cents on the $100 of valuation was levied for the school district. With reference to the meaning of the phrase appearing in the statute, "added to the taxes on real estate," it was held in California Loan, etc., Co. v. Weis, 118 Cal. 489, 496, 50 P. 697, 700, that "the word 'added,' as here used, does not contemplate a mathematical computation. It is employed in the sense of subjoined or appended. * * *"

In the case of Cordano v. Kelsey, 28 Cal. App. 9, 19, 151 P. 391, 396, among other things, it is held that, in a notice of sale for delinquent taxes, it is necessary that the amount of penalties and costs be separately stated, and that (citing Campbell v. Canty, 12 Cal. App. Dec. 373,[1] and quoting sections 205–207 of Black on Tax Titles), "the giving of notice in the manner and form prescribed by the statute is an essential jurisdictional fact"; also, that "not only is the giving of notice of the sale essential, but it must be such notice as the statute prescribes."

[3-5] Assuming the correctness of the conclusion hereinbefore stated to the effect that each lot was separately described and assessed, and reasoning from the rule announced in the case of California Loan, etc., Co. v. Weis, 118 Cal. 489, 496, 50 P. 697, as well as from the case of Cordano v. Kelsey, 28 Cal. App. 9, 19, 151 P. 391, 398, it becomes apparent that the construction which should be placed on the statutory requirement that the amount of "taxes, penalties, and costs due" should be placed "opposite each name and description," is that opposite each *description* all "taxes, penalties, and costs" applicable thereto should be placed, rather than that where, as in the instant case, there are several pieces of property separately assessed and described, the total amount due thereon on account of the several charges of "taxes, penalties, and costs" should be added together and stated in one aggregate amount. But, as in substance is said in the case of Cordano v. Kelsey, 28 Cal. App. 9, 19, 151 P. 391, 398, while it is true that in the form the notice was given it was possible for the owner of the three lots in question to have ascertained or computed the amount of each of the several items affecting any one lot, the law did not place that burden upon him, but rather enjoined that duty upon others as a jurisdictional prerequisite to the validity of a tax deed dependent upon precedent proceedings.

However, the last preceding statement, as affecting the facts in the instant case, requires notation of the additional fact, that while the notice as published contained the statement that unless the delinquent taxes for the year ending June 30, 1917, with all penalties and costs due thereon, were paid on or before a specified date the assessed property would be sold to the state, so far as the property herein involved was concerned, and which by the terms of the notice was not to be sold to the state, but "to the highest bidder for cash," the notice contained no reference to "penalties," but instead thereof the column heading in the delinquent list contained the unauthorized item of "percentage."

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[1] For opinion on hearing by Supreme Court, see 162 Cal. 382, 123 P. 266.

As thus phrased or framed, the owner had no notice that any *penalties* were included in the sum total fixed as affecting all the lots combined. Nor did he occupy a positive situation in either his assumed or his actual knowledge of what was meant by "percentage." Obviously, such an expression might cover any number of different charges at an arbitrary rate or valuation, whether authorized by statute or not, and therefore the owner would be unable to do more than conjecture either as to what item or what amount was included in the "percentage," or what part or portion of the total charge was included therein. In the case of Bussenius v. Warden, 71 Cal. App. 717, 722, 236 P. 371, it was held that the requirement of section 3764 of the Political Code, as amended in 1913 (Stats. 1913, p. 556), that the delinquent list to be published by the tax collector must contain the names of the persons and a description of the property delinquent, and "the amount of taxes, penalties, and costs due," is not complied with where the tax list sets forth the amount due as taxes and costs, but fails to set forth the amount due for penalties; and that a subsequent tax deed predicated upon such defective notice is void. To the same effect is Snodgrass v. Bell (Cal. App.) 261 P. 497. The word "penalty" is not synonymous with the word "percentage," from which it would follow that, if the principle announced in the last two cited cases is correct, the notice of sale was insufficient, with the ultimate result that the deed upon which appellant relies was of no validity, and conveyed no title to him.

[6] Since plaintiff was legally possessed of no title to the property in question, he is in no position to complain of the relief which was granted to defendant in quieting his title thereto. In the case of Canty v. Staley (Cal. Sup.) 123 P. 252, 255, may be found the statement that:

> "Parties who purchase property at tax sales acquire the title to the property, if all the proceedings for the levy of the taxes and the sale are regular and in strict conformity to law; but, if not so, they acquire no rights to the property which either a court of law or equity can enforce" (citing authorities).

It becomes unnecessary to devote attention to other suggestions interposed by respondent as reasons for the affirmance of the judgment.

The judgment is affirmed.

I concur: YORK, J.

CONREY, P. J. I concur in the judgment, and in the opinion also, except its assumption that the assessments were valid. There were three separate attempted assessments. Each one was by law required to be complete in itself. Two of them failed to name either the owner or "unknown owners." For the validity of an assessment it must contain the name of the owner, or be made to "unknown owners." Pol. Code, § 3636.

In Gottstein v. Holmes (Cal. App.) 264 P. 310, referred to in the foregoing opinion, it does not appear in the decision that the assessments were defective in respect to their statement of the owner's name, or that such defect, if it existed, was brought to the attention of the court.

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93 Cal. App. 555

PHILLIPS et al. v. MACKIE. (Civ. 5202.)

District Court of Appeal, Second District, Division 1, California. Aug. 20, 1928.

Brokers ⚿49(1)—Defendant having signed exchange agreement, agreeing to pay broker's commission immediately, brokers held prima facie entitled to commission.

Where brokers secured a purchaser of realty, whom defendant accepted as ready, able, and willing to exchange property on terms specified in contract, and defendant signed agreement to immediately pay commission for broker's services, acknowledging delivery to her of offer to exchange, and declaring that exchange agreement was then on her part in full force and effect, *held*, that brokers had completed their services and were prima facie entitled to commission.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by B. G. Phillips and another, copartners doing business under the name of Phillips & Ream, against Mrs. Cora K. Mackie. From a judgment of nonsuit, plaintiffs appeal. Reversed.

Thomas J. Pitts, of Los Angeles, for appellants.

William Ellis Lady, of Los Angeles, for respondent.

CONREY, P. J. This action was brought to recover brokers' commissions alleged to be due for services rendered in accordance with a contract whereby defendant agreed to pay for those services a commission of $500. At the close of the testimony presented by plaintiffs, the court, on motion of the defendant, ordered a nonsuit, and judgment was en-

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

tered accordingly. The plaintiffs appeal. The contract was in writing in the form of an offer by one Mrs. Stewart, accepted by respondent, for an exchange of described properties, and all contained in one paper. This agreement, including the promise to pay to plaintiff the said sum of $500, appears in full in the reporter's transcript.

An examination of the transcript discloses that the appellants secured for the defendant a purchaser whom she accepted as ready, able and willing to exchange the property *upon the terms specified in the contract*, and it also appears that the agreement obtained by appellants was signed by both of the parties to the exchange. In that part of the agreement signed by defendant Mackie, she said:

> "I hereby agree and declare that Phillips & Ream is and has been my agent in procuring the said exchange agreement. I hereby agree to pay my said agent immediately the sum of five hundred and no/100 dollars ($500.00) commission for his services. I hereby acknowledge delivery to me of the aforegoing offer to exchange and declare that this exchange agreement is now on my part in full force and effect."

Under this contract the brokers' services were completed at the same time when the defendant promised to pay. As was said by the Supreme Court (Jauman v. McCusick, 166 Cal. 517, 522, 137 P. 254, 256), in relation to a similar contract:

> "She did not, as did the owner in the cases cited by her, agree to pay a commission for the securing of a purchaser ready and willing to purchase the land. She agreed to pay a commission for securing a specific agreement. Such agreement having been secured, she was liable under the precise terms of her contract."

A prima facie case was made by the plaintiffs, and a nonsuit should not have been granted.

The judgment is reversed.

We concur: HOUSER, J.; YORK, J.

TOMBLIN v. HILL et al. (Civ. 3522.) ★

District Court of Appeal, Third District, California. Aug. 18, 1928.

Hearing Granted by Supreme Court Oct. 15, 1928.

1. Trusts 🔑103(4)—Attorney, purchasing client's property at judicial sale, is presumed trustee of client, unless purchasing with client's consent, and transaction is fair.

When attorney purchases at judicial sale property in relation to which he has in some way acted in professional capacity, it is presumption of law that he shall be regarded as trustee of client, unless he shows purchase with client's consent, and that transaction was in every way fair, and not to client's disadvantage.

2. Attorney and client 🔑123(1)—Attorney is under no actual incapacity to purchase from client.

Attorney is under no actual incapacity to deal with or purchase from his client.

3. Trusts 🔑107—Proof that client consented to attorneys purchasing client's property, and there was no abuse of confidence, or advantage taken, overcomes presumption that attorney is constructive trustee.

Presumption that attorney, purchasing client's property at judicial sale, is constructive trustee of property, is overcome by clear showing that there has been consent, with full knowledge by client, no abuse of confidence, and no advantage taken.

4. Trusts 🔑103(4)—Attorney, purchasing client's property without client's consent, became trustee for client, and could not change relation without client's consent.

In action to establish trust in real property against attorney, acquiring legal title in proceedings in which he acted as plaintiff's attorney regarding property, testimony by attorney that he made purchase without knowledge or consent of plaintiff established trust for plaintiff, though there was no abuse of confidence, or advantage taken of plaintiff, and trust relation could not be changed by any act of attorney without plaintiff's consent.

5. Trusts 🔑110—Evidence of attorney's conduct in purchasing property of client involved in actions showed he considered himself trustee for client.

In action by plaintiff to establish trust in real property against attorney acquiring legal title in proceedings in which he acted as plaintiff's attorney regarding property, evidence showing plaintiff was mentally incapacitated during portion of time in which attorney and client relation obtained, adverse position taken by attorney towards plaintiff, procurement of third parties to become apparent purchasers, and large difference in value between amount expended by attorney and value of property, showed attorney considered himself trustee of properties for plaintiff, though there was no willful abuse of confidence or intentional taking advantage of client, and attorney was required to account for property to plaintiff.

6. Execution 🔑264—Purchaser at execution sale is successor to judgment debtor, whether title be considered legal or equitable (Code Civ. Proc. § 700).

Under Code Civ. Proc. § 700, purchaser at execution sale becomes successor in interest of judgment debtor, whether his title under certificate of sale be considered legal or equitable.

7. Trusts 🔑134—Trustee's possession was possession of beneficiary, and trustee could not defeat beneficiary's claim to property, by showing beneficiary's title passed to third person, not party to action (Code Civ. Proc. § 367).

Where defendant was trustee of real estate for plaintiff, possession of trustee was possession of plaintiff beneficiary, and trustee could defeat beneficiary's claim by showing beneficiary's title passed to third person, not party to

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★Superseded by opinion of Supreme Court, 275 P. 941.

action, on ground that, under Code Civ. Proc. § 367, every action must be prosecuted in name of real party in interest.

8. Trusts ⚷134—Trustee holds legal title for beneficiary.

Trustee holds legal title for beneficiary.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by M. Marie Tomblin against Frank C. Hill and others. Judgment for defendants, and plaintiff appeals. Reversed.

Hugh Dickson and Duke Stone, both of Los Angeles, for appellant.

Hewitt, Crump & Penn, of Los Angeles, for respondents.

BARTLETT, Justice pro tem. Plaintiff asks in this action to have the defendants Frank C. Hill and Cornelia Beauvais declared to be holders of the legal title to certain real properties situated in the city of Los Angeles in trust for her, and for an accounting of rents and profits. It is alleged in the complaint that plaintiff at all times since November, 1921, is and has been the owner and entitled to the possession of the property; that on November 21, 1921, she employed the defendant Hill as her attorney to represent her in litigation pending in the superior court of Los Angeles county; that in 1922 a judgment was rendered in an action wherein one Olive Pearl Phillips was plaintiff against this plaintiff, defendant Hill acting as attorney for this plaintiff in the action; that on January 2, 1923, the property in litigation was sold by the sheriff under an execution issued in the Phillips action, and purchased by Mrs. Phillips through her attorney; that on April 27, 1923, Mrs. Phillips assigned her sheriff's certificate to the Union Bank & Trust Company; that on January 3, 1924, the Union Bank & Trust Company assigned its interest under the sheriff's certificate to the defendant Cornelia Beauvais; that said Cornelia Beauvais was acting for Hill in an attempt and with the design of acquiring the property for himself, and in fraud of plaintiff's rights; that on January 3, 1924, the sheriff executed a sheriff's deed of the properties to the defendant Beauvais; that said Beauvais is the agent of Hill, and holds the title to the property for said Hill; that Hill on several occasions between January 2, 1923, and January 2, 1924, refused to give plaintiff the address of defendant Beauvais; that Hill and Beauvais claim to own the property to the exclusion of plaintiff; that a mortgage on the property is held by the Union Bank & Trust Company; that Hill has purchased other judgments against plaintiff with intent and design to acquire title to the property for himself, said purchases having been made without the knowledge or consent of plaintiff, and in fraud of plaintiff, and in violation of the duties of Hill as the attorney for plaintiff; that Hill has collected certain rents, and paid out money for taxes and interest; that plaintiff offers to repay any moneys paid out by Hill lawfully in the purchase of judgments against plaintiff, and any other sums he may have legally expended; that the property at the time of the sale under the Phillips judgment was worth $55,000; and that at the time this action was instituted the property is of a value of $80,000.

The answer of Hill, Beauvais, and the Union Bank & Trust Company denies ownership of the property by plaintiff, denies all allegations of fraud, and denies the property to be of a value in excess of $55,000. As an affirmative defense it is averred in the answer that on January 2, 1923, plaintiff owned the property subject to a $12,000 mortgage held by the Security Trust & Savings Bank, which mortgage indebtedness was then in default, to two judgment liens in favor of one Koeberle for the sums of $1,180.45 and $922.45, respectively, to a judgment in favor of one O. D. Collins for $25,000, to a judgment in favor of one Rublee for $2,279.54, and certain delinquent taxes and penalties, and interest thereon, which it is alleged amount approximately to the market value of the property. The answer sets forth in detail the acts and events leading up to and following the acquisition by Hill of the property, and avers acquiescence, ratification, and estoppel, and also avers as a defense that plaintiff is not the real party in interest.

The trial court found in favor of the defendants on all the material issues involved, and decreed by its judgment that plaintiff has no right, legal or equitable, in or to the property in question; that defendant Frank C. Hill is the owner and entitled to the possession thereof; that neither Frank C. Hill nor Cornelia Beauvais holds title to the property in trust for plaintiff; and that plaintiff is entitled to recover nothing by her action.

The evidence adduced at the trial shows that plaintiff first became acquainted with defendant Hill in 1905, and first consulted him professionally in June, 1921, at which time she called at his office for advice and assistance concerning a threatened foreclosure of a trust deed which she had given on this property to O. D. Collins and J. O. Mouser on March 1, 1921, for the sum of $35,000, due 60 days after date. This loan was in fact $25,000, the excess of $10,000 being usurious interest. In addition to the Collins trust deed, plaintiff owed over $12,000 to the Security Trust & Savings Bank on a note secured by her first mortgage on the same property, federal income taxes, city and county taxes, and a large amount of open accounts to merchants and others, aggregating many thousand dollars. For some months Hill negotiat-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ed with the attorneys for Collins in an endeavor to obtain a reduction of the Collins demand, so that the property could be refinanced. He was not successful in this, and Collins insisted on full and immediate payment, and served notice of sale on plaintiff under this trust deed, fixing the date of sale for November 29, 1921. On November 15, 1921, upon proceedings had in the superior court of Los Angeles county, plaintiff was adjudged incompetent, and her brother-in-law John H. Coulter, was appointed her guardian. The guardian retained Hill and commenced an action against Collins to have the trust deed declared void, and for a penalty of $30,000 under the Usury Act; a temporary injunction was issued and served, restraining the trustee from selling the properties; the action was thereafter tried, and resulted in a judgment rendered November 20, 1922, which declared the trust deed void, but which gave Collins a simple money judgment on the cross-complaint, which he had interposed, for $25,000, without interest. From this judgment the guardian of plaintiff took an appeal, and thereafter this judgment was affirmed by the Appellate Court of the Second Appellate District, Division 1, the decision therein being reported in 71 Cal. App. 380, the same being filed February 21, 1925.

Prior to the time plaintiff was adjudged incompetent, one Koeberle, an assignee of several Los Angeles merchants, secured a judgment against plaintiff on December 31, 1921, for $1,161 and costs. Hill was not an attorney for plaintiff or her guardian in this action. On April 29, 1923, this judgment was purchased by one G. C. Watson, acting for Hill, an execution was issued thereon, and the property was sold to Watson on May 21, 1923, and the writ of execution was wholly satisfied. On January 17, 1922, Koeberle obtained a judgment in another action against plaintiff for $1,922.45. On August 17, 1922, one Mrs. Olive Pearl Phillips, who had loaned plaintiff some money and taken her note for $8,000 to evidence the loan, began an action on the note against plaintiff's guardian. Hill appeared in this action for the guardian, and answered, denying liability for more than $2,500. An attachment was issued, and the property in controversy was levied upon on August 17, 1922. On a trial of the action judgment was rendered in favor of Mrs. Phillips on November 1, 1922. On January 2, 1923, under an execution issued in this last action the property was sold to Mrs. Phillips for $6,922.55, the writ being returned as fully satisfied. The sheriff issued his certificate of sale to Mrs. Phillips on January 2, 1923, and on April 27, 1923, Mrs. Phillips assigned all her right, title, and interest in the property under the sheriff's certificate to the Union Bank & Trust Company, which bank on January 3, 1924, assigned its interest in the property to the defendant Cornelia Beauvais. On January 3, 1924, the sheriff of Los Angeles county executed a sheriff's deed of the property to defendant Cornelia Beauvais.

On November 24, 1922, a writ of execution on the $25,000 Collins judgment was issued, and on January 15, 1923, all the right, title, and interest of Coulter, as guardian, and of the plaintiff, in and to the properties, was sold to Collins for $25,422.55, the judgment being thereby satisfied in full, and on January 29, 1924, the sheriff issued his deed of the properties to Collins. On November 6, 1922, one Kenneth Rublee, a nephew of plaintiff, commenced an action against her for $2,000 and costs, and attached the property, obtaining judgment by default on November 28, 1922; the judgment being for $2,266.14, together with costs and attorney's fees. Hill was not an attorney in this case, and no levy or sale was made under this judgment. On May 21, 1923, the Security Trust & Savings Bank assigned its $12,000 mortgage, which was then in default, to one G. C. Watson, and on the same day the Union Bank & Trust Company, as assignee of the sheriff's certificate of sale under the Phillips judgment, redeemed from the Koeberle sale. The plaintiff was restored to competency on December 20, 1922. Immediately after this plaintiff told Hill she had large sums of money due her from an estate in the East, and that she intended to go to the East and collect moneys sufficient to pay up all of the mortgages, judgments, and debts she was owing in California. About March 19, 1923, she departed for the East and remained there until about December 10, 1923, when she returned to the city of Los Angeles. During her absence plaintiff often wrote and telegraphed Hill that she was making progress in the collecting of moneys, and would soon have them in hand and make remittances sufficient to clear all of her indebtedness.

On or about April 17, 1923, Hill was informed by the former guardian of plaintiff that plaintiff would be unable to redeem from the sheriff's sales that had been made on the Koeberle and Phillips judgments, and thereupon said Hill caused one George C. Watson to purchase, with funds advanced by Hill, the Koeberle judgments, and later caused the Union Bank & Trust Company to purchase the certificate of sale issued on the Phillips judgment, and on May 21, 1923, did cause the Union Bank & Trust Company to purchase the mortgage of the Security Trust & Savings Bank on the plaintiff's property. These judgments, certificates of sale, and mortgages were afterwards assigned to the defendant Cornelia Beauvais, and thereafter transferred by her to the defendant Hill. Hill notified the former guardian of plaintiff that he had purchased the mortgages and judgments, that plaintiff claimed she was about to receive large sums of money in the East, that such moneys had not been forthcoming, that unless plaintiff redeemed from these sales before January 2, 1924, she would lose all right to the property, and asked Coulter to urge plaintiff to make the redemptions. Hill thereafter gave plaintiff a full and accurate account of the moneys he paid out, urged and requested her to redeem before January 2, 1924, and after her return from the East told her it was necessary for her to redeem the property before January 2, 1924, or she would lose all her rights thereto.

Plaintiff, instead of redeeming the property, on or about February 15, 1924, came to Hill and represented that she had a cash purchaser of the properties for $52,500, and asked him if he would be willing to make such sale, and out of the proceeds take only the moneys he had actually advanced. To this Hill consented, and a deal to effect this sale was begun, but was abandoned by plaintiff, for the reason that she would receive no moneys from such sale, as her debts exceeded the sum of $63,000. After this no further claim of her having any interest in the property was made by plaintiff until May 11, 1925, on which date this action was begun.

[1-3] The claim that defendant Hill holds the property under a constructive trust is based upon the ground that he was the attorney for plaintiff in certain legal proceedings, which culminated in the legal title becoming vested in Hill prior to the institution of this action. That it is a presumption of law that, when an attorney purchases at a judicial sale property in relation to which he has in some way acted in a professional capacity, he shall be regarded as the trustee of his client is well established, unless he shows he has purchased for himself, with his client's consent, and that the transaction is in every way fair and not to his client's disadvantage. An attorney is under no actual incapacity to deal with or purchase from his client. If he makes a clear showing that there has been a consent with full knowledge on the part of his client, no abuse of confidence, and no advantage taken, the legal presumption of his being a constructive trustee of properties purchased is overcome and his purchase will be upheld. Kisling v. Shaw, 33 Cal. 425, 91 Am. Dec. 644; Boardman v. Crittenden, 52 Cal. App. 438, 198 P. 1020; 3 Cal. Jur., p. 622, § 33.

[4] If it be conceded there was no abuse of confidence and no advantage taken, the defendant's own testimony in this case shows that he made the purchases without the knowledge or consent of plaintiff. He thereafter held the property in trust for her, a relation which he could not change by any act of his without her consent. Dean v. Shingle, 198 Cal. 652, 658, 246 P. 1049, 46 A. L. R. 1156; Cobb v. Whitney, 124 Okl. 188, 255 P. 566.

[5] While it cannot be said that the evidence taken at the trial of this action shows that there was any willful abuse of confidence or intentional taking advantage of his client on the part of defendant in the many transactions that resulted in the legal title to the properties becoming vested in him, there are certain elements entitled to serious consideration. The mental incapacity during a portion of the time in which the relation of attorney and client obtained, the position taken by Hill in the Phillips case that the loan sued on was for the sum of $2,500, instead of $8,000, his purchase thereafter of the certificate of sale on this judgment for $6,922.55 and its accruing penalties, his having a third party, G. C. Watson, and the defendant Cornelia Beauvais become the apparent purchasers of the various certificates of sale and judgments and mortgage against plaintiff, and his consent to permit plaintiff to negotiate a sale of the property after the time to redeem from the sale under the Phillips judgment, taken into consideration with the large difference between the amount expended on account of the properties by Hill, some $27,500, and their admitted value of $55,000, are persuasive facts in this case pointing to the conclusion that defendant Hill, up to the time of the present controversy, considered himself a trustee of the properties involved for the plaintiff. Counsel for defendants concede:

> "It is not clear whether Hill purchased the Phillips' certificate of sale and the mortgage of the Security Bank and redeemed from the Koeberle sale, intending at that time to hold adverse to Mrs. Tomblin."

As stated, if the defendant did not then intend to acquire the property in his individual capacity, he could not change the character of his title by a subsequent change of intention.

[6] The sheriff's certificate of sale and the deed made thereunder to O. D. Collins, pleaded by defendants as a fourth affirmative defense as a bar to this action, presents a novel matter for consideration. Said O. D. Collins is not a party to this action. Under section 700 of the Code of Civil Procedure the purchaser at an execution sale becomes the successor in interest of the judgment debtor, whether his title under the certificate of sale be considered legal or equitable. Pollard v. Harlow, 138 Cal. 390, 71 P. 454, 648; Leaver v. Smith, 47 Cal. App. 474, 190 P. 1050; Bateman v. Kellogg, 59 Cal. App. 464, 211 P. 46; Wangenheim v. Garner, 42 Cal. App. 332, 183 P. 670; Freelon v. Adrian, 161 Cal. 13, 118 P. 220; 11 Cal. Jur. 117, § 64.

[7] Section 367 of the Code of Civil Procedure provides that every action must be prosecuted in the name of the real party in interest. Can a defense that an action is not being prosecuted by the real party in interest be invoked as a bar to the action, where the defendant is shown to be a trustee for the plaintiff? The purpose of an action seeking

the holding of a defendant to be a trustee of real properties is in many respects similar to one for quieting title to real estate. In such actions it has been held that a defendant not in possession cannot defeat a title of a plaintiff in possession by showing title in a stranger to the suit with whom he is not in privity. McGrath v. Wallace, 85 Cal. 622, 24 P. 793; Williams v. City of San Pedro, 153 Cal. 44, 94 P. 234; Sears v. Willard, 165 Cal. 12, 130 P. 869; Rockey v. Vieux, 179 Cal. 681, 178 P. 712; Kilfoil v. Warden, 46 Cal. App. 503, 189 P. 303; Weldon v. Lawrence, 76 Cal. App. 534, 245 P. 451.

[3] The possession of a trustee is the possession of his beneficiary. A trustee holds the legal title for his beneficiary. It cannot be held that he can defeat the beneficiary's claim by showing that the beneficiary's title has passed to some third person, not a party to the action.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

93 Cal. App. 577

SPALDING v. BENNETT et al. (Civ. 3536.)

District Court of Appeal, Third District, California. Aug. 22, 1928.

1. Brokers 🔑43(2)—Oral promise to pay specified sum for services for procuring lease held not within statute of frauds (Civ. Code, § 1624; Code Civ. Proc. § 1973).

Oral promise to pay specified sum for services for procuring lease *held* not within provisions of statute of frauds, since neither agreement to purchase nor sell real estate is required to be in writing by Civ. Code, § 1624, or Code Civ. Proc. § 1973.

2. Brokers 🔑86(1)—Evidence of lease procured by brokers, agreement for listing and lease by broker's clients with defendants on same terms, supported judgment allowing broker commissions.

In action for broker's commission for procuring lease of real property, evidence showing lessees voluntarily came to broker regarding prospects of securing lease, that broker solicited listing of property and entered into agreement of employment as agent to procure lease containing promise to pay compensation fixed for similar services by realty board, that written lease was procured and sum deposited therefor, but that subsequently defendants entered into lease of premises with broker's clients on similar terms, supported judgment allowing broker commission for procuring lease.

3. Brokers 🔑80—Defendants, sued for brokers' commissions, could not complain of acceptance of lease on terms less favorable than secured by brokers.

In action by brokers to recover commission for procuring lease of real property, defendants could not complain against judgment allowing brokers' commissions, because they saw fit to accept lease on terms less favorable to themselves than terms secured by brokers.

4. Brokers 🔑8(3)—Evidence held to show defendants acquiesced in employment of brokers with promise to pay commissions fixed by realty board for reasonable value.

Evidence that brokers' employee conferred with defendants regarding leasing of their premises, that defendants agreed to payment of commissions, and stated they would not ask brokers to accept less commission than that fixed by realty board showed acknowledgment by defendants of liability to pay commissions in amount fixed by realty board for similar services, or implied agreement to pay reasonable value of services, and indicated that defendants acquiesced in employment of brokers.

5. Brokers 🔑8(3)—Evidence that defendant refused to sign lease procured by brokers until he saw attorney did not show agreement to pay commissions subject to attorney's approval.

In action by brokers to recover commissions for procuring lease of real property, statement by defendant, after brokers procured lease, that he could not sign until he saw his attorney, did not show agreement to pay commissions subject to approval of defendant's attorney, in view of other evidence showing agreement to employ brokers and pay commissions without reservations.

6. Brokers 🔑86(4)—Concession as to correctness of lease procured by broker held acknowledgment that brokers were procuring cause, entitling brokers to commission, though lease was entered into without brokers' aid.

In action by brokers to recover commissions for procuring lease of real property, evidence that defendants conceded written contract of lease procured by brokers was just as they wanted it, and that they would not ask brokers to reduce commissions below amount specified by realty board, showed acknowledgment that broker was procuring cause of obtaining lease on terms satisfactory to defendants, and authorized recovery of commissions by brokers, though lease was finally executed without presence or aid of brokers.

7. Brokers 🔑53—Broker, who is efficient cause of procuring customer willing and able to lease property on terms acceptable to owner, is entitled to commissions.

Where broker is efficient cause of procuring customer who is ready, willing, and able to lease property on terms specified by owner in contract of employment, or on terms acceptable to owner, he is entitled to commissions.

8. Brokers 🔑54—Owner, after accepting customer procured by broker and execution of satisfactory lease, cannot deny customer's ability or willingness to consummate contract.

When customer procured by broker is accepted by owner, and lease is executed on terms satisfactory to owner, owner is estopped from denying ability or willingness of customer to consummate contract.

9. Brokers 🔑56(3)—Neither principal nor customer procured by broker can defeat broker's claim for commissions by concluding transaction without broker's aid.

After broker has procured customer willing and able to lease property on terms acceptable to owner, neither principal nor customer may defeat claim of broker to his compensation by concluding transaction without broker's aid.

10. Brokers 🔑86(1)—Destruction of original contract and check after brokers procured acceptable customer held insufficient to show brokers' abandonment of employment.

In action by brokers to recover commissions for procuring lease of real property, where brokers procured customer, and lease was actually executed between owner and customer on terms acceptable to owner, mere destruction of original contract to lease and deposit check, in absence of further testimony, was insufficient evidence to warrant holding that broker abandoned employment and forfeited commissions.

Appeal from Superior Court, Los Angeles County; Howard A. Peairs, Judge.

Action by B. H. Spalding against Charles H. Bennett, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Peyton H. Moore, of Los Angeles, for appellants.

Barker & Keithly, of Los Angeles, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment for broker's commissions for procuring a 50-year lease of real property.

[1] The complaint contains two counts, the first of which is based upon an alleged oral promise to pay a specified sum for services for procuring the lease, while the second count claims compensation upon a quantum meruit. The transaction is not within the provisions of the statute of frauds, since it was neither an agreement to purchase nor sell real estate, which, in the absence of a memorandum in writing, is prohibited by section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure. The complaint alleges that the respondent was a duly licensed real estate broker, doing business in the city of Los Angeles; that the appellants were the owners of lot 1, block 7, of Wright's subdivision of lots 78, 95, and 96 of McDonald's Tract of the city of Los Angeles, Cal.; that on November 19, 1923, the appellants employed respondent to negotiate a 50-year lease of said premises upon specific terms, mentioned at $250 per month as rental for the first five years, $400 per month for the following five years, and an increased rental of $100 per month for each succeeding 5-year period until the termination of the lease; that the efforts of respondent resulted in securing the customers, who subsequently executed said lease upon the exact terms specified by the appellants. The first count alleged that appellants agreed to pay respondent for said services a sum equivalent to the amount fixed by the Los Angeles Realty Board schedule of broker's commissions for similar transactions. The second count prayed for judgment upon a quantum meruit. Upon trial the court found all the allegations of the complaint to be true, that the commissions which were fixed by the schedule of the realty board for such services were $4,225, and that said sum was also a reasonable compensation therefor. Judgment was thereupon rendered in favor of the respondent for the sum of $4,225, together with interest thereon, aggregating the sum of $4,814.04.

The appeal is based solely upon a charge that the findings of the court are not supported by the evidence. It is claimed that (1) there is no evidence of the employment of respondent as an agent to procure the lease; that (2) there was no agreement to pay for such services, either a specified sum, or the reasonable value thereof; and that (3) the respondent abandoned his employment and thereby waived his commissions.

[2, 3] There is no merit in these contentions. There is a conflict of evidence, but the record discloses ample testimony to support the findings and judgment of the court. It satisfactorily appears that the lessees first voluntarily came to the office of respondent, inquiring regarding the prospects of securing a lease upon the identical property in question. Respondent sent two salesmen to appellants upon different occasions, soliciting a listing of the property and an agreement of employment as agent to procure the lease. There is substantially no conflict as to the exact terms of the lease agreed upon. A promise to pay the compensation fixed for similar services by the realty board was clearly made. Respondent procured a written contract from the lessees, who agreed to all the terms required by appellants, which document also provided for the depositing of $5,000 as security for the faithful performance of the covenants of the lease. A check for $1,000 was actually delivered to the respondent by the lessees to bind the bargain. A controversy afterwards arose between respondent and the appellants regarding the commissions to be paid, and this check and contract with the lessees were then destroyed. Appellants contend that this constituted an abandonment of the employment as broker and a waiver of his claim for compensation. Immediately thereafter the appellants entered into a lease of the premises with respondent's clients upon the exact terms specified, except that $5,000 deposit for the faithful performance of the terms of the

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

lease was not required. The appellants, however, may not complain because they have seen fit to accept a lease upon terms less favorable to themselves than the terms which were secured by respondent. 4 Cal. Jur. 606, § 39; 4 R. C. L. 322, § 59; 9 C. J. 600, § 89; Arnold v. La Belle Oil Co., 47 Cal. App. 290, 297, 190 P. 815.

[4] Regarding the employment of respondent as the agent of appellants, Ruth Schauerman, respondent's saleslady, testified that she had a conference with both of the appellants in November, 1923, and that they specified the terms of the lease which they were willing to make, which conformed exactly to the terms of the lease subsequently executed by them, except as to the amount of deposit. She testified that appellants said "they would take care of the commissions; * * * they were willing to pay a commission—knew that a commission had to be paid." And in a subsequent conference, during which she told them respondent had a client who would lease the premises upon the terms specified, appellants replied "that it was fine that they would lease it, and if we could lease it and get those terms, it was perfectly satisfactory." This witness further testified that at the last-mentioned conference appellants said respecting the payment of commissions:

> "We have called the Realty Board and figured with them, and the commission is more than we expected it would be, but we would not ask you to cut it one penny."

This appears to be a clear acknowledgment that appellants recognized their liability to pay for the services of their agent the amount fixed by the Los Angeles Realty Board for similar services. Mr. Ulm, another salesman of respondent, having procured the written contract with respondent's client to lease the premises upon the terms specified, took this agreement, together with the $1,000 check above mentioned, to appellants, who carefully read it over in the presence of each other. Mr. Bennett then asked his wife, "Is that just the way we want it, Mamma?" To which she replied, "Yes." In discussing the commissions at this conference, Mr. Bennett further said:

> "Now, that commission is more than I thought [it would be] when I gave Mrs. Schauerman the listing, but when I called up the Board, I found it was about right, and I would not ask you to cut it one penny; but I can't sign it until I see my attorney."

We are of the opinion that, fairly construed, the record discloses evidence clearly indicating that appellants acquiesced in the employment of respondent as their agent, and promised to pay him the amount, fixed by the Los Angeles Realty Board for similar services, as compensation. At least, it must be conceded that the foregoing evidence implies that they agreed to pay respondent some amount as compensation for his services in procuring a lease of the premises upon the specified terms. If the specific amount agreed upon may be said to be in doubt, still the judgment must stand, because it represents the reasonable value of the services performed, as indicated by both the pleadings and the proof in the case.

[5-10] The appellants contend that their agreement to employ respondent as their agent and pay him commissions for his service was subject to the approval of their attorney, Mr. Byrnes, and that appellant's foregoing statement with respect to the lease, that "I can't sign it until I see my attorney," confirms this claim. But we are of the opinion that the record, including the evidence heretofore quoted, indicates that appellants, without reservation, agreed to the specific terms of the lease, as well as to the payment of commissions for the agent's service. Both Ruth Schauerman and Mr. Ulm testified positively that the appellants did not state that the commissions for the broker's service must be satisfactory to their attorney. The inference which must be drawn from the foregoing statement of Mr. Bennett, that "I can't sign it until I see my attorney," clearly indicates that he recognized the contract of employment, and desired to submit to his attorney the mere form of the lease, for their protection. It does appear that appellants' attorney, Mr. Byrnes, did believe that the contract of employment was within the statute of frauds, and therefore void, and evidently because they considered the commissions excessive they were warranted in repudiating the contract. Mr. Lockwood, one of the lessees, testified that Mr. Byrnes had said to him:

> "Morally we owe the money, but he [the respondent] has nothing in writing, and legally he cannot get it, and we won't pay it."

But upon appeal it is not contended that the contract of employment is void because it was not reduced to writing or signed by the parties to be charged. From the testimony heretofore quoted it appears that the appellants conceded that the written contract of the lessees procured by the respondent was "just the way we want it," and that, while the commissions exceeded their expectations, they had conferred with the Realty Board and found them to be about right, and therefore would not ask the respondent to cut them one penny.

These concessions amount to an acknowledgment that respondent was the procuring cause of obtaining a written contract from the lessees upon terms entirely satisfactory to appellants, and a promise to pay commissions equivalent to the sum fixed by the Realty Board for such services. This being true, the respondent is entitled to recover his compensation, in spite of the fact that the lease was finally executed between the parties thereto without the presence or aid of the respondent. Where a broker is the efficient cause of procuring a customer who is ready, willing, and able to lease property upon the terms specified by the owner in the contract of employment, or upon terms acceptable to the owner, he is entitled to his commissions. 4 Cal. Jur. 583, § 25; 4 R. C. L. 307, §§ 49, 50; Twogood v. Monnette, 191 Cal. 103, 215 P. 542. When the customer procured by the agent is accepted by the owner, and the lease is executed upon terms satisfactory to the owner, he is estopped from denying the ability or willingness of the customer to consummate the contract. 4 R. C. L. 309, § 49; Twogood v. Monnette, supra; Rucker v. Hubler, 56 Cal. App. 771, 206 P. 472.

After a broker has procured a customer willing and able to lease property upon terms acceptable to the owner, neither the principal nor the customer may defeat the claim of the broker to his compensation by concluding the transaction without the broker's aid. 9 C. J. 619, § 99. Since the 50-year lease was actually executed between the appellants and the customers procured by respondent, upon terms acceptable to the owners, the mere destruction of the original contract to lease, and the deposit check for $1,000, in the absence of further testimony, is insufficient evidence to warrant a holding that the respondent thereby abandoned his employment and forfeited his commissions. The record indicates just the contrary purpose, on the part of respondent.

The judgment is, therefore, affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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93 Cal. App. 632

PEOPLE v. WILSON. (Cr. 1469.)★

District Court of Appeal, First District, Division 1, California. Aug. 24, 1928.

Rehearing Denied Sept. 22, 1928.

1. Criminal law 🔑741(1)—Whether person present at crime, aided and abetted therein, so as to be principal, is fact question for jury (Pen. Code, § 31).

Whether a person, who is shown to have been present at the time and place of commission of the crime, aided and abetted therein, so as to be a principal, within Pen. Code, § 31, is question of fact for the jury to decide from all the circumstances proved.

2. Robbery 🔑24(1)—Evidence held sufficient to justify conviction of defendant for robbery, second degree, on theory that she was present to aid and abet (Pen. Code, § 31).

Evidence *held* sufficient to warrant conclusion that defendant was present at robbery, for purpose of aiding and abetting actual robbers by diverting suspicion, to serve as lookout and give warning of approach of any one, or to take charge of robbers' automobile, keep engine running, and give direct aid to them in making their escape, justifying her conviction of robbery, second degree under Pen. Code, § 31.

3. Criminal law 🔑552(1)—Unexplained presence at crime may be deemed circumstance tending to show complicity.

The unexplained presence of a person at the scene of the commission of a crime may be deemed a circumstance tending to show complicity in the transaction.

4. Criminal law 🔑1037(1)—District attorney's persistent cross-examination of defendant respecting reasons for carrying pistol, notwithstanding rulings sustaining objections, held not to require reversal, without assignment for misconduct.

Where police detective testified without objection to finding pistol in defendant's vanity case, and that she stated in answer to question that she carried gun for her protection, conduct of district attorney in persisting to cross-examine defendant as to why she stated to officer that she had carried pistol for her protection, though all defendant's objections thereto were sustained, and his referring thereto in his argument, *held* not to require reversal, where defendant did not assign this as misconduct.

5. Criminal law 🔑719(1)—District attorney's statement in argument, fairly supported by evidence, was not improper.

District attorney's statement to jury during his argument, which was fairly supported by the evidence, was not improper.

6. Criminal law 🔑823(2)—Instructions respecting degrees of robbery held not objectionable, as implying defendant's presence at crime, in view of other instruction.

Where court charged that defendant should not be found guilty at all, unless jury was convinced to a moral certainty and beyond a reasonable doubt that robbery was committed as alleged in information, and that defendant was present and aided and abetted therein, instructions relating to degrees of robbery *held* not objectionable, as implying that defendant was present at scene of crime, though, standing alone, they might give rise to such implication.

7. Criminal law 🔑823(1)—Typographical mistake in using term "a defendant," instead of "the defendant," in instruction, held not objectionable, as permitting conviction if codefendants were guilty, in view of other instruction.

Typographical mistake in using the term "a defendant" in instruction, instead of "the defendant," *held* not objectionable, as in effect informing jury that, if they found that either of codefendants aided or abetted in the commission of the robbery, it was their duty to find defendant guilty thereof, where the following instruction required jury to find to a moral certainty and beyond a reasonable doubt that defendant aided and abetted in commission of the crime before they could convict her.

Appeal from Superior Court, City and County of San Francisco; James G. Conlon, Judge.

★Rehearing denied.

Lorena Wilson was convicted of robbery in the second degree, and she appeals. Affirmed.

Joseph M. Trusty and Frank J. Golden, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

KNIGHT, J. The appellant, Lorena Wilson, was charged jointly with her husband, Harry Wilson, and one Russell Griffin, with the crime of robbery alleged to have been committed in San Francisco on September 21, 1927. She was arrested in Oakland on December 1, 1927, and tried separately in February, 1927; her codefendants having been previously sentenced to the state prison on another charge. The jury found her guilty of robbery in the second degree, and, following the denial of motions for a new trial and probation, she was sentenced to imprisonment in the state prison. Thereupon she took this appeal from the judgment of conviction and the order denying her motion for a new trial.

The first point made is that the verdict is not supported by the evidence and is contrary to law. The record discloses that shortly prior to the hour of 8 o'clock on the evening of the robbery appellant's codefendant Russell Griffin, accompanied by another man and a woman, drove in an automobile to a grocery store on the corner of Noriega street and Twentieth avenue, San Francisco, and while his companions waited outside near the front of the store, Griffin entered the store, armed with a pistol, and after threatening Miss Rose O'Connor, the manager of the store, who was alone therein at the time, stole the money that was in the cash register, and then made his escape by driving away with his companions. Direct evidence was introduced to prove that appellant and her husband were the other two persons with Griffin at the time he perpetrated the crime, and the prosecution introduced evidence of certain circumstances which it claimed justified the conclusion that appellant aided and abetted in its commission, and the jury so found. These circumstances briefly stated, were as follows:

About dusk on the evening of the robbery a Mrs. Woods, living on Twentieth avenue, about six houses distant from the grocery store and on the same side of the street therewith, was standing in front of her home, watering the lawn, and while doing so a Chrysler coupé approached slowly, with only one headlight burning. She saw that it was occupied by two men and a woman, the latter being seated between the men; and her attention was particularly attracted to them because her husband was employed by the agency handling that make of car, and when she first saw the coupé approach she thought that one of its occupants was her husband, and that he was driving home in one of the agency's cars; but as the parties came closer to her she saw that her husband was not one of them. The coupé passed within 3½ or 4 feet of her, "hugging" the curb, and then proceeded on along Twentieth avenue directly in front of the grocery store, around the corner into Noriega street, and circled the block. This maneuver was repeated three times. The window of the coupé was down, and consequently each time the parties drove by Mrs. Woods she was able to get a good look at them.

On the fourth trip around the block, the coupé drew in still closer to the curb toward Mrs. Woods, and as it passed slowly by her one of the men curtly told her to "go into the garage and mind her own business." In compliance with such command she went into the garage, but looked back out through the glass door, and saw the coupé continue on slowly along Twentieth avenue until it reached a point about 20 feet the other side of Noriega street. It stopped there, and the two men alighted; whereupon Mrs. Woods hurried to the phone to notify the police, but, being unable to obtain telephonic connection with the department, because her party line was "busy," she immediately returned to the front yard and stood behind the trunk of a tree, where she could observe the subsequent movements of the coupé and also the interior of the grocery store through its front windows. She testified that, after both men got out of the coupé, one of them entered the store, while the other stood near a street light directly in front of the store; that she saw the man in the store commit the robbery, and then run out, join the other man, and that both men then jumped into the coupé, the engine of which had been kept running, and drove away; and that while all of this was going on she had a clear view, through the rear window of the coupé, of a woman seated therein. Mrs. Woods afterwards, at the Oakland jail and at the trial positively identified appellant as the woman occupant of the coupé. Additional evidence was adduced tending to show that appellant made more or less resistance at the time of her arrest, and also that she had contradicted herself in some respects regarding the whereabouts of her husband and as to other pertinent matters.

Appellant's defense depended entirely upon her own testimony, no other witness being produced in her behalf, and her testimony on direct examination was to the effect merely that she lived with her husband and three children, and that Griffin boarded with them; that she was not present in the coupé at the time of the robbery, as claimed by Mrs. Woods; and that she did not know her husband had been doing wrong until he was arrested.

[1, 2] Section 31 of the Penal Code declares in part that all persons concerned in the commission of a crime, whether they directly

commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed; and the contention appellant makes regarding the evidence is that, even assuming that she was present at the time and place of the robbery, there was no proof introduced to establish the fact that she aided and abetted in the commission of the crime. We are unable to agree with this contention, for it is well settled that the question of whether or not a person who is shown to have been present at the time and place of the commission of a crime has aided and abetted therein is one of fact for the jury to decide from all the circumstances proved (People v. Woodward, 45 Cal. 293, 13 Am. Rep. 176; People v. Kauffman, 152 Cal. 331, 92 P. 861; People v. Wilson, 135 Cal. 331, 67 P. 322); and in our opinion the circumstances hereinabove narrated are legally sufficient to warrant the conclusion that appellant had previous knowledge of what was about to transpire, and that her object in being present was to divert any suspicion as to their purpose, or to serve as a lookout, and to give warning of the approach of anyone seeking to interfere with their enterprise., or to take charge of the automobile, keep the engine running, and to give direct aid to the men in making their escape. Any one of the purposes mentioned would be sufficient upon which to base the reasonable inference that she was aiding and abetting in the commission of the robbery.

[3] Furthermore, it has been held that the unexplained presence of a person at the scene of the commission of a crime may be deemed a circumstance tending to show complicity in the transaction. People v. Woodward, supra. Here appellant denied that she was present at the scene of the crime, but the jury, by its verdict, declared that she was; consequently, in that state of her testimony, her presence was unexplained, and may have been taken by the jury as an additional circumstance tending to show complicity in the crime. The case last cited is one upon which appellant relies to support her contention that the evidence is insufficient. But, aside from the declaration of the legal principle above referred to, we think the case is of little value here, because an analysis of the decision shows that it goes no farther than to restate in negative form the provisions embodied in section 31 of the Penal Code to the effect that the mere presence of a person at the time and place of the commission of a crime is not legally sufficient to sustain a conviction, unless it be found as a fact that he aided and abetted in the commission thereof, and, as the decision in the case declares, it is "for the jury to decide from all the facts proved, whether he aided, assisted, or abetted in the perpetration of the offense." In other words, an affirmative finding on the elements mentioned may be based upon the circumstances surrounding the person's presence. Therefore it would appear that the conclusion reached in the present case is not in conflict with any of the rules stated in the case cited.

[4] Appellant assigns as error certain rulings of the trial court and the conduct of the district attorney in relation to the introduction in evidence of an envelope and a pistol which were found in appellant's possession at the time of her arrest, the circumstances leading up to and attending which were as follows: At the time the robbery occurred the Wilsons and Griffin resided on Twenty-Third avenue in Oakland, and they continued to live there until the following month, October, 1927, at which time they moved to San Francisco, where they resided until the time of appellant's arrest. For several days preceding appellant's arrest the Oakland police department had under surveillance a house on Twelfth street, knowing that a government letter from the War Veterans' Bureau, addressed to Griffin, was about to be delivered there, and the day after it was delivered appellant called to get it. As she left the premises, the police followed her for some distance, and she finally ran into the doorway of an apartment house. As the officers were about to follow her in, she came out of the door carrying a vanity case, which was partly opened. After a brief struggle she was placed in the police automobile, and one of the officers asked her to hand over the vanity case, which she refused to do, and during the struggle for it she threw it out of the machine. It was picked up, and among the articles found therein was the government envelope addressed to Griffin and a Mauser pistol fully loaded. The particular portions of the testimony given by the police detective on direct examination as to the struggle for the vanity case and the finding of the envelope and pistol therein went before the jury without objection, as did the further testimony given by the same officer to the effect that they asked appellant "why she carried the gun, and she said she carried the gun for her protection"; but, upon introducing the envelope and pistol in evidence, appellant objected thereto, and her objections were overruled as to the admission of the envelope, but sustained as to the pistol. Thereafter, and on cross-examination of appellant, the district attorney persisted in asking appellant, despite the repeated objections of appellant, which the court consistently sustained, why she had stated to the officers that she carried the pistol for protection. The district attorney also touched upon the same matter in an indirect manner during his argument to the jury. Therefore, at the conclusion of the arguments the trial court, through abundance of caution, instructed the jury that "all objections to questions asked

by the district attorney with reference to the possession by the defendant" of the pistol had been sustained, and all testimony given with reference thereto stricken out, and in addition the court admonished the jury "to disregard and discard from their minds any and all ideas and impressions and convictions that the production of such weapon in court has or may have formed in the minds of the members of the jury," and to disregard also "any and all impressions, ideas, or convictions which form from any and all questions and answers of the defendant and the remarks of the district attorney in reference to the possession by the defendant of said revolver at the time of her arrest."

It is evident from the foregoing condition of the record that appellant was not injured by the rulings of the trial court regarding appellant's reason for carrying the pistol because the objections made with reference thereto were sustained; nor can it be said that the ruling as to the reception in evidence of the sealed envelope addressed to Griffin, if erroneous, operated to her prejudice, because, as stated, the officer had already testified, without objection on appellant's part, that such envelope was found in appellant's possession, and, conceding that the conduct of the district attorney in repeatedly asking appellant her reason for carrying the pistol, after the court had ruled such testimony inadmissible, and in adverting to the same matter in his argument, is subject to just criticism, it cannot be held to have constituted reversible error because neither during the cross-examination nor the argument did appellant assign the same as misconduct.

[5] The only assignment of misconduct made related to the district attorney's statement to the jury, during his argument, that appellant saw Griffin going into the store with the pistol and committing the robbery, and we think that such inference was fairly deducible from the evidence, and that therefore the statement objected to was not improper.

[6] Appellant also complains of the giving of four instructions, the first two of which relate to the degrees of robbery. Appellant claims that the implied meaning of said instructions was that she was present at the scene of the crime. Standing alone, the instructions might give rise to such implication; but the court elsewhere in its charge instructed the jury in substance that appellant should not be found guilty at all, unless the jury was convinced to a moral certainty and beyond a reasonable doubt that a robbery was committed as alleged in the information, and that appellant was present and aided and abetted therein, as defined in said instructions; consequently, when the instructions objected to are read in connection with the others constituting the court's charge, the implication imputed to them entirely disappears.

[7] The third instruction objected to apparently contained a typographical mistake, the term "a defendant" being used instead of "the defendant"; and appellant claims that as a result of such mistake the jury was in effect informed that, if it found that either of her codefendants aided and abetted in the commission of the robbery, it was their duty to find appellant guilty thereof. The very next instruction quoted in appellant's brief clearly shows, however, that the jury could not have been misled by the typographical error. It reads as follows:

> "If the jury is convinced to a moral certainty and beyond a reasonable doubt that a robbery was committed as alleged in the information, and that the defendant aided and abetted as defined in these instructions, in the commission of the acts leading up to and resulting in such robbery, and that the defendant was actually present at the scene of the commission of the robbery, or at such convenient distance as to be able to come to the immediate assistance of her associates, if required, or to watch to prevent surprise, or the like, at the time and place and on the occasion when it is alleged and claimed that such robbery was committed, and that she then and there directly committed the acts constituting the offense, or aided and abetted in its commission, as defined in these instructions, or, being present, advised and encouraged in its commission, then it is your duty to return a verdict of guilty against defendant."

Appellant also attacks the foregoing instruction upon the ground that there is no evidence to support any of the elements of the crime therein set forth. We have already discussed the evidence, and, as stated, the reasonable inferences to be drawn therefrom are legally sufficient in our opinion to establish the necessary elements constituting the crime of which appellant was convicted.

The judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; CAMPBELL, Justice pro tem.

93 Cal. App. 590

PEOPLE v. HAACK. (Cr. 1031.)

District Court of Appeal, Third District, California. Aug. 22, 1928.

1. Criminal law ⚷741(5)—Corroboration of accomplice held sufficient to warrant submission of larceny case to jury (Pen. Code, § 1111).

In prosecution for grand larceny for theft of calves, based on testimony of accomplice, corroborating testimony *held* sufficient to warrant submission of case to jury, under Pen. Code, § 1111.

2. Criminal law ⚷1171(1)—Any misconduct in examining accomplice respecting counts on which prosecuting officers knew they could not introduce corroborating evidence held harmless, where court instructed jury to acquit on such counts (Pen. Code, § 1111).

Even if prosecuting officers, when examining accomplice respecting crimes charged in certain counts, knew they would not be able to introduce corroborating evidence, as required by Pen. Code, § 1111, though they had stated that they intended to introduce such corroborating testimony, accused was not damaged thereby, where court directed jury to acquit on such counts; such direction constituting a plain and unequivocal instruction that any evidence received respecting those counts had no bearing on remaining count.

3. Criminal law ⚷815(1)—Instruction not to consider fact that others were not prosecuted for offense charged held not objectionable, as directing jury to disregard testimony of witnesses connected with crime charged.

Where trial court stated during void dire examination of jurors and in his instruction that the fact that others had not been arrested or prosecuted at that time for the larceny charged was not before jury, and must not be considered for any purpose, and cannot be allowed to influence verdict, *held* not objectionable, as instructing jury not to consider for any purpose the testimony of any witness who was connected by evidence in some way with offense charged.

4. Criminal law ⚷1172(3)—Error in instruction relative to corroboration of accomplice testimony, in assuming that certain persons were accomplices, held favorable to defendant.

Error of court in assuming, in its instruction requiring corroboration of accomplice testimony, that certain persons were accomplices, *held* favorable to defendant, since, if they were such accomplices, their testimony against defendant would not be competent corroboration of accomplice testimony.

5. Criminal law ⚷829(1)—Refusal of defendant's requested instructions, covered by instructions given, was not error.

Refusal of defendant's requested instructions covering correct legal propositions was not error, where matters involved were covered elsewhere by court's charge.

6. Criminal law ⚷507(5)—Instruction that certain person became accomplice by attempting to conceal stolen calves, after being informed they had been stolen, held properly refused (Pen. Code, § 1111).

In prosecution for larceny by theft of calves, refusal of defendant's requested instruction that certain person became an accomplice by his attempt to conceal the calves, after he was informed that they had been stolen, *held* properly refused, since, if he had received calves, knowing they were stolen, he would not have been an accomplice, under Pen. Code, § 1111.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Carl Haack was convicted of grand larceny, and he appeals. Affirmed.

Clinton Johnson, of Oroville, and Ray Manwell, of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. Under an indictment found and returned to the superior court of Butte county by the grand jury thereof, and filed in said court on the 7th day of May, 1927, the defendant was convicted of the crime of grand larceny, in that he, on or about the 1st day of April of said year, did unlawfully and feloniously steal and take away two calves, the personal property of one Nettie Frishholz. This is an appeal by the defendant from the judgment of conviction and the order denying his motion for a new trial.

The indictment as found was in four counts, viz.: Count 1, charging the offense of which the defendant now stands convicted, and with which this appeal is alone concerned; count 2, charging him with the stealing, on or about the 7th day of April, 1927, of two calves, the property of one William Cardoza; count 3, charging him with the stealing, on or about the 3d day of March, 1927, of one calf, the property of one John Bettencourt; count 4, charging him with the stealing, on or about the 2d day of April, 1927, of one calf, the property of one William N. Lewis.

The trial of which the present appeals are the outgrowth is the second prosecuted against the defendant under the indictment. The result below of the first trial was the conviction of the accused under counts 1, 2, and 3, and his acquittal under count 4. He took an appeal to this court from the judgment and the order disallowing his motion for a new trial on his conviction at the first trial, and in an opinion by Mr. Justice Plummer of this court the judgment and the order were reversed and the cause remanded for a new trial. People v. Haack (Cal. App.) 260 P. 913. It is, among other things, said in the opinion:

"This appeal presents for our consideration two major reasons why the judgment of the trial court should be reversed, to wit: First, that conviction was had upon the uncorroborated testimony of an accomplice; and, second, alleged error on the part of the trial court in instructing the jury on matters of law. A careful reading of the testimony set out in the transcript discloses that there is absolutely no corroborating testimony, as required by section 1111 of the Penal Code, in so far as counts 2 and 3 of the indictment are concerned, and no further comment need be made thereon."

In the opinion it is further held that the record disclosed sufficient corroboration of the testimony of the accomplice to justify the submission of the case to the jury on the question of the defendant's guilt or innocence of the crime stated in the first count of the indictment, but properly held that a reversal was required because of erroneous instructions read to the jury by the court. A reversal of the judgment and the order followed, of course.

At the last trial, or the one from which the present appeals have arisen, the court directed the jury to return verdicts of acquittal as to counts 2 and 3, and the jury acted accordingly. As above stated, we are concerned here only with count 1, which, as also stated above, charges, in appropriate legal form, the defendant with the stealing, on April 1, 1927, of two calves belonging to Mrs. Frishholz.

The witness upon whose testimony the people principally relied at both trials for a conviction of the accused was a Mrs. Florence King, who testified at both trials that she participated with the defendant in the commission of the larceny charged in count 1, and who, therefore, was confessedly an accomplice of the accused. Pen. Code, § 1111. As on the former appeal, so on this, the point first urged is that the verdict fails of sufficient support, for the asserted reason that the testimony of Mrs. King, the accomplice, was not corroborated by other testimony, as required by the section of the Penal Code just cited. Other assignments of error involve the action of the trial court in giving and disallowing certain instructions.

The testimony presented by the people at the second trial in support of the charge set forth in count 1 of the indictment is substantially the same as that likewise presented at the first trial. The opinion of Mr. Justice Plummer (cited above) contains a full and accurate statement of the facts brought out by the testimony so presented. It is not necessary, therefore, that we should repeat herein, in elaborate or extended detail, the evidence adduced at the trial responsible for the present appeals. There should be made herein, however, some reference to the facts as they were brought before the jury at the last or second trial, in order that a general outline of the case, as it was made by the evidence, may be with us as we consider the several legal points which defendant contends support his demand for a reversal.

Mrs. King testified: That she had on several different occasions previous to the 1st day of April, 1927, accompanied the defendant in the nighttime on rides in the latter's automobile, which was a Studebaker; that at some time in the afternoon of April 1, 1927, the defendant made an engagement with her for a ride that night; that between 9 and 10 o'clock p. m. of that day (on which rain had to some extent fallen) the defendant drove to a point near her home, situated not far distant from the town of Gridley; that she met him there and got into his auto, and that they thereupon drove westerly from her home on the highway, until they reached a point on the highway opposite a barn situated in a field belonging to Mrs. Nettie Frishholz; that, when reaching that point on the highway, or when in near approach thereto, either she or the accused (she was not certain which of the two) suggested that they go to the barn of Mrs. Frishholz, a short distance from the highway, and see if they could find some calves; that the Studebaker was thereupon moved to and parked on the unpaved portion of the highway opposite the barn, and the two then climbed over the fence, went to the barn, where they saw three young calves; that, with ropes, they tied two of the calves and took them to the fence bordering on the highway; that at this particular moment of time they observed the lights of an automobile which was approaching from the west, and that the defendant, leaving the witness in the field with the calves, passed over the fence, got into his car, and drove "up the highway" a short distance, returning after the other automobile had passed the spot where the witness and the calves were; that, on returning, the accused, aided by the witness, lifted the calves over the fence, placed them in the rear portion of the automobile, thereupon returned to the ranch where the witness and her husband resided, and turned the calves loose in a field on said property. A short time thereafter, in the month of April (the exact time or date the witness said she could not give), the defendant met and told the witness that "there was trouble with the calves," further saying, "Get rid of them; take them off the place;" that later the defendant was at her home, and they then informed the husband of the witness (Lee King) that the calves had been stolen, and that her husband thereupon said that "he wanted no stolen calves on his place and that he wanted them to be taken away"; that defendant stated that he had no time to remove the calves from the King place, and that thereupon the witness' husband requested the defendant to assist him (King) in loading the calves in his (King's) car; that the defendant complied with King's request, and assisted the latter in lifting the calves into the car of King, who then took the animals to a field in which there was located what the witness referred to as a "tin barn." The defendant, when King removed the calves to the so-called "tin barn" premises, did not accompany the latter.

[1] The circumstances upon which the people relied at the first trial for corroboration of the testimony of Mrs. King are fully and clearly stated in our opinion disposing of the former appeal as follows:

> "The Studebaker automobile, owned by the defendant and taken from his possession a few days after the alleged larceny, was found to be equipped with three smooth tires and one tire comparatively new. The three smooth tires were on the front wheels of the automobile and on the right rear wheel thereof. The comparatively new tire, with the tread thereon still intact, was found upon the left rear wheel of the defendant's automobile. As stated herein, rain had fallen on the day preceding the night of the alleged larceny. The automobile tracks alongside the highway in the neighborhood of the Frishholz barn, discovered the morning after the larceny, discloses that they were made by an automobile on which three of the tires were smooth, and that the tire on the left rear wheel was comparatively new and the tread was intact. An examination of this tread was made by witnesses familiar with the different makes of tires, and these witnesses testified that the tracks made by the tire on the left rear wheel of the car that was stopped along the Frishholz barn on the night of the larceny were made by a Federal tire, and that the left rear wheel of the defendant's automobile was equipped with a Federal tire having a like tread with the tire that made the marks to which we have just referred. The testimony also showed a number of foot tracks leading from the place where the automobile was stopped to and from the Frishholz barn. These tracks indicated that a man and a woman had participated in the larceny. The man's tracks were large; the woman's tracks were small. Measurements were made of these tracks, and especially of the tracks made by the larger of the two persons participating in the larceny. The length of these tracks was found to be identical with the length of the shoe worn by the defendant at the time of his trial. The width, however, was slightly in excess of the width of the shoes then worn by the defendant. Upon being arrested, the defendant stated to the arresting officer 'that, if they were going to send him to the penitentiary, there would be more go with him,' and also that the calves could be found at the tin barn."

Precisely the same circumstances as corroborative of Mrs. King's testimony were brought out at the second trial. In the opinion on the former appeal, this court declared that the circumstances as narrated in the foregoing excerpt tended to connect the defendant with the commission of the crime charged in count 1, "and sufficiently fills the measure of proof required by section 1111 of the Penal Code." We adhere to that declaration, not only as in its application to the first trial, but also as in its application to the last or second trial. Section 1111 of the Penal Code provides:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

In People v. McLean, 84 Cal. 480, 24 P. 32, it is stated that, while the corroborating evidence in that case was not strong, and that more is required by way of corroboration than to raise a mere suspicion (People v. Thompson, 50 Cal. 480), "yet the corroborating evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the offense, although it is slight, and *entitled, when standing by itself, to but little consideration.*" See, also, People v. Melvane, 39 Cal. 614; People v. Garnett, 29 Cal. 622; People v. Clough, 73 Cal. 351, 15 P. 5; People v. Blunkall, 31 Cal. App. 778, 783, 161 P. 997, 999; State v. Miller, 65 Iowa, 60, 21 N. W. 181; People v. Mayhew, 150 N. Y. 346, 44 N. E. 971.

It is not necessary that we should herein analytically examine the circumstances constituting the corroborating proof in this case, to make it clear that, as such proof, they are sufficient under section 1111 of the Penal Code. The significance of those circumstances as corroborating proof is clearly shown by the analysis thereof by Mr. Justice Plummer in the opinion handed down by this court on the former appeal herein, and to that opinion we refer for a full consideration and discussion of the proposition.

[2] It is next objected that the court erred, to the prejudice of the defendant's rights, by allowing the people to introduce evidence addressed to the proof of the charges contained in counts 2 and 3 of the indictment. At the first trial of the accused on all of the four counts set forth in the indictment, the people, as this court correctly declared in its former opinion, utterly failed to introduce evidence corroborative of the accomplice, Mrs. King, as to counts 2 and 3, and it was charged by counsel for the defendant that the prosecuting officers knew, at the beginning of the second trial, that they would not be able to present such corroborating evidence, because there was, as they knew, no such evidence available to them. It was hence objected that the testimony by Mrs. King regarding those counts would bring into the case proof of the commission by the defendant of other crimes which the prosecuting officers knew from the very beginning could not be legally proved. When objection was made in the court below to the evidence, special counsel for the people stated that he intended to introduce two witnesses who were not called to testify at the former trial, and whose testimony would corroborate that of Mrs. King as to counts 2 and 3. The judge, in overruling the objection, in effect stated that he had no reason for assuming that the prosecuting officers were not acting in good faith in the matter. It turned out, however, that the people were unable to present such corroborating proof.

If the prosecuting officers at all times knew that they would not be able to corroborate the testimony of Mrs. King as to counts 2 and 3, they certainly would be subject to just censure for attempting to prove the crimes alleged in those counts. But, like the court below, we cannot say but that those officers in good faith believed that they could make the proof required, but were in that particular disappointed by the parties by whom they expected to make it. We must assume, in the absence of a contrary showing, that, at the time they stated that they had the corroborating testimony referred to, they honestly believed that they could make the required proof. Assuming, however, that they knew, when examining Mrs. King respecting the crimes alleged in counts 2 and 3, that they would not be able to introduce corroborating evidence as to said crimes, it cannot justly be concluded that the accused was damaged by the conduct of the prosecuting officers as to that matter, since the court subsequently made an order directing the jury to acquit the defendant of the crimes therein alleged, from which order the jury, as intelligent persons, must have concluded that they were not at liberty to consider that evidence in determining the question of the guilt or innocence of the defendant under count 1. The direction to acquit on those two counts in effect constituted a plain and unequivocal instruction to the jury that any evidence received regarding those counts had no bearing whatever on count 1.

[3] While the jurors were being examined upon their voir dire, in which proceeding the judge of the court took a part, the latter stated to the talesmen that:

> "It will develop in this case that there are others who are not being prosecuted, or at least haven't been prosecuted up to this time. * * * Now, if the jury are going to refuse to convict this man solely on that account, what is the use of trying him, because that will be the fact."

In its charge to the jury the court repeated substantially the foregoing statement in the following language:

> "The fact that others have not been arrested or not being prosecuted at this time is not before you, and must not be considered by you for any purpose, and not to be allowed to influence your verdict."

It is argued by counsel for the defense that the effect of the foregoing statements to the jury was to tell the latter that, in deliberating upon the question of the guilt or innocence of the accused, they were not to consider for any purpose the testimony of any witness who the evidence might tend to show was connected in some way with the commission of the offense stated in count 1. We cannot agree with that interpretation of the instructions in question. The court was right in stating to the jury that they had no right to take into consideration the fact that others who might have been connected with the commission of the crime were not being or had not been prosecuted; and in so stating that proposition to the jury the court used no language which a person of average intelligence would interpret as meaning that they should not consider the testimony of such witnesses in their deliberation upon the case. It will be noted that the court did not say that the *testimony* of any assumed accomplices was not to be considered by the jury, but merely that the fact that any accomplices who might not have been arrested or prosecuted should not be permitted to influence them in making up their minds upon the ultimate question.

[4] The court further correctly instructed the jury that the testimony of one accomplice could not be corroborated by the testimony of another accomplice. Of course, these instructions assumed that there were accomplices of the accused other than the witness Mrs. King, and presumably the court had in mind, in giving those instructions, Lee King and Mrs. Watson. The assumption was, of course, unwarranted, since both testified that they knew nothing about the larceny of the calves until after the animals were brought by the accused to their respective places; and there was no evidence, other than any inferences which might have been afforded by their own testimony and that of the defendant and Mrs. King, that Lee King and Mrs. Watson were in league with the accused and Mrs. King in the stealing of the calves before the theft took place. Hence the court, instead of assuming that Mrs. Watson and Lee King were accomplices, should have submitted to the jury proper instructions upon the question of whether those parties were accomplices. But the assumption by the court that they were was an error favorable to the defendant, for the reason that, if they were such accomplices, their testimony, which was susceptible to an interpretation which would be against the defendant, would not constitute competent corroboration of Mrs. King's testimony. Moreover, the court in other parts of its charge in clear language instructed the jury that they must take into consideration all the evidence in the case and also instructed the jury that they were to view with caution the testimony of Mrs. King, an admitted accomplice, or that of any other person that the jury might under the evidence conclude was also an accomplice.

[5, 6] The defendant complains of the refusal by the court to give several instructions which he proposed. Those of said instructions which were correct involved the statement of legal propositions which were covered elsewhere by the court's charge. One of the instructions was to the effect that Mrs. King was an admitted accomplice. The court so instructed the jury. The instruction proposed by the defendant that Lee King became an ac-

complice by reason of his attempt to conceal the calves after he was informed by Mrs. King that they had been stolen was, as indicated above, improper. Legally, even though he received the calves, knowing them to have been stolen, he would not be an accomplice under section 1111 of the Penal Code. The same would be true as to Mrs. Watson. Said instruction was properly refused.

The other instructions proposed by the defendant and disallowed by the court merely involved the statement of certain elementary propositions of law which are sometimes referred to as "stock instructions," viz.: The presumption of the innocence of the accused, the elements which the jury should consider in passing upon the credibility of the witnesses, the necessity for the concurrence of the entire jury to reach a verdict, the right of each juror to use his own judgment in arriving at a conclusion, and his duty to remain steadfast to his own judgment until convinced by a full, fair and careful consideration of the evidence that his judgment was erroneous, that the burden of proving his innocence was not on the defendant, but the burden of proving guilt was upon the people. As stated, all these instructions were given by the court in language so plain that it could not be misunderstood. We may add that the charge of the court contained the statement in clear language of every legal principle applicable to the case. The court seemed to have been exceedingly careful in cautioning the jury to consider the testimony of the admitted accomplice with care, for in a number of instances it called the attention of the triers to the fact that Mrs. King was an accomplice and that it was necessary that her testimony should be corroborated by evidence which of itself or alone would tend to connect the defendant with the commission of the crime. The instructions condemned in our former opinion were, of course, excluded at the second trial.

The defendant seems to have had a fair and impartial trial, and, so far as we can judge from the record before us, was justly as well as legally convicted.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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93 Cal. App. 560

LIBERTY BANK v. ERNST. (Civ. 5786.)★

District Court of Appeal, First District, Division 1, California. Aug. 21, 1928.

Rehearing Denied Sept. 20, 1928. Hearing Denied by Supreme Court Oct. 18, 1928.

1. Evidence 🔑100—Evidence of acts or statements of strangers to action, in so far as they furnish circumstantial evidence of relevant facts, or have legal operation material to subject of inquiry, is admissible.

Although a party litigant cannot be concluded, or his rights affected, by the acts or statements of strangers, yet in so far as such acts or statements furnish circumstantial evidence of relevant facts, or have any legal operation material to the subject of inquiry, evidence thereof is admissible.

2. Bills and notes 🔑504, 509—Evidence that defendant was accommodation maker, and that payee acquired note for value without notice, held admissible as against defense that note sued on was obtained by fraud.

In an action on a note, defended on ground of fraud, evidence relating to transaction occurring out of presence of defendant, and which he was not shown to have authorized, which tended to show that, contrary to defendant's claim, latter was accommodation maker, and that payee acquired note for value without notice in transaction free from fraud, *held* improperly excluded; it being sufficient that defendant signed note and placed it in possession of others for their use.

3. Trial 🔑45(1)—Plaintiff's offer of proof as to circumstances under which note sued on was given held sufficient, where witnesses were in court.

In action on note, defended on ground that it was fraudulently procured, plaintiff's offer of proof as to circumstances under which note was given *held* sufficient, where cashier of payee was on witness stand when offer was made, and its president, who participated in transaction sought to be proved, was in court.

4. Trial 🔑208—Court having denied offer of proof by plaintiff, and instructed jury to consider no evidence ruled inadmissible, held to show testimony stricken.

In action on note, where court denied offer of proof by testimony of plaintiff's witness, who was cashier of payee bank, and later instructed jury not to consider any evidence ruled inadmissible, *held* to show that cashier's testimony was stricken, and that jury did not pass thereon.

5. Trial 🔑252(3)—Refusal of part of instruction applying only to stricken testimony held proper.

Refusal of portion of instruction applying only to stricken testimony *held* proper, such part being inapplicable to evidence remaining for jury's consideration.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Liberty Bank against J. Ernst. Judgment for defendant, and plaintiff appeals. Reversed.

Ross & Ross, of Redding (Maurice T. Dooling, Jr., and F. A. Devlin, both of San Francisco, of counsel), for appellant.

Fletcher A. Cutler, of Burlingame, for respondent.

CASHIN, J. An action on a promissory note executed by defendant Ernst to the California Bank of San Mateo and transferred after maturity to the plaintiff. The answer, which denied that the note was given for

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★Rehearing denied. Hearing denied by Supreme Court.

value, alleged that the instrument was executed at the request of R. J. Falvey, who, as the cashier and manager of the payee bank, by false and fraudulent representations induced the defendant to agree to purchase certain stock in the Nonnenmann Motor Company; that Falvey agreed to obtain a loan from the payee for the amount of the purchase price of the stock, namely, $1,500, and pursuant to the agreement a note for that amount was prepared by Falvey and presented to the defendant, who signed it, and that the same was delivered to Falvey, as cashier and manager of the payee; that Falvey further agreed to credit the proceeds of the loan to the defendant's account with the payee, which he failed to do; and that as such cashier and manager he appropriated the whole to his own use and to that of the payee and the Nonnenmann Motor Company. A jury returned a verdict for the defendant, and from the judgment entered thereon the plaintiff appealed.

It is contended that the exclusion of certain evidence and the refusal of a part of an instruction offered by the plaintiff, together with the giving of an instruction proposed by the defendant, were prejudicially erroneous. It is conceded that the proceeds of the note were not credited to the account of the defendant, and his testimony supports the allegations respecting the representations and agreement made by Falvey. It appears, however, that the note was not executed at the bank or presented to the defendant by Falvey, but by one W. B. Hyder, to whom, after the same had been signed, the defendant delivered it. It also appears that Hyder was interested in the Nonnenmann Motor Company and that the note was delivered to the bank by him. Falvey denied that the representations or agreement alleged were made, or that the note was executed for the purpose claimed by the defendant.

The plaintiff then sought to prove that the facts of the transaction were as follows: That shortly before the execution of the note Elwood Nonnenmann, who was accompanied by Hyder, applied on his own behalf and that of the motor company to the payee bank for a loan of $1,500; that the amount which the bank was permitted to loan to an individual had already been borrowed by Nonnenmann and the motor company, and the request was refused; that Nonnenmann, having stated to Falvey that the defendant was going into the company, then proposed to Harden Hatch, the president of the bank, that a loan of the above amount be made on the note of defendant, which Hatch, on behalf of the bank, agreed to do, provided the defendant, upon investigation proved to be financially responsible. This fact having been ascertained, Hatch prepared the note in question and delivered it to Nonnenmann for defendant's signature; that in the meantime Hyder, as a temporary accomodation to the motor company pending the investigation mentioned, executed his note to the bank for a like amount, which was credited to the account of the company; that the note prepared by Hatch was subsequently executed by the defendant and delivered to the bank without other instructions; and that credit therefore was given to the motor company and the Hyder note canceled.

The witness Falvey was permitted, over objections, to testify to certain of the above matters, but subsequently this testimony was stricken out, and the jury instructed to disregard it. The plaintiff thereupon made its offer, which the court excluded.

[1, 2] It appears from the record to have been the theory of counsel for the defendant, whose objection the court sustained, that the offered evidence was incompetent, as it related to a transaction occurring out of the presence of the defendant and which he was not shown to have authorized. Although a party litigant cannot be concluded, or his rights affected, by the acts or statements of strangers, yet in so far as such acts or statements furnish circumstantial evidence of relevant facts, or have any legal operation material to the subject of inquiry, evidence thereof is admissible (Wigmore Evidence [2d Ed.] § 1770; 22 Corp. Jur. "Evidence," §§ 313, 314, pp. 287, 288); and where, as here, the excluded evidence with the testimony of the cashier tended to show that contrary to the claim of the defendant the latter was an accommodation maker of the note, and that the payee acquired the same for value without notice in a transaction which was free from fraud, such evidence was admissible, and it was unnecessary to show that the defendant was present when the transaction occurred, it being sufficient that he should have signed the note and placed it in the possession of the motor company, thus conferring upon it ostensible authority to use it (Tischhauser v. Prentice, 30 Cal. App. 699, 159 P. 226; Boston Steel & Iron Co. v. Steuer, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426; Bank of Commerce & Savings v. Randell, 107 Neb. 332, 186 N. W. 70, 21 A. L. R. 1360), as the offered evidence tended to show was done. This evidence, with the testimony of the cashier which it corroborated, was, if believed by the jury, sufficient to support a finding adverse to the claim that the note was fraudulently procured by the payee, and its exclusion was prejudicially erroneous.

[3] Defendant contends that the offer of proof was insufficient, citing Rose v. Doe, 4 Cal. App. 680, 89 P. 135, and Biddick v. Kobler, 110 Cal. 191, 42 P. 578. As there held, a general offer to prove a variety of things without producing a witness or segregating the different items, or, if the witness be present, without putting a question to him in such form as to give an opportunity for an

objection, are sufficient grounds for refusing the offer. In the present case, however, the cashier of the payee was on the witness stand when the offer was made, and its president, who participated in the transaction sought to be proved, was in court. Under such circumstances the offer was sufficient.

[4] Defendant further claims that the testimony of the cashier was not stricken out; that all the material facts contained in the offer of proof were testified to by him and passed upon by the jury. The record shows that all the testimony of the cashier relating to the transaction between the payee and the motor company was admitted subject to objection, the court stating that the same would be stricken out if the defendant was not shown to be connected therewith. The offer of proof included the facts in the above connection to which the cashier had testified, and the court in ruling upon the offer said:

> "The offer is denied. The jury will be instructed not to consider that evidence in any way. * * *"

Subsequently the following instruction was given:

> "You are not to consider any evidence that the court has ruled inadmissible."

The above sufficiently shows defendant's contention to be untenable.

[5] The portion of the instruction which the plaintiff claims was erroneously refused applied only to the facts of the transaction between the payee bank and the motor company, and after Falvey's testimony respecting the transaction had been stricken out this portion of the instruction was inapplicable to the evidence which remained for the jury's consideration, and its refusal was proper. People v. Cochran, 61 Cal. 548; Meyer v. Foster, 147 Cal. 166, 81 P. 402.

Plaintiff further contends that an instruction given for the defendant had the effect of taking from the jury the question whether Falvey, in making the representations and promises alleged, was acting within the scope of his authority, together with the other questions presented in the offer of proof. In so far as it had the latter effect it was not improper; nor was it prejudicially erroneous, in view of other instructions by which the jury were told that the implied authority of a cashier is limited to acts done in the usual and ordinary course of business, and that Falvey had no implied power to represent the bank in stock-selling transactions, and any promise in reference to a sale of stock not within the ordinary course of the bank's business was not binding upon it.

The record discloses no error warranting a reversal of the judgment other than the ruling by which competent material evidence constituting substantially the entire case for the plaintiff in rebuttal was excluded. This evidence, with the testimony of Falvey denying the alleged fraud, was sufficient, if believed by the jury, to have supported a verdict for the plaintiff, and its rejection was prejudicial to a degree requiring a reversal of the judgment.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

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93 Cal. App. 557

PEOPLE v. CALDERON et al. (Cr. 1674.)

District Court of Appeal, Second District, Division 2, California. Aug. 20, 1928.

1. Criminal law ⚷686(2)—Permission to introduce surrebuttal testimony by people in criminal prosecution is within trial court's discretion.

Permission to people to introduce surrebuttal testimony in criminal prosecution is within discretion of trial court.

2. Criminal law ⚷686(2)—Permission to people to reopen case after noon recess to introduce rebuttal testimony, which was rebutted by defendant, was not abuse of discretion, where no prejudice to defendant was shown.

Where defendant's counsel was permitted to call witnesses in rebuttal after close of codefendant's testimony, and two witnesses testified in rebuttal for people after district attorney announced, "That is all for the state," granting of motion by people after noon adjournment to reopen, and introduction of further rebuttal testimony, which was again rebutted by defendant, was not abuse of discretion, where defendant did not show prejudice, or any new evidence that might have been offered, had their witnesses not been excused, and it affirmatively appeared that people did not coach witnesses during noon recess.

3. Criminal law ⚷798½—Form of verdict to find defendant guilty of first degree burglary held not to limit jury's finding, under instructions on second degree burglary.

Where jury were properly instructed as to finding defendants guilty of burglary in first or second degree, or that one or both were guilty, and were instructed that, if offense was committed during daytime they should substitute second degree on verdict, forms of verdict finding defendant "guilty of burglary, a felony, and find it burglary of first degree," did not limit jury to finding of first degree burglary.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Andrew Calderon and another were convicted of burglary, and they appeal. Affirmed.

John F. Groene, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

CRAIG, Acting P. J. The appellants and one Cinvente S. Lueras were jointly charged with the crime of burglary, to which offense the latter pleaded guilty, and appellants were convicted of burglary in the first degree. Motions for a new trial and in arrest of judgment were thereafter presented, which were denied, and Calderon and Torres appeal from the judgments and from the rulings upon said motions.

It appears that the home of one M. Yano, at Wilmington, in Los Angeles county, was robbed during the night of January 18, 1928. Appellants and Lueras were arrested when seen throwing a package from an automobile in which they were driving, and a trunk, certain jewelry, and other personal property of Yano were found in their machine. Calderon later made a written confession, and Lueras testified at the trial, both admitting the robbery in detail.

[1, 2] It is first objected that the trial court erred in permitting the people to introduce certain surrebuttal testimony. At the conclusion of the defendant Torres' testimony, his counsel and the district attorney announced, "That is all," whereupon counsel for Calderon asked permission to call two witnesses in rebuttal, which was granted, the court directing that counsel "confine the evidence strictly to rebuttal testimony." Two other witnesses then testified in rebuttal for the people, at which time the district attorney announced, "That is all for the state, if your honor please." Thereupon a conference was held at the bench between the judge and the district attorney. The court then remarked:

> "Well, it is now very close to 12 o'clock. I think we will take an adjournment until 2 o'clock, regardless of what is taken up at that time."

When the court reconvened, Lueras was called in rebuttal, to which counsel for his codefendants objected, upon the ground that the people had closed, and all witnesses had been excused. The district attorney stated, and here insists, however, that he did not close, except for the time being, and as to the witness then testifying, and that he had expressed at the bench an intention of calling Lueras in the afternoon. At this time he said that, if a motion were necessary, he would move to reopen, and the court granted the motion, saying that "it must be confined strictly to rebuttal evidence." Lueras testified, and was cross-examined by counsel for Calderon, after which the latter took the stand and denied the rebuttal testimony of Lueras.

Appellants do not attempt to show wherein they were prejudiced in this respect, or what, if any, new evidence they might have offered had their witnesses not been excused. It is said that counsel for the people had an opportunity to coach the witness before 2 o'clock, but it affirmatively appears that he did not do so. Such a matter is one peculiarly within the discretion of the trial court, and under the circumstances of this case we think it did not exceed its authority in admitting the testimony in question.

[3] It is next contended that the court erred in giving to the jury a form of verdict finding the defendant Andrew Calderon "guilty of burglary, a felony, and find it burglary of the first degree," and that the same form of verdict was given the jury as to the defendant Torres. It is argued that this was an attempt to instruct that they be convicted, and that the offense be fixed of the first degree only, and it is asserted that the court further erred in refusing to instruct the jury that they might find the appellants guilty of the offense charged in any degree within their discretion.

The record discloses that the jury were instructed fully upon all phases of the case, and as to their duty in the event that they should find from the evidence that the defendants, or either of them, committed burglary in the first or second degree, or that one committed the offense of either degree with the aid of the other, or that one or both were guilty. The jury were given forms of verdict finding each defendant not guilty, and others reading "first degree as charged in the information," with the admonition that, if they should find that the offense was committed, and that it occurred in the daytime, they "should substitute 'second degree as charged in the information.'" It is obvious that the forms of verdict furnished by the trial court in no way limited the jury in their findings, and that they were properly instructed to return them in accordance with the evidence and the law as given them by the court.

There are no other points which merit discussion. The judgments and orders appealed from are affirmed.

We concur: THOMPSON, J; HAZLETT, Justice pro tem.

PEOPLE v. MYERS. (Cr. 1658.)★

District Court of Appeal, Second District, Division 2, California. Aug. 24, 1928.

Hearing Granted by Supreme Court Oct. 22, 1928.

1. Criminal law ⟹**15—Enactment of criminal statute as amended operated as absolute repeal of original statute.**

Enactment of a criminal statute as amended operated as absolute repeal of original statute.

2. Indictment and information ⟹**109—Information charging burglary held demurrable for failure to charge specific nature of offense (Pen. Code, §§ 950, 952; Pen. Code, § 484, as amended by St. 1927, p. 1046).**

Information charging crime of burglary, in that on or about certain date defendant willfully, unlawfully, feloniously, and burglariously entered a certain store building with intent to commit the crime of theft therein, *held* demurrable under Pen. Code, §§ 950, 952, for failure to state which of the five offenses comprised within the definition of theft under Pen. Code, § 484, as amended by St. 1927, p. 1046, was intended.

3. Indictment and information ⟹**109—Where each of several distinct acts may constitute offense defined by statute, information charging commission of offense generally or of all acts specified is demurrable (Pen. Code, §§ 950, 952).**

Where each of different and distinct acts specified in a number of subdivisions of a single section constitutes the offense defined, an information charging commission of the offense generally or with each and all acts specified, is subject to demurrer, under Pen. Code, §§ 950, 952.

4. Indictment and information ⟹**71—Information must present distinct issue for trial so that defendant may be prepared to meet it and plead jeopardy against further prosecution.**

Information must present a distinct issue for trial, so that defendant may be prepared to meet it, and, in the event of conviction or acquittal, plead jeopardy against further prosecution, and this is especially true where, from language used in statute, many things may be done which will constitute the offense.

5. Indictment and information ⟹**71—Rules requiring pleading with reasonable certainty to inform defendant of charge have not been abrogated by Legislature or courts.**

Rules requiring that pleading must with reasonable certainty inform defendant with what he is charged have not been abrogated by the Legislature or the courts.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Frank A. Myers was convicted of burglary in the second degree, and he appeals. Reversed.

R. M. Wiley, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the State.

Walter K. Tuller, of Los Angeles, amicus curiæ.

CRAIG, Acting Presiding Justice. The appellant was charged with the crime of burglary; it being alleged by information that on or about the 6th day of January, 1928, he willfully, unlawfully, feloniously, and burglariously entered the store, room, and building of one August Wahlforth, in the city of Los Angeles, with intent to commit the crime of larceny, contrary to the form, force, and effect of the statute in such cases made and provided. A demurrer was interposed whereby it was contended that the information failed substantially to conform to sections 950, 951, and 952, of the Penal Code, that it did not state facts sufficient to constitute a public offense, and that the facts stated did not state a public offense. The demurrer was overruled, and the defendant pleaded not guilty. The defense offered no evidence, and the defendant did not testify. After the people had closed, the trial court directed that the information be amended by substituting the word "theft" for the word "larceny," to which the defendant then demurred generally, which demurrer also was overruled. The jury was instructed that, if they believed beyond a reasonable doubt that the defendant entered the store of August Wahlforth on said date with intent to commit the crime of theft as charged in the information, they should find him guilty of burglary, and state the degree thereof. A verdict of burglary in the second degree was returned.

It was insisted by objection to the introduction of any evidence, and by repeated objections during the trial, that no issue was raised by the information and plea of not guilty, and that the facts alleged failed to sufficiently state a public offense. A motion for an instructed verdict was overruled, and the defendant appeals.

We think the demurrer should have been sustained, and hence it will serve no useful purpose to consider other arguments advanced by appellant "Burglary," as defined by section 459 of the Penal Code, consists of feloniously entering any "house, * * * store, * * * with intent to commit grand or petit larceny." Section 490a of the Penal Code, as added by St. 1927, p. 1046, requires that the word "theft" be substituted for "larceny." Prior to 1927, larceny, as defined by section 484 of the Penal Code, consisted of "the felonious stealing, taking, carrying, leading or driving away the personal property of another." The same section as amended thereafter, and prior to the commission of the alleged offense here involved, was enacted as follows:

★Superseded by opinion of Supreme Court, 275 P. 219.

" '*Theft' Defined.* Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been intrusted to him, or who shall knowingly and designedly, or by any false or fraudulent representation or pretense, defraud any other person of money, labor, or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money or property or obtains the labor or service of another, is guilty of theft. * * *" (St. 1927, p. 1046.)

[1, 2] The enactment of section 484 in its present form operated as an absolute repeal of the original section. Billings v. Harvey, 6 Cal. 381; Buck v. Canty, 162 Cal. 226, 121 P. 924. The entering of a building or store with intent to steal another's personal property was formerly the only means in which one might be said to have entered with intent to commit larceny. Since by amendment a burglar may be prosecuted and convicted of the same offense by entering with intent to commit theft heretofore universally accepted as the popular term for "larceny," and as descriptive thereof (Bouv. Dict.; 2 Bl. Comm. 230), with intent to commit theft by fraudulently appropriating property intrusted to him, with intent to commit theft by defrauding another of real or personal property by fraudulent representations or pretenses, or by causing or procuring others to report falsely of his financial standing, to his gain, or by obtaining the labor or service of another, he may be guilty of burglary by entering with intent to commit either of these five offenses. Or, to state the matter differently, burglary may be committed in any one of the five ways designated by the statute. But the information wholly fails to charge any offense other than mere entering "with the intent then and therein to commit the crime of theft."

[3-5] The Penal Code plainly directs that an indictment or information must contain a statement of the acts constituting the offense so as to enable a person of common understanding to know what is intended. Where, as in the instant case, different and distinct acts specified in a number of subdivisions of a single section, each of which constitutes the offense defined, an information charging a defendant with the commission of the offense generally, or with each and all of the acts specified, would be subject to demurrer for failure to comply with the provisions of sections 950 and 952 of the Penal Code. People v. Lee, 107 Cal. 477, 40 P. 754; People v. Plath, 166 Cal. 227, 135 P. 954; People v. Taylor, 187 Cal. 378, 203 P. 85. The pleading must present a distinct issue for trial, that the defendant may be prepared to meet it, and, in the event of conviction or acquittal, plead jeopardy against further prosecution. People v. Lanterman, 9 Cal. App. 674, 100 P. 720. Especially is this true where from the language used in the statute many things may be done which may constitute the offense. People v. Silva, 8 Cal. App. 349, 97 P. 202; People v. Webber, 138 Cal. 145, 70 P. 1089. The rules of the common law have been changed by the Codes, and many formalities and particularities formerly deemed necessary are no longer required, but fundamental rules requiring that the pleading must with reasonable certainty inform the defendant with what he is charged have not been abrogated by the Legislature or the courts. People v. Ward, 110 Cal. 369, 42 P. 894.

The judgment and orders appealed from are reversed.

We concur: THOMPSON, J.; HAZLETT, Justice pro tem.

SOUTHERN CALIFORNIA BOND & FINANCE CORPORATION v. MATHES.★

(Civ. 6189.)

District Court of Appeal, First District, Division 1, California. July 26, 1928.

Rehearing Denied Aug. 25, 1928. Hearing Granted by Supreme Court Sept. 17, 1928.

1. Taxation 🔑552—Two lots held separately assessed, so as to justify collection of 50 cents on each lot, in addition to delinquent taxes and penalties (Pol. Code, § 3770).

Where two lots belonging to same person were separately described, and a separate valuation placed against each on the assessment roll, and similar entries were made in the delinquent tax roll, the two lots sold for taxes were separately assessed, and hence tax collector was justified, under Pol. Code, § 3770, in collecting, in addition to delinquent taxes and penalties, 50 cents on each lot.

2. Taxation 🔑627—Delinquent tax list as published, describing property in single entry as "lots 44 and 45, block 192," with amount due opposite, instead of separately, held properly prepared (Pol. Code, §§ 3747, 3762, 3771a).

Delinquent tax list, which as prepared and published showed name of L. S. Everts, with description of property opposite his name as "lots 44 and 45, block 192," and amount due of $5.49 opposite description, instead of showing lots separately, with amount due opposite each described lot, as appellant contended should have been done, *held* properly prepared, under Pol. Code, § 3762, requiring list to contain property owner's name, with property's description and delinquency opposite, and in view of sections 3747 and 3771a.

3. Taxation 🔑659—Notice of tax sale, received through mail by property owner within provided time, though envelope was incorrectly addressed, held conforming to statute requirements (Pol. Code, § 3771a).

Owner of property to be sold for taxes having received notice of sale through mail within

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★Superseded by opinion of Supreme Court, 276 P. 1013.

time provided by statute, and acknowledged receipt of the same, although his name was spelled incorrectly on envelope, *held*, that notice conformed to requirements of Pol. Code, § 3771a.

4. Taxation ⚷734(1)—That tax sale was made for the first year's delinquent taxes, instead of last, did not avoid sale.

Tax sale was not void, because made for delinquent taxes for first fiscal year they were delinquent, instead of for the last year of delinquency.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by the Southern California Bond & Finance Corporation against James H. Mathes. Judgment for defendant, and plaintiff appeals. Affirmed.

Herbert C. Kelly, of San Diego, and Benjamin Kirby, of Los Angeles, for appellant.

Hamilton & Lindley, of San Diego, for respondent.

KNIGHT, J. This is an appeal by the plaintiff from a judgment in favor of defendant in an action to quiet title to lots 44 and 45 in block 192 of the City Heights Tract, a subdivision of land situate within the city of San Diego. For several years prior to June 30, 1924, the lots in question belonged to one L. S. Everts, and commencing in the year 1918 he purposely allowed the taxes thereon to become and remain delinquent until June 30, 1924, when the lots were sold at tax sale by the tax collector of San Diego county for the delinquent taxes due for the fiscal year 1918–1919, at which sale respondent became the purchaser. Within the statutory time, prior to the tax sale, Everts received by registered mail from Herbert S. Croghan, the tax collector of said county, the printed form of notice of sale required to be given by the tax collector pursuant to the provisions of section 3771a of the Political Code; and immediately upon the receipt of said notice Everts mailed to the tax collector a reply, written on the reverse side of said notice, as follows:

> "Mr. Herbert Croghan—Dear Herb: Thanks for the notice. When I charged these lots off my books several years ago, I did so because I did not feel they were worth the extra cost to me for paving, grading, etc., and I still feel the same way about it. Here's hoping that the party who gets them has a rabbit's foot. Sincerely, Leslie Everts."

Following the tax sale and on July 10, 1924, the tax collector executed and delivered to respondent a tax deed in due form, and thereafter, to wit, on July 17, 1924, Everts and his wife executed and delivered to the appellant, Southern California Bond & Finance Corporation, a quitclaim deed to said property, which constitutes appellant's ground of title.

In an opinion rendered by the trial court it was indicated that there were irregularities "with reference to the amount computed as the tax and penalty" and that there was "also a question with reference to the service of the notice of sale," which rendered the tax proceedings faulty; but the court held that, by virtue of said letter from Everts to the tax collector, neither Everts nor his grantee were in a position to "attack the tax sale for these irregularities," and accordingly directed that judgment be given for respondent. There were no findings made as to the asserted irregularities above mentioned, nor upon the questions of waiver or estoppel, the court having found generally that plaintiff was not the owner of the property nor entitled to the possession thereof, and judgment was entered in conformity with such general findings.

[1] Upon publishing the delinquent list, the tax collector is required by section 3770 of the Political Code to "collect, in addition to the taxes due on the delinquent list, together with the penalties for delinquency, fifty cents on each lot, piece, or tract of land separately assessed * * * which shall be paid to the county and be placed to the credit of the salary fund"; and pursuant to the provisions of said section the tax collector in the present case entered a charge of $1 against the two lots. The main contention appellant makes against the validity of the tax proceedings herein is that, if the assessment of said lots as entered upon the assessment roll be construed as a single assessment of the two lots, then the sale was void, because an overcharge of 50 cents was made on such single assessment, citing Rimmer v. Hotchkiss, 162 Cal. 385, 123 P. 256, Hall v. Park Bank, 165 Cal. 356, 132 P. 452, and Warden v. Broome, 9 Cal. App. 172, 98 P. 252; and that, on the other hand, if it be held that the lots were separately assessed, thereby justifying the added charge of $1 under said section 3770, then the sale was irregular, because, as appellant claims, the lots were not afterwards separately advertised and sold, citing Knox v. Higby, 76 Cal. 264, 18 P. 381; and Stege v. City of Richmond, 194 Cal. 305, 228 P. 461.

In our opinion, the entries made in the assessment roll show beyond question that the lots were separately assessed, because they were separately described and a valuation of $70 was placed against each lot, and the entries made in the delinquent tax roll were identical with those made in the assessment roll. Therefore, the lots being separately assessed, the tax collector was justified, under the provisions of section 3770 of the Political Code in collecting, in addition to the taxes shown to be due on the delinquent list, together with the penalties for delinquency, 50 cents for each lot.

[2] Regarding the second question, as to whether there was any irregularity in the publication of the delinquent list, section 3764

of the said Code, as it existed in 1919 at the time of the delinquency herein, provided that:

> "The tax collector must publish the delinquent list which must contain the name of the persons and a description of the property delinquent and the amount of taxes, penalties, and costs due, opposite each name and description."

In the published delinquent list for the fiscal year 1918–1919, the listing of property in question was made as follows:

"Number.	Name and Description.	Taxes, Penalties, Costs.
7640	Everts, L. S.—In city of East San Diego, in City Heights, lots 44 and 45, block 192.....	$5.49

And in the addenda to the published delinquent list for the fiscal year 1923–1924, said property was listed as follows:

No.	To Whom Assessed and Description of Property.	Least Acceptable Bid.
1357	Everts, L. S.—In city of East San Diego, City Heights, lots 44 and 45, block 192......................	$5.49

It would appear, therefore, that all of the legal requirements of the statute were complied with; the published delinquent list having contained the name of the owner, and description of the property delinquent, and the amount of the taxes, penalties, and costs due thereon. Appellant contends, however, that in the preparation and publication of the delinquent list the tax collector should have departed from the form of the entries made in the assessment roll and in the delinquent roll, and segregated said lots and advertised them separately, with the amount of taxes, penalties, and costs due on each lot set opposite the description thereof. But our attention has been called to no statute or decision requiring or authorizing this to be done, and in the absence of such authorization the tax collector would have no right to do so. Nor do we believe that such action on his part is contemplated by the statute, because, in view of the innumerable subdivisions of land in the state containing their countless numbers of lots, which are being assessed and taxed in the identical manner here followed, such segregation and advertisement on the part of the tax collector would be not only impracticable, but would result in the publication of a delinquent list of endless length.

Moreover, in order to carry out the scheme provided by the law that each piece of property separately assessed shall bear and pay its own taxes and penalties, such segregation and advertisement which appellant contends should be made is wholly unnecessary, because section 3747 of said Code especially provides that "the taxes on any particular lot, piece, or parcel of land contained in any assessment may be paid separately from the whole assessment, *if* [as here] *such lot, piece, or parcel has a separate valuation on the assessment roll* * * *" (italics ours), and that, when so paid, "the tax collector shall make an entry on the margin of the assessment-book, showing what certain property has been released by the payment of the taxes as herein provided, together with the amounts of such taxes separately and specifically set forth," and section 3771a of said Code provides in part that "* * * no bid shall be accepted at such [tax] sale for a sum less than the amount of all taxes, penalties and costs due as shown in the advertised list. * * *" It is evident, therefore, from the foregoing sections, that each lot in question here, being separately assessed, was subject to separate redemption or sale, without interfering with and independent of the tax lien existing against the other, provided payment was made of the amount of tax and penalties shown by the delinquent roll to be due against that particular lot.

The cases of Knox v. Higby, supra, and Stege v. City of Richmond, supra, cited by appellant, are not controlling in the present case, because there, as the decisions point out, the delinquent rolls and the published lists differed from the assessment roll, and were published in such form as to require the proceeds from the sale of one piece of property, which was separately assessed, to be applied in satisfaction of the tax lien existing against another piece of property, which was also separately assessed. Here the delinquent roll and the published list conformed strictly to the entries made in the assessment roll, and, the lots being separately assessed, the exact amount of taxes, penalties, and costs against each lot was readily determinable from the delinquent roll, and therefore, under the provisions of section 3747, each lot became and was subject to separate redemption or sale. For the reasons stated, we conclude that there was no irregularity in the tax proceedings which invalidated the sale.

We are also unable to sustain appellant's claims that there was a variance of 9 cents between the total amount of taxes and penalties shown to be due by the delinquent roll and the total amount shown to be due by the published list. The specific items set forth in the delinquent roll prove that the correct total was $5.49, and this was the amount set forth in the published list. When the total was first entered in the delinquent roll, obviously a mistake of 9 cents was made in addition, the amount inserted being $5.40; but, as the photographic copy of the delinquent roll inserted in the transcript shows, this entry was corrected to read $5.49.

[3] The printed form of notice of sale received by Everts was properly addressed to "L. S. Everts, 727 First Nat'l Bank Bldg. San Diego, Calif.," but the envelope in which it was sent was addressed to "L. S. Eberts," and appellant therefore contends that there was a failure to conform to the requirements of section 3771a of said Code. The point is utterly without merit, for admittedly Everts received the notice within the period of time the same

was required to be mailed, and immediately answered it. In the case of Krotzer v. Douglas, 163 Cal. 49, 124 P. 722, cited by appellant, the notice having been improperly addressed did not reach the owner at all; and in the other case cited, Knight v. Hall, 28 Cal. App. 435, 152 P. 952, the notice was not mailed within the statutory period. Neither case is therefore in point.

[4] Appellant further contends that the tax sale was void, because it was made for the delinquent taxes for the fiscal year 1918–1919, the first delinquency, instead of being made for the delinquency of 1923–1924, citing Scott v. Beck (Cal. Sup.) 259 P. 933. But a rehearing was subsequently granted in that case (266 P. 951), and the final decision therein was placed upon different grounds. Therefore the decision which was set aside cannot be taken as authority.

Concluding, as we do, that the proceedings upon which the tax sale herein was based were not void, it is unnecessary to consider or determine the legal effect of the letter from Everts to the tax collector, written on the back of the notice of sale.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

On Application for Rehearing.

PER CURIAM. Appellant petitions for a rehearing, again urging substantially the same grounds heretofore relied upon for reversal, together with the additional ground that the decision herein is in conflict with one rendered about the same time by the District Court of Appeal of the Second District, Division 1, in the case of Gottstein v. Kelly et al. (Cal. App.) 269 P. 940. It appears that the decision in that case was filed five days prior to the filing of the one in the present case, and although, as the record in that case discloses, the sole attorney for appellant therein was also leading counsel for appellant in the present case, having been the sole attorney of record for appellant from the institution of the suit to the time appellant's reply was filed, at which time other counsel became associated with him, the petition for rehearing herein conveyed to us for the first time the information that the main point involved in the present appeal was involved also in another appeal before the reviewing court of another district. And in this connection it should be stated, also, that while that case involved several legal points, the position taken by said attorney in that case with reference to the legal point upon which the present appeal was decided was diametrically opposed to the position he took before us. In that case he was claiming title under and sought to sustain a tax deed, and therefore was urging the trial and appellate courts to declare that the asserted irregularity in the tax proceedings relating to the form in which the delinquent tax list was published was no irregularity at all; whereas, in the case before us, he sought to nullify a tax deed founded upon the same asserted irregularity, and was urging that such irregularity was wholly fatal to the tax proceeding.

However, we have examined the decision in that case, and it would appear therefrom that, although the decisive point involved in the case before us was there considered and discussed, it did not prove to be the turning point on that appeal; the court there holding that the erroneous use of the word "percentage" in the publication of the delinquent list, instead of the statutory word "penalties," rendered the proceeding void. There was no such defect in the present case. Therefore, notwithstanding that the opinion in that case contains an expression of views upon the point at issue here, which may be somewhat at variance with the ultimate conclusion we have reached thereon, we are of the opinion that, in view of the different ground upon which that case was decided, the decision therein does not seriously affect the one in the present case.

Moreover, upon examining the record in that case, it becomes evident that the arguments advanced by said attorney in support of the validity of the tax deed in that case tends strongly to fortify the decision we have rendered here, for in that case in dealing with the point involved here he says in his reply brief:

> "Respondent criticizes the form of the published delinquent notice, because the amount was not set opposite each description. But section 3764 does not say 'each description,' but 'each name and description.' There being but one name in this instance, there was but one place where any amount was required by this section to be stated. There are several California cases dealing with the form of such published list, and in all of them a substantial compliance with the statutory requirements has been considered sufficient, and the lists have in each instance been liberally construed."

And after quoting from section 3885 of the Political Code and several California cases, he continues:

> "No person could be misled by this delinquent list. Any person of ordinary intelligence, examining it, could tell that the amount stated in it was the amount of taxes, penalties, and costs for which the three lots were being sold to the state. Under these circumstances the list performed its function and was sufficient" (citing several California cases).

And in his petition for a rehearing in that case he says:

> "The question thus seems to be narrowed down to the discussion of whether it is necessary for the tax collector, in publishing the delinquent list, to specify an amount against each lot separately listed and valued, in cases where several such lots are included in a single assessment, and the computations on the as-

sessment roll and delinquent roll are carried out on a single line, and contain only a single gross amount. It is respectfully urged that the duty of the tax collector in publishing the delinquent list is to copy the items in the delinquent roll and assessment roll, rather than to recalculate and divide them into their component items, and that any other rule would be impracticable in operation, would be of no actual benefit to any person, would involve much clerical labor, and would undoubtedly result in many mistakes and discrepancies, and thus needlessly hinder the state in its attempt to collect its just dues."

As indicated, we find no reason to recede from the conclusion we have reached in the case before us, and believing, as we do, that there is no merit in the other points raised by appellant, including the one that the recitals in the tax deed render it void, the petition for rehearing herein is denied.

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93 Cal. App. 553

KAGE v. HASS et al. (Civ. 6437.)

District Court of Appeal, First District, Division 2, California. Aug. 20, 1928.

1. Venue 🔑59—Change of venue is properly denied, where defendant, residing in county where action was commenced, does not join in motion.

A motion for a change of venue is properly denied, where one of defendants, whose residence is in the county where the action was commenced, is a proper party to the action, and does not join in the motion.

2. Appeal and error 🔑912—On appeal from order denying change of venue, appellate court must assume trial court found defendant not joining in motion was resident of county.

In support of order denying defendant's motion for a change of venue, appellate court must assume that trial court found, on conflicting evidence, that defendant not joining in the motion was a resident of the county in which action was brought, and under such circumstances trial court's judgment will not be disturbed.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Henry Kage against Joseph Hass and another. From an order denying his motion for a change of venue, the named defendant appeals. Affirmed.

Theodore L. Breslauer, of San Francisco, for appellant.

Ralph Booth McAbee, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant Isenberg to recover a judgment for money loaned. He filed his complaint May 7, 1927. The defendant Isenberg appeared and filed a demurrer June 13, 1927. Thereafter, on August 26, 1927, pursuant to his request, the plaintiff was granted permission to file an amended complaint. The amended complaint was so framed that it pleaded a cause of action against the defendant Isenberg and the defendant Joseph Hass as individuals, and against the two as copartners. Later an alias summons issued against the defendant Joseph Hass. On October 5, 1927, the defendant Isenberg appeared and filed a demurrer to the amended complaint. On November 14, 1927, the defendant Joseph Hass appeared and filed a demurrer to the amended complaint, a notice of motion to change the place of trial from the city and county of San Francisco to the county of Los Angeles, an affidavit in support of his motion, and a demand that the change be made. The motion for change of venue was made solely by the defendant Joseph Hass, and was not joined in by the defendant Isenberg. The motion for a change of venue was denied, and the defendant Hass has appealed from the order.

[1] A motion for a change of venue is properly denied, where one of the defendants, whose residence is in the county where the action was commenced is a proper party to the action and does not join in the motion. Paxton v. Paxton, 150 Cal. 667, 89 P. 1083. We do not understand that the defendant questions that rule, but he contends that the evidence in the record shows that both defendants Isenberg and Hass resided in Los Angeles. We think he is mistaken as to the facts. In his notice of motion the defendant Hass stated:

> "That said motion will be based upon all the papers, files, and records in this cause, and upon the affidavit of the defendant Joseph Hass served herewith, and said defendant's demand for change of place of trial, also served herewith, and upon this notice."

Nothing to the contrary appearing in the record, we may assume the motion was based on the papers enumerated in the notice of motion. In his affidavit the defendant Hass alleged that both defendants resided in Los Angeles. In the verified amended complaint the plaintiff alleged:

> "That the said defendant A. H. Isenberg now is, and at all times herein mentioned has been, a resident of the city and county of San Francisco, state of California."

It therefore appears that the evidence before the trial court was conflicting on the subject as to where the defendant Isenberg resided.

[2] In support of the judgment of the trial court we must assume that the trial court found the fact against the defendant Hass and in favor of the plaintiff. In other words, it must have found that the defendant Isen-

berg was a resident of the city and county of San Francisco. Under such circumstances on appeal the judgment of the trial court will not be disturbed. Mitchell v. Kim, 42 Cal. App. 111, 183 P. 368.

The order is affirmed.

We concur: BUCK, Presiding Justice pro tem.; NOURSE, J.

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93 Cal. App. 568

PEOPLE v. CALVERT et al. (Cr. 1046.)

District Court of Appeal, Third District, California. Aug. 21, 1928.

1. Criminal law 🔑742(2)—Whether deputy sheriff, testifying to hauling still to defendant's truck, where it was taken away, and to notifying sheriff thereof, was accomplice, held for jury.

In prosecution for possessing still for manufacture of liquor, evidence that deputy sheriff testified to seeing defendant operating still, and hauling equipment, including liquor, to defendant's truck, where it was loaded and taken away, and that deputy informed sheriff what he saw, *held*, to present jury question whether deputy sheriff was accomplice.

2. Criminal law 🔑507(4)—Officer, feigning complicity in crime to secure evidence, is not accomplice.

Officer, who feigns complicity in commission of crime for mere purpose of securing evidence on which to prosecute offender, is not accomplice.

3. Criminal law 🔑824(7)—Failure to instruct jury that witness was accomplice held not error, where testimony clearly showed he was accomplice, and defendants did not request such instruction.

Where witness' testimony showed clearly that he was accomplice to crime of possessing still, so that jury could not have found otherwise, failure of court to instruct jury that witness was accomplice was not error, where record failed to show defendants requested such instruction, and proposed instruction did not contain witness' name, which was inserted after trial.

4. Criminal law 🔑889—Instruction that jury, returning guilty verdict with recommendation for leniency, had nothing to do with leniency, and directing jury to return verdict without recommendation, held not error.

Where jury found defendants guilty as charged in information, with recommendation for leniency of court, instruction by court that question of leniency was something with which jury had nothing to do, and directing jury to retire for further consideration, and giving them forms of verdict containing no recommendation as to punishment, was not error.

5. Criminal law 🔑957(3)—Affidavits of jurors, stating they were guilty of misconduct, held properly stricken, where defendants did not contend verdicts were decided by lot (Code Civ. Proc. § 657, subd. 2).

Where counsel for defendants did not contend that verdicts of jurors were decided by lot, court did not err in striking affidavits of some of jurors, in which they stated they were guilty of misconduct in arriving at their verdict, under Code Civ. Proc. § 657, subd. 2.

6. Criminal law 🔑956(11)—Counter affidavits, showing telephone conversation by jurors during deliberation did not refer to trial, warranted denial of new trial on ground of misconduct (Pen. Code, § 1128).

Where affidavits were presented that three jurors were permitting during deliberation to telephone to their homes, in violation of Pen. Code, § 1128, counter affidavits, showing telephone conversations did not refer to case or to any matter which could have influenced jurors, was sufficient to warrant denial of motion for new trial on ground of such misconduct.

7. Intoxicating liquors 🔑203—Information charging unlawful, willful, and felonious possession of still did not fail to state public offense, because not charging still was "knowingly" possessed (Pen. Code, § 7, subds. 1, 5).

Information charging defendants with "unlawfully, willfully, and feloniously" possessing still did not fail to state public offense, because not charging still was "knowingly" possessed, since doing a thing willfully is doing it knowingly, under Pen. Code, § 7, subds. 1, 5, and 4 Words and Phrases, Second Series, "Willful."

8. Intoxicating liquors 🔑137—Word "still" includes receiver into which distilled liquor is discharged (St. 1927, p. 497).

Under St. 1927, p. 497, prohibiting possession of still for manufacture of liquor, word "still" is used in broader sense, as including receiver into which distilled liquor is discharged.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Still.]

9. Criminal law 🔑678(1)—Evidence that liquors from separate pots were discharged into single receiver showed possession of one still, not several, and did not require election (St. 1927, p. 497).

In prosecution under information charging possession of still, which referred to complete still, evidence that liquid from two pots or retorts was being discharged into single receiver, and that another incomplete still was nearby, showed but one complete still in possession and control of defendants, under St. 1927, p. 497, and contention that evidence showed that defendants had possession of three stills, constituting three separate offenses, and that district attorney should have been compelled to elect on which he relied for conviction, could not be sustained.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Thomas Calvert and others were convicted of possession of a still, and they appeal. Affirmed.

Lindauer & Horan, of Vallejo, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The information charges that on or about March 29, 1928, Thomas Calvert, Arnold Calvert, Carl A. Calvert, Anthony Pimentel, and Frank Smith did "unlawfully, willfully, and feloniously possess and have in their control a still, which was then and there designed, used, and intended for use in the manufacture of intoxicating liquor for beverage purposes, to wit, whisky, sometimes called 'jackass brandy,' then and there containing one-half of 1 per centum and more of alcohol by volume." Pimentel pleaded guilty and was released on probation. The other defendants were tried together. Smith was acquitted, and the three Calverts were found guilty. They moved for a new trial, which was denied, and this appeal is from the judgment and the order denying a new trial.

John J. and Frank Alameda are the owners of 140 acres of land near Cordelia, in Solano county. They leased the buildings thereon to a man named Jack Burns for a period covering the time of the alleged offense. About 11 o'clock in the forenoon of March 29, 1928, three peace officers went to the Alameda place, and in an open shed thereon they discovered a still in operation, discharging alcohol into a wash boiler; Pimentel being in the immediate charge of the plant at that time. Parts of another still were later found lying near a creek in the same vicinity. The officers then went to the dwelling house, about 350 feet from the shed, where they found Smith and the three Calverts; Arnold being in bed. It does not appear by what right or authority the defendants were in possession of the premises. Carl said to one of the officers, but not in the presence of the other defendants, that "they were paying money for protection"; that "they were supposed to be tipped off, if they were going to be raided." Thomas made similar statements to another officer. The court instructed the jury that these admissions were evidence only against the defendants who made them.

Pimentel testified that all of the defendants participated in the installation and operation of the still. While this testimony stands uncontradicted, Pimentel was clearly an accomplice. Appellants contend that there is no corroboration of his testimony as against Arnold. Pimentel testified that the defendants operated the plant on the Alameda place during January, 1928, and then moved it to a place above Boyes Springs, in Sonoma county, where they operated it for a time, and thereafter moved it back to the Alameda place, where "at first we * * * were going to set them down in the creek, but the flood came and washed it away," and that two of the stills were in operation in the shed at the time the officers came, and "the third still was down the creek."

Eugene Potterton, a deputy sheriff of Napa county, testified that about the middle of January, 1928, he saw Arnold Calvert "operating the still" on the Alameda place; that he saw the plant in operation there several times during that month; that in the latter part of January or the 1st of February he (Potterton) hauled the equipment and several barrels of liquor down to the road where they were loaded on defendants' truck and taken away; that "around the middle of March" Carl A. Calvert and Pimentel returned to witness' place with a truck on which "they had a box of groceries * * * in the cab of it," and "then they had a lot of stuff covered with canvas that I did not see"; that they left the truck there for three days, and then took it away; that at the time he hauled the equipment down to the road he was a deputy sheriff of Napa county; that he did not "at any time tell any of the officers of the law that there were stills in operation" on the Alameda place, or "that the Calverts were running a still up on the Alameda place." The witness later testified as follows:

> "Q. Who is the sheriff whom you served? A. Steckter now. * * *
>
> "Q. Did you communicate to him what you saw on the ranch? A. I did.
>
> "Q. When? A. December, January, March.
>
> "Q. Not in February? A. It was the early part of February, if I did."

[1, 2] Counsel for defendants requested the court to instruct the jury that "the witness Potterton is an accomplice as to the crime charged against the defendants." The court refused to give the proposed instruction, but instructed the jury that, if "Potterton aided, assisted, abetted, or encouraged" the commission of the alleged crime, he "was an accomplice within the meaning of the law, and you cannot convict the defendant upon his testimony alone, unless it is corroborated by such other evidence as shall tend to connect the defendants with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof," and that the testimony of an accomplice "cannot be corroborated by the testimony of another accomplice." An instruction to the same effect was given relative to the testimony of Pimentel.

In his argument to the jury, the district attorney contended that the witness Potterton was not an accomplice, but that his acts were merely those of an officer in an honest effort to secure evidence of the offenses being committed by the defendants. Under the evidence, the question whether Potterton was an accomplice was exclusively for the jury to determine. People v. Spaulding, 81 Cal.

App. 615, 618, 254 P. 614; People v. Swoape, 75 Cal. App. 404, 413, 242 P. 1067; People v. Demera, 64 Cal. App. 121, 123, 220 P. 673. An officer who feigns complicity in the commission of a crime for the mere purpose of securing evidence upon which to prosecute the offender is not an accomplice. People v. Spaulding, supra; People v. Lanzit, 70 Cal. App. 498, 509, 233 P. 816; People v. Heusers, 58 Cal. App. 103, 104, 207 P. 908; People v. Keseling, 35 Cal. App. 501, 504, 170 P. 627.

[3] Appellants contend that the court should have instructed the jury that Pimentel was an accomplice. The record fails to show that the defendants requested the court to give such an instruction. The proposed instruction, which appellants contend should have been given, did not contain Pimentel's name; but his name was inserted therein after the trial. Pimentel's own testimony shows so clearly and certainly that he was an accomplice that no juror could have had any doubt that he was such. It was shown at the trial that he had entered a plea of guilty to the very charge upon which the other defendants were being tried. Since the only possible inference to be drawn from the evidence is that he was an accomplice, and it is inconceivable that the jury did not so find, the rights of the other defendants were not prejudiced by the failure to instruct that he was an accomplice. People v. McDermott, 75 Cal. App. 718, 720, 243 P. 485.

[4] The jury found the appellants "guilty as charged in the information, with recommendation for leniency of the court." The court stated that "the leniency of the court is something with which the jury have nothing to do," and directed the jury to retire for further consideration of the case, giving them forms of verdict containing no recommendation as to punishment. Thereafter the jury returned a verdict finding the appellants guilty as charged in the information. There was no error in the court's action in this regard. People v. Pyler (Cal. App.) 267 P. 370.

[5] In support of their motion for a new trial, appellants filed the affidavits of some of the jurors in which they stated they were guilty of misconduct in arriving at their verdict. The court made an order striking out these affidavits. Counsel for appellants say:

> "Counsel does not contend that the verdicts were decided by lot. But we do contend that they were decided by means other than a fair expression of opinion on the part of all the jurors."

In People v. Reid, 195 Cal. 249, 261, 232 P. 457, 462 (36 A. L. R. 1435), it is said:

> "Upon well-grounded considerations of public policy, jurors are legally disabled to impeach their verdict by any means, whether it be by affidavit, or by testimony, or by extrajudicial statements. * * * The only exception * * * is in the case of so-called 'chance verdicts.' Code Civ. Proc. § 657, subd. 2."

[6] Affidavits were presented to the effect that three of the jurors were permitted, during their deliberations, to telephone to their homes. This was in direct violation of the provisions of section 1128 of the Penal Code. Counter affidavits, however, show that in these telephone conversations no reference was made to the case on trial, or to any matter which could have influenced any of the jurors. The counter showing was sufficient to warrant the denial of the motion for a new trial on the ground of such misconduct. People v. Cord, 157 Cal. 562, 571, 108 P. 511; People v. Page (Cal. App.) 260 P. 591; People v. Murphy (Cal. App.) 268 P. 927.

[7] Appellants contend that the information does not state a public offense, "in that it failed to allege that still charged in the information was 'knowingly' possessed." The information charges that the defendants "unlawfully, willfully, and feloniously" possessed the still. "To do a thing willfully is to do it by design with set purpose." People v. Sheldon, 68 Cal. 434, 437, 9 P. 457, 459. To do a thing willfully is to do it knowingly. People v. Swiggy, 69 Cal. App. 574, 581, 232 P. 174; 4 Words and Phrases, Second Series, p. 1304; Pen. Code, § 7, subds. 1 and 5.

[8, 9] Appellants contend that the evidence shows they had possession of three stills, if any, constituting three separate offenses, and that the district attorney should have been required to elect upon which he relied for a conviction. It is true that the witnesses refer to two stills in operation at the time of the arrest, and another incomplete still near the same place. The liquors from what they termed two stills were being discharged into a single receiver, a wash boiler. In discussing the subject of distillation in Cyclopedia Americana it is said:

> "The essential features in a simple distillatory apparatus are: (1) The still, pot, or retort, that is, the receptable for the material to be distilled. * * * (2) The condenser, by means of which the distillates are condensed. (3) The receiver, which collects the products of distillation in a liquid state."

Webster's New International Dictionary defines a still as follows:

> "A vessel, boiler, or copper used in distilling liquids, esp. alcoholic liquors; a retort. Sometimes, the whole apparatus used in vaporization and condensation."

A still, in the broader meaning, includes the receiver into which the distilled liquor is discharged, as clearly appears from the illustration accompanying the definition. It is clear that the word "still" is used in this broader sense in the statute under which the defendants were prosecuted. It makes it unlawful to knowingly have the possession or control of "any still, still worm, still cap, still condenser or stilling device of any kind, designed, used or intended for use in the manufacture or production of intoxicating liquor for beverage purposes," with stated exceptions not material here. Stats. 1927, p. 497. The information charges that the defendants had the possession and control of "a still," meaning a complete still, not merely some of the parts thereof. The evidence shows that there was but one receiver, the wash boiler, and therefore, but one complete still, in the possession and control of the defendants. In view of this conclusion, it is unnecessary to discuss the question whether the possession and control of two or more stills in a single room, operated as a single plant, would constitute more than one crime. What the appellants term three stills are so intimately connected together by the evidence that, if they were in possession of one, they were in possession of all of them.

The judgment and the order are affirmed.

We concur: HART, J.; PLUMMER, J.

93 Cal. App. 601

BALLOS v. NATURAL. (Civ. 6269.)★

District Court of Appeal, First District, Division 1, California. Aug. 23, 1928.

Hearing Denied by Supreme Court Oct. 22, 1928.

1. Trial 🔑194(16)—Instruction that automobile driver's recklessness is not excused by not knowing others were on highway held not erroneous as charging upon facts.

Instruction that automobile driver cannot assume road is clear, and fact that he does not so know is no excuse for conduct that would have amounted to recklessness had he known of presence of others on road, *held* not erroneous as a charge upon the facts.

2. Automobiles 🔑246(2, 3)—Instruction that automobile driver cannot assume road clear, and that recklessness is not excused by not knowing others were thereon, held not misleading.

Instruction that automobile driver cannot assume road is clear, and fact that he does not so know is no excuse for conduct that would have amounted to recklessness had he known of presence of others thereon, *held* not misleading.

3. Automobiles 🔑160(1)—It is automobile driver's duty to anticipate presence of pedestrians on highway.

It is the duty of the driver of an automobile to anticipate the presence of pedestrians on the highway.

4. Automobiles 🔑246(4)—Expression "proper care," in instruction setting out automobile driver's duty, held not misleading.

Use of expression "proper care" in instruction to effect that automobile driver must have machine under such control as will enable him to avoid collision with other persons using proper care and caution, *held* not misleading; such phrase meaning only that degree of care which a prudent man should use under like circumstances.

5. Trial 🔑243—Instruction stating care pedestrians should use, held not conflicting with instructions stating care vehicle drivers should exercise, when all instructions are read together.

Plaintiff's instruction that law does not require pedestrians using highway to look in every direction every instant of progress, but only to use such caution as a prudent person would use under like circumstances, *held* not, when read with other instructions, to conflict with defendant's instruction that pedestrians as well as drivers of automobiles using highway must exercise constant care and caution commensurate with special hazards, exercising ordinary care at all times, and not to assume that street is clear.

6. Trial 🔑296(3)—Instruction that motor vehicle operator must always have machine under control, avoiding collisions with others, held not erroneous, where read with other instructions.

Instruction that it is duty of operator of a motor vehicle to always keep machine under control so as to avoid collisions with pedestrians and other persons using the highway *held* not erroneous as prescribing a higher degree of care than required by law, when read together with other instructions on which it was dependent.

7. Trial 🔑140(2)—It was for jury to determine weight to give plaintiff's testimony on second trial, in view of contradictory testimony at first trial.

Where action to recover for personal injuries received in automobile collision was twice tried, *held* it was for the jury to determine what weight would be given to plaintiff's testimony, in view of his contradictory testimony at the first trial.

8. Trial 🔑90—No motion being made to strike evidence apparently admissible, when contrary is shown, objection to its admissibility is deemed waived.

Where evidence is apparently admissible, and no motion is made to strike it when the contrary is shown, an objection to its admissibility is deemed to have been waived.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by Henry Ballos against Don Natural. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. M. Abbott, K. W. Cannon, and J. E. Reardon, all of San Francisco, for appellant.

Keyes & Erskine, of San Francisco, for respondent.

CASHIN, J. The plaintiff, while a pedestrian crossing Third street in the city and county of San Francisco at its intersection with Thornton avenue, was injured by an

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★Hearing denied by Supreme Court.

automobile operated by the defendant. The injuries were found by a jury to have been caused by the negligence of the defendant, who appeals from a judgment for damages entered upon the verdict.

It is claimed that certain instructions given the jury were prejudicially erroneous, and that the verdict on the issue of contributory negligence is unsupported.

[1, 2] The jury, at the request of the plaintiff was instructed that—

> "The operator of a motor vehicle has no right to assume that a road is clear, but must under all circumstances and at all times be vigilant, and must anticipate and expect the presence of others. Accordingly, the fact that the operator of the motor vehicle did not know that any one was on the highway is no excuse for conduct which would have amounted to recklessness if he had known that another person or vehicle was on the highway."

It is contended that the instruction charged with respect to matters of fact, assumed facts not proven, and incorrectly stated the law as to the duty of the operator of a motor vehicle.

[3, 4] The record discloses no evidence that the defendant had knowledge of conditions on the highway, but the instruction reasonably construed was but the declaration of a rule of law and not a charge upon the facts, and, in view of the record, was not misleading, nor could it have been misunderstood by the jury. Furthermore, the trial court was careful to instruct the jury that—

> "In considering the instructions you will understand that the court does not assume the existence of any facts for, as stated, you are the sole and exclusive judges of the facts."

The jury was also instructed that—

> "The operator of an automobile is not necessarily exempt from liability for injuries occurring in a public street or highway by showing simply that at the time of the accident he was running at a rate of speed allowed by law. He still remains bound to anticipate that he may meet persons at any point on the street or highway, and he must, in order to avoid the charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with other persons using proper care and caution, and, if the situation requires it, he must slow up and stop."

It is urged by the defendant that this, with the first instruction quoted, placed upon the automobile driver the duty to exercise a higher degree of care than that which the law requires, and that the use of the expression "proper care" was misleading.

We cannot agree with this contention. It is the duty of the driver of an automobile to anticipate the presence of pedestrians on the highway (Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 41 A. L. R. 1027), and each of the instructions criticized was approved in Nichols v. Nelson, 80 Cal. App. 590, 252 P. 739. Moreover, the jury was elsewhere fully and correctly instructed as to the relative rights of pedestrians and those operating vehicles on the highway. As held in the case last cited, the employment of the word "proper" to indicate the care required of a defendant means only the exercise of that degree of care which a prudent man should use under like circumstances, and which is the degree of care which the law imposes on the other. Ramsbottom v. Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448; Missouri, K. & T. R. Co. v. Flood, 35 Tex. Civ. App. 197, 79 S. W. 1106. As the court said:

> "Where a court has used words or phrases in their customary and conventional sense, no complaint can be made, * * * the jury are presumed to possess ordinary intelligence and to understand the meaning and use of words in their common and ordinary application"—citing Hutson v. Southern California Ry., 150 Cal. 701, 89 P. 1093.

As stated, the jury was fully and fairly instructed in the present case as to the degree of care required of both parties; and, where this has been done, a subsequent charge to find for one or other of the parties if proper care had not been exercised is not prejudicial. Nichols v. Nelson, supra; St. Louis S. W. R. v. Parks, 40 Tex. Civ. App. 480, 90 S. W. 343.

[5] The following instruction was also given at the request of the plaintiff:

> "You are further instructed that the law does not require of a pedestrian that he must look in every direction every instant of his progress. It does require that he must look at least in those directions from which danger may be easily apprehended as often and as carefully as would a person of ordinary prudence under like circumstances."

Subsequently there were given two instructions offered by the defendant, which he claims were in conflict with the above, these being as follows:

> "In the exercise of a common right to the use of the public highways, all persons, pedestrians as well as drivers of automobiles, using the same, must exercise constant care and caution for the conservation of their correlative rights commensurate with the special hazard which is peculiar to and nowadays is ever present in the use of the public highways."

And "the law imposed upon the plaintiff, Henry Ballos, the duty of exercising ordinary care at all times. It was his duty to exercise his faculties of sight and hearing to ascertain whether an automobile was approaching immediately before going or attempting to go in front thereof. If he went or attempted to go in front of said automobile, and if at that time he could, by exercising his senses of sight and hearing, with ordinary care have ascertained the approach of said automobile and its proximity to the point at which he was crossing, and if he failed to do so, and if his failure to do so was a proximate cause of his injuries, then and in that event the plaintiff cannot recover, and your verdict must be in favor of the defendant, Don Natural."

The jury was further instructed that—

> "A pedestrian has no right to assume that a street is clear, but under all circumstances and at all times he must be vigilant and must anticipate the presence of vehicles traveling in the street."

The above instructions create no conflict in any material particular. Read together, they fairly state the law; and, as the jury was admonished by the court not to select a single sentence or a single instruction and base their verdict solely upon that, and told that they were to consider the instructions together as a whole, it cannot reasonably be said that the jury was led to believe that one measure of care should be applied to pedestrians and another to drivers of vehicles.

[6] The jury was also instructed that—

> "It is part of the duty of the operator of a motor vehicle to keep his machine always under control so as to avoid collisions with pedestrians and other persons using the highway."

As claimed by appellant, it is the duty of a driver to use ordinary care to keep his vehicle under control and to avoid collisions, and, to the extent that a higher degree of care was prescribed, the instruction was erroneous. This instruction, however, did not stand alone, but was preceded and followed by others in which the court fully and correctly stated the degree of care required in the management of vehicles on public streets, thus removing the misleading effect, if any, of the instruction quoted.

It is further contended that the court by its instructions taken as a whole unduly enlarged the duties and obligations of the defendant and minimized those of the plaintiff. A reading of the instructions negatives this contention, and shows that the charge as a whole fully and fairly stated the law of the case.

[7] The action was twice tried, and there appears some contradiction between the testimony of the plaintiff given at the first trial and that given by him at the second on the issue of contributory negligence. Appellant contends that the plaintiff should be bound by that given on the first trial of the action, which testimony, it is claimed, shows that he was guilty of contributory negligence as a matter of law.

The jury were the exclusive judges of the credibility of the plaintiff, and it was for them to determine, in view of the contradictory testimony given at the first trial, the extent to which his testimony was entitled to belief. Code Civ. Proc. § 1847; Welch v. Alcott, 185 Cal. 732, 198 P. 626; Withers v. Massengill, 148 Cal. 769, 84 P. 153; People v. Raich, 26 Cal. App. 286, 146 P. 907; People v. Chesney, 72 Cal. App. 570, 237 P. 793.

[8] Appellant in his closing brief claims that the admission of evidence of his acts and oral statements shortly after the accident was prejudicially erroneous. Before this testimony was admitted, there was introduced a writing signed by him, stating that he knew at the time of the collision that some person had been struck by his automobile; that the occurrence caused him to faint, and the machine after the collision continued on its course for some distance; that after his recovery he left the automobile in the street and went to the house of a friend, who later accompanied him to the police station. The statement was objected to on the ground that it was not shown to have been voluntarily made, whereupon the plaintiff introduced evidence tending to prove the fact. The oral statements in question were testified to by the person who accompanied him to the police station and by a police officer. According to the testimony of the former, appellant came to his house shortly after the accident and requested assistance in removing his automobile from the street. The witness, accompanied by appellant, thereupon drove in an automobile to the place where appellant's car had been left, but, not finding it, appellant then requested to be taken home. After several questions by the witness, appellant admitted that some person had been struck by his automobile, whereupon the witness urged him to report the matter to the police, which was accordingly done. The officer testified to a statement made by appellant after his arrival at the police station in which he made the same admission, stating further, according to the officer, that he "kept on going, and that his machine stopped, and, when he came to himself, he took a street car down to a friend of his on Leland avenue."

It is urged that evidence of appellant's conduct after the accident, in particular his visit to the police station and his statement to the officer that after the accident he kept on going, was incompetent. In support of this contention, appellant cites Henderson v. Northam, 176 Cal. 493, 168 P. 1044, where it is held that, while the failure to perform a duty imposed by statute is evidence of negligence, the act or omission in order to warrant a recovery must have contributed to the injury, and that the failure to stop after the accident, since it in no wise contributed to the injury, was not a subject for consideration by the jury. This rule, however, has no application here, as the testimony of the witness was offered for another purpose. Appellant having denied in his answer that his automobile struck the plaintiff, and the fact not having been admitted at the trial, it was incumbent upon plaintiff to prove it. The testimony was admitted for this purpose; but appellant contends that his written statement was sufficient proof of the fact, and that other evidence thereof was improper. At the trial he also objected, on the ground of its irrelevancy, to any evidence of his acts or statements after the accident, with the exception of the writing mentioned. Although the admissions contained in his written statement were not denied by appellant, who offered no evidence at the trial other than the deposition of the plaintiff, the latter was not apprised of his intention in that regard, and was in any event entitled to introduce any competent evidence tending to prove a material issue in the case. The greater portion, if not all, of the testimony of the two witnesses was relevant to the issue mentioned, and, if parts were inadmissible, the same should have been called to the attention of the court by an objection and a motion to strike, specifying the portions of the testimony to which objection was made. Shatto v. Crocker, 87 Cal. 630, 25 P. 921; Hellman v. McWilliams, 70 Cal. 449, 11 P. 659. This appellant failed to do, relying on his general objection to the admissibility of the testimony as a whole. Where evidence is apparently admissible, and no motion is made to strike it when the contrary is shown, an objection to its admissibility is deemed to have been waived. City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 453, 181 P. 658; People v. Lawrence, 143 Cal. 148, 76 P. 893, 68 L. R. A. 193; De Bock v. De Bock, 43 Cal. App. 283, 299, 184 P. 890.

After a review of the whole record, including the evidence, we are satisfied that the conclusions of the jury on all the issues were fully supported, and that no error is shown which would justify a reversal of the judgment.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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93 Cal. App. 609

KOLBERG v. SHERWIN-WILLIAMS CO.★
(Civ. 6324.)

District Court of Appeal, First District, Division 2, California. Aug. 23, 1928.

Rehearing Denied Sept. 22, 1928.

1. Fraud 🔑11(1)—Statement of manufacturer's agents that spray compound would not injure plaintiff's orchard, and had been used in same vicinity without injury, held one of fact.

In an action to recover for injuries to orange orchard caused by use of product as a spray to destroy scale on the trees, statement by manufacturer's agents that the compound would destroy the pests without injury to the trees, leaves, or fruit, and had been used on other orange groves in same vicinity without injury, *held* one of fact, and not merely an opinion.

2. Negligence 🔑27—Manufacturer of inherently dangerous spray compound, sold through middleman to plaintiff, held liable for injuries to orange orchard.

Manufacturer of compound inherently dangerous to orange trees *held* liable to plaintiff for injuries to orchard from use of such compound purchased through a middleman.

3. Negligence 🔑27—Manufacturer could not claim benefits of dealer's contract with consumer whereby dealer was not liable for injuries from use of compound for spraying orchard.

Defendant manufacturer could not claim benefits of contract executed by its dealer with plaintiff, whereby the dealer was agreed not to be liable for any injury from plaintiff's use on orange orchard of compound manufactured by defendant to destroy scale on trees.

4. Damages 🔑139—$1,900 for loss to orange crop from spraying trees with defendant's compound, sale bringing $1,981 less than average, held not excessive.

Damages of $1,900 for loss to plaintiff's orange crop from use of spray compound manufactured by defendant, where evidence showed plaintiff received from sale of 2,340 boxes of oranges picked from sprayed trees $1,981 less than average price received from oranges picked from trees not sprayed, and that 700 boxes which fell to ground from sprayed trees were total loss, *held* not excessive.

5. Damages 🔑138—$4,200 for injury to 480 orange trees, covering six acres, from using defendant's spray compound, or $700 per acre, held not excessive.

Damage of $4,200 for injury to orchard from use of defendant's compound for spraying trees, where evidence showed that 480 trees, covering six acres, were injured, and the trial court estimated total damage by allowing $700 an acre, *held* not excessive.

6. Damages 🔑222—Trial court having found damage to "six acres of orchard and trees thereon," held, that damages awarded covered damage to land, and not to separate trees.

In an action to recover damages for loss and injuries from use on orange orchard of a spray to destroy scale, where trial court, in findings of fact, found "injury and damage to orchard and the trees thereon," and in its conclusions of law found "damage to six acres of orchard," *held*, that word "orchard" was intended to cover the tract of land planted to orange trees, and that damages were intended to cover damage to the land, and not to separate trees.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Herman Kolberg against the Sherwin-Williams Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John W. Hart and Albert M. Cross, both of Los Angeles, for appellant.

★Rehearing denied.

Head, Wellington, Jacobs & Scovel, of Santa Ana, for respondent.

NOURSE, J. Plaintiff sued for damages for loss and injury sustained by him from the use upon his orange orchard of a product manufactured and sold by the defendant, known as "Citromulsion," and used for the purpose of spraying orange and other citrus trees to destroy scale. Plaintiff had judgment for $6,100, from which the defendant has appealed on a bill of exceptions.

The manufactured article was sold by the agents of defendant to the plaintiff through a dealer under an agreement that the dealer would apply the spray to plaintiff's orange trees under the direction and control of defendant's agents. The spray was applied under this arrangement, and resulted in serious injury to the trees sprayed, and in loss of a large portion of the crop of oranges. Plaintiff sued upon the theory that the manufactured article was inherently dangerous to citrus fruit trees, that this fact was known to the defendant, and that the plaintiff was induced to purchase it and have it applied to his trees through the false representations of defendant's agents. The cause was tried before the court sitting without a jury, and the court made findings of fact in accordance with the allegations of the complaint. The burden of appellant's case on appeal is that these findings are not supported by the evidence.

[1] It is argued that there is no evidence to support the finding that "Citromulsion" contained an oil or ingredient that was essentially or inherently dangerous to and destructive of the leaves, wood, and fruit of citrus trees, or the finding that defendant knew it contained any such essentially and inherently dangerous element. The point is wholly without merit, as the evidence is all one way. It is admitted that the compound contained about 73 per cent. of heavy gravity hydrocarbon oil and about 27 per cent. of inert ingredients. The horticultural commissioner of Orange county testified that hydrocarbon oil "is of itself injurious to citrus groves when applied straight—I have seen lots of groves injured by being sprayed with hydrocarbon oil." Other witnesses testified from their experience that this oil was injurious to orange trees; that they had seen orange groves, where it had been used, lose leaves, buds, and fruit. Counsel for appellant really confess the point when they say that:

> "It was merely a question of finding the proper dosage under different weather conditions, and conditions of the trees which would do the work of killing the pests with the greatest degree of safety to the trees."

It might as well be said that arsenic is not in itself a dangerous poison because, if taken in a specially small dose, it would not cause injury. The matter of dosage was not an issue in the case. The finding under attack was responsive to the allegations of the complaint that the defendant's agents falsely and fraudulently represented to plaintiff that the compound would destroy the pests without injury to the orange trees, or to the leaves, wood, or fruit, that it had been used on a number of other orange groves in the vicinity without any injurious effects, and that, though it would destroy the scale, it would not injure the orange trees, or the growth, buds, or fruit thereon. These representations were found to be untrue—that, in fact, the compound had been used on a number of other orange groves, and had resulted in serious damage to the trees, causing the leaves, buds, and fruit to fall.

The finding that the defendant knew of the injurious qualities of the compound is supported by the evidence that their agents had been actively engaged in spraying other orange groves, and that their attention had been called to the damage done within a month prior to the time these representations were made to the plaintiff. Counsel for defendant concede that the injurious qualities of the spray were well known to the defendant, and that these activities in other groves were in the line of "experiments," for the purpose of determining how far the oil should be diluted to make it effective in destroying the scale without injury to the trees. But they argue that the representations that the compound would not injure the orange trees were mere expressions of opinion and not actionable. The representations were based upon statements of what had occurred when the spray was used on other orange groves in the vicinity, "and it is well established that a statement of what might otherwise be an opinion, if based on alleged facts, is a statement of fact and not a statement merely of an opinion." French v. Freeman, 191 Cal. 579, 586, 217 P. 515, 517; Tracy v. Smith, 175 Cal. 161, 165, 165 P. 535.

Here the representations made to plaintiff were that the spray would kill the scale and that it would not injure the trees or the fruit or the buds. These representations were supplemented by the positive statement that the spray had been used in other groves with "good results" and without injury. The fact is that in some of these "experiments" in other groves defendant's compound was used diluted as follows: 4 per cent. (4 gallons of citromulsion to 100 gallons of water); 5 per cent., with 20 pounds of sulphur added; 6 per cent.; and 8 per cent. The results were: With the 4 per cent. mixture, 75 per cent. defoliation; with the 5 per cent. mixture, 25 per cent. defoliation; with the 6 per cent. mixture, 80 per cent. defoliation; and with the 8 per cent. mixture, 90 per cent. defoliation. These facts were not disclosed to plaintiff, but, with full knowledge of the disastrous results of these experiments, the defendant's agents represented that the spray had been used with "good results," and that it would not injure the trees, the foliage, or the fruit.

[2, 3] The defendant directed its agents to solicit persons to purchase citromulsion from Chidlaw Bros, and to have the same applied by Chidlaw Bros. under the direction of defendant's agents. When the sale was made to plaintiff, he signed with Chidlaw Bros. a written order for a barrel of the spray, under which it was agreed that Chidlaw Bros. assumed no responsibility for any injury that might occur from the use of the spray. This contract was set up as a special defense in the answer, wherein the defendant alleged that it was not a party to the contract. The trial court found this to be true. The defendant now argues that Chidlaw Bros. were agents of the defendant, and that their exemption from liability inured to the benefit of defendant. At the trial the defendant took the position that Chidlaw Bros. were not its agents, but dealers purchasing its product. The liability of the defendant rests upon the sound rule that a manufacturer or seller of an article inherently dangerous to life or property is liable for injuries to the ultimate consumer who has purchased through a middleman. 17 A. L. R. 674, 683. Here the written contract expressly exempted the middleman from liability. It did not pretend to cover the liability of the defendant, which was not a party to the contract, and had no knowledge of its execution. The rule in this state is clear that a third party cannot claim the benefits of a contract executed by others, unless it appears from the contract itself that it was executed for his benefit. Ferguson v. Marsh, 37 Cal. App. 484, 485, 174 P. 678; Wilson v. Shea, 29 Cal. App. 788, 790, 157 P. 543.

[4, 5] The defendant insists that the damages awarded are excessive. The trial court allowed the plaintiff $1,900 as loss to his orange crop for the 1924 season and $4,200 as damage to the orchard. The evidence upon the $1,900 item was that the plaintiff received from 2,340 boxes of oranges picked from sprayed trees the sum of $1,981 less than the average price which he received for oranges picked from trees which had not been sprayed and which were sold at the same time. In addition it was shown that more than 700 boxes had fallen to the ground from the sprayed trees and were a total loss. The evidence would have supported an award greater than that given by the trial court. As to the $4,200 item, the evidence was that 480 trees, covering six acres, were injured and the trial court estimated the total damage by allowing $700 an acre. Plaintiff's evidence would have justified a greater award, while that offered by the defendant showed the damage to be much less. The trial court had the duty of resolving the conflict and we see no error in its finding.

[6] But the defendant argues that the measure of damages adopted by the trial court was on the basis of the damage per tree rather than per acre, and that the damages were therefore allowed for injuries to the trees alone and not for injury to the land. In its findings of fact, the trial court found "injury and damage to his orchard and to the trees thereon in the average sum of $700 an acre on six acres thereof," and, in its conclusions of law, the court found "damage to six acres of his orchard in the sum of $4,200." It is plain that, in both instances, the trial court used the word "orchard" as covering the tract of land planted to orange trees, and that the damages awarded were intended to cover the damage to the land, and not that suffered by the separate trees. The judgment is within the rule of Shearer v. Park Nursery Co., 103 Cal. 415, 420, 37 P. 412, 42 Am. St. Rep. 125, and Truman v. Sutter, etc., Co., 76 Cal. App. 293, 308, 244 P. 923.

Other points raised do not require consideration. We find no error in the record.

Judgment affirmed.

We concur: STROTHER, Presiding Justice pro tem.; STURTEVANT, J.

McCARRON v. GOODWIN, City Manager.★
(Civ. 6239.)

District Court of Appeal, First District, Division 1, California. Aug. 22, 1928.

Rehearing Denied Sept. 21, 1928. Hearing Granted by Supreme Court Oct. 18, 1928.

1. Municipal corporations ⚿185(1)—Police officer held removable by city manager, for releasing offender from custody without filing complaint or reporting transaction (San Jose City Charter, art. 7, § 53; art. 8, § 57; art. 16, § 112).

Under San Jose City Charter, art. 7, § 53, and article 8, § 57 (St. 1915, p. 1869), providing that appointive officers shall be appointed and removed by city manager, and specifying the appointive officers, police officer *held* removable by city manager on charges of having released an offender, without filing complaint against him or reporting transaction to his superior officers, as against contention that only penalty which city manager was authorized to inflict was such as civil service commission might have determined, under article 16, § 112, and that, none having been fixed by commission, city manager was without power of removal; violation of civil service provisions not being involved.

★Rehearing denied. Hearing granted by Supreme Court.

2. Municipal corporations 🔑185(4)—Charter requirement that city manager file statement of grounds for removing officer held not to refer to method of removal (San Jose City Charter, art. 8, § 57).

San Jose City Charter, art. 8, § 57 (St. 1915, p. 1869), authorizing city manager to remove any person appointed by him, providing that he must file with council and civil service commission a statement of grounds of removal, does not refer to the method of removal, but provides for a subsequent notice and record of the fact, with reasons therefor.

3. Municipal corporations 🔑185(5)—City manager's power to dismiss police officer held not dependent on proof to any degree of certainty of truth of charges (San Jose City Charter, art. 8, § 57).

Power of city manager to dismiss police officer under San Jose City Charter, art. 8, § 57 (St. 1915, p. 1869), for failing to file complaint against offender released by him, or to report transaction to his superior officers, did not depend on proof to any degree of certainty of the truth of the charges, but it was sufficient that evidence tending to their support was adduced.

4. Pleading 🔑8(9)—Allegation that evidence was insufficient to support finding and order removing police officer held mere legal conclusion.

Allegation, in certiorari petition to review dismissal of police officer that evidence was insufficient to support finding of city manager on charges against petitioner or order of dismissal *held* mere legal conclusion.

5. Municipal corporations 🔑185(13)—Petition for certiorari to review removal of police officer held insufficient to show that no evidence tending to support charges filed was presented (San Jose City Charter, art. 8, § 57; Code Civ. Proc. § 452).

Petition for certiorari to review removal of police officer by city manager, under San Jose City Charter, art. 8, § 57 (St. 1915, p. 1869), which alleged that, in addition to evidence in support of written charges filed, city manager received evidence of other acts, and erred in finding petitioner guilty of such and other acts, *held* insufficient, taken as a whole, to show that no evidence tending to support charges filed was presented, even though liberally construed as required by Code Civ. Proc. § 452.

6. Municipal corporations 🔑185(13)—Finding on charges against police officer originally filed, being sufficient to support dismissal, any error in entertaining subsequent charges held not subject to certiorari review (San Jose City Charter, art. 8, § 57).

Where finding of city manager on charges originally filed against police officer was sufficient to support order of dismissal, under San Jose City Charter, art. 8, § 57 (St. 1915, p. 1869), any error in entertaining oral charges subsequently made was not subject to review in certiorari proceeding.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Certiorari proceeding by Andrew McCarron against C. B. Goodwin, as City Manager of the City of San Jose, to review an order of defendant removing plaintiff from the position of police officer. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

Owen D. Richardson and William H. Johnson, both of San Jose, for appellant.

Archer Bowden, City Atty., of San Jose, for respondent.

CASHIN, J. Appellant was a police officer of the city of San Jose, from which position he was removed by an order made by respondent, who is the city manager of the municipality. A petition for a writ of certiorari to review the order was filed, and, after having been twice amended, a general demurrer thereto was sustained, without leave to amend further, and from a judgment dismissing the petition the appeal was taken.

[1] The petition alleged that appellant ever since December 29, 1913, had been a patrolman; that on October 26, 1926, J. N. Black, the chief of police of the city, filed charges against him, a copy thereof, together with copies of a notice of hearing, the order of dismissal complained of, and a petition for rehearing with the order denying the same, being annexed to the petition. The charges, as shown by the exhibits, were in substance that an intoxicated automobile driver, who had been placed under arrest by two police officers of the city, was released from custody by petitioner and another officer, without filing a complaint against the offender or reporting the transaction to their superior officers. On November 2, 1926, a copy of the charges, with a notice fixing the time for a public hearing thereon, and stating that appellant would be entitled to the aid of counsel, was served. He appeared at the hearing, and at its conclusion the order of dismissal was made, this being followed by a petition for a rehearing, which was denied.

It is claimed that, neither under the provisions of the charter of the city nor by the proceedings had, as shown by the petition, did respondent have power to dismiss appellant, and that the court erred in sustaining the demurrer. The charter, which was approved by the Legislature of 1915 (Stats. 1915, p. 1869), provides that the city council shall appoint the city manager, city clerk, civil service commission, and city planning commission (section 53, art. 7), and by the same section that *all other appointive officers shall be appointed and removed by the city manager.* Section 57 provides that the city manager "shall appoint the following officers [naming them] *and all other officers of the city,* subject to the provisions of article 16 of this charter, except where this charter expressly provides otherwise," and, further:

"The city manager may remove any person appointed by him, provided that he must file with the council and the civil service commission a statement of the grounds of the removal and give to the person sought to be removed an opportunity to be heard in his own defense at a public hearing."

Article 16 of the charter prescribes the duties of the civil service commission, divides the civil service of the city into an unclassified and a classified service, and provides that "positions in the classified service shall be filled by the city manager" (section 105) from an eligible list of persons who have passed examinations in accordance with the regulations of the civil service commission. The same article (section 112) of the charter provides that the civil service commission, subject to the approval of the council, shall determine the penalties for the violation of the civil service provisions of the charter.

The position held by appellant, who was appointed thereto before the charter was adopted, was within the classified service as defined by the charter, which provided that:

"All persons in the employ of the city holding positions in the classified service, as established by this charter at the time it takes effect, shall, unless their positions be abolished, retain the same until discharged, reduced, promoted, or transferred in accordance with the terms of this charter." Section 108.

Appellant claims that the only penalty for neglect of duty which the city manager was authorized to inflict was such as the civil service commission might have determined, as provided by section 112, and that, none having been fixed by the commission, respondent, who proceeded under section 57 of the charter, was without the power of removal. It is also claimed that the latter section requires as a condition precedent to such removal that the grounds therefor be filed with the commission before the hearing, it not being alleged, however, that this was not done.

[2] It will be sufficient to say that appellant was not charged with a violation of the civil service provisions of the charter, but with violations of duty as an appointive officer who, under sections 53 and 57, was expressly made subject to removal by the city manager in the manner provided by the last section. Furthermore, it is manifest from a reading of the section that the requirement that a statement of the ground of removal be filed with the council and commission does not refer to the method of removal, but provides for a subsequent notice and record of the fact with the reasons therefor. Bannerman v. Boyle, 160 Cal. 197, 116 P. 732. The proceedings before respondent are contained in the exhibits referred to above. The complaint filed by the chief of police, the substance of which has been stated, together with the notice, show a compliance with the charter requirements, were sufficient to authorize respondent to hear and determine the charges so made, and require no further discussion.

Appellant contends, however, that the allegations of the petition show that no evidence was adduced in support of the charges filed, the only evidence adduced being in support of other and different charges made at the hearing, and that the order of dismissal was based upon the latter charges and was for that reason void. The petition, after alleging the service of a copy of the charges and notice of hearing and appellant's appearance thereat, avers:

That "thereupon said respondent purported to hear said purported charges, and assumed jurisdiction to hear the same and to admit and receive evidence against this petitioner upon other and entirely different charges than said purported charges, of which this petitioner did not have even a pretense of notice, to wit, upon oral, unwritten, unpreferred charges of drinking intoxicating liquors while on duty and in uniform in bootleg joints and on the streets; and petitioner avers that he never at any time herein mentioned had any opportunity to be heard in his own defense against said other or different or any of said charges before said respondent;" that on November 5, 1926, "respondent purported to give and make an order finding your petitioner guilty of said charges preferred in said written charges or said oral charges, a copy of which order is hereunto annexed; * * *" and, further, "that no evidence was offered nor received by said respondent to substantiate or support the said finding or order by said respondent dismissing your petitioner. * * *"

[3-5] Due service of a copy of the charges, with notice of the time fixed for the hearing, being admitted in the petition, the power to dismiss petitioner did not depend upon proof to any degree of certainty of the truth of the charges. It was sufficient that evidence tending to their support be adduced; and to sustain an attack upon the order of dismissal it was necessary to allege a want of such evidence. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P. 35. The petition contains no such allegation; its whole tenor being that in addition to evidence in support of the charges filed respondent received evidence of other acts, and, according to the application for rehearing, erred in finding petitioner "guilty of such and other acts." Nor does the last-quoted paragraph of the petition supply the omission or contradict the preceding paragraphs therein; this allegation in form and effect implying that such evidence was received, but alleging the same to be insufficient to support the finding or order. This was but the averment of a legal conclusion (Herbert v. Southern Pacific Co., 121 Cal. 229, 53 P. 651; Great Western Power Co. v. Pillsbury, supra), which tendered no issue and must be disregarded (Callahan v. Broderick, 124 Cal. 80, 56 P. 782).

The further allegation that petitioner was not afforded an opportunity to defend against any of the charges is also contradicted by the allegations above quoted and the fact, which the pleading admits, that he was present at the hearing. The averments of the petition are contradictory and their meaning obscure; and while the allegations of a pleading must be liberally construed with a view to substantial justice (Code Civ. Proc. § 452), those in the present case, taken as a whole, fail to show that no evidence tending to support the charges filed was presented.

[6] Moreover, the exhibits attached thereto, which contain the record of the proceedings before respondent, affirmatively show a hearing on the original charges and that the order of dismissal was based thereon. Whether such an order, resting alone upon additional charges preferred at the time of the hearing, might be sustained, it is unnecessary to determine, as it appears from the order, and is averred in the petition, that petitioner was found guilty upon all the charges. The finding upon those originally filed was sufficient to support the order of dismissal, and any error in entertaining those subsequently made is not subject to review in this proceeding. Paddon v. Superior Court, 65 Cal. App. 34, 223 P. 91.

We are satisfied that the petition failed to state facts sufficient to constitute a cause of action and that the demurrer was properly sustained.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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93 Cal. App. 650

PEOPLE v. REVENKO. (Cr. 1473.)

District Court of Appeal, First District, Division 1, California. Aug. 25, 1928.

1. Criminal law 🔑1144(½)—On appeal, matters not required to be entered on minutes will be presumed to have complied with law.

On appeal in criminal cases, matters not required by law to be entered on the minutes will be presumed, in absence of anything in the record to the contrary, to have complied with the law.

2. Criminal law 🔑1144(15)—Informing jury it would be locked up for night if unable to agree on verdict will be presumed on appeal to have been done by bailiff on court's direction (Pen. Code, § 1128).

On appeal in criminal case, act of court bailiff, who had been sworn to take charge of jury, in entering jury room after knocking at door and informing jury that, if it was unable to agree on verdict within 15 minutes, judge would order jury locked up for the night, will be presumed to have been authorized by the trial court, as required by Pen. Code, § 1128, since there is no legal requirement that directions which court may give bailiff after retirement of jury as to its custody and care should be made a matter of record; burden being on defendant to show irregularity in the proceeding.

3. Criminal law 🔑1163(1)—Burden of showing prejudicial effect of irregularity is on defendant (Pen. Code, § 1404).

Burden of showing prejudicial effect of irregularity, so as to entitle defendant to reversal of of judgment of conviction under Pen. Code, § 1404, is on defendant.

4. Criminal law 🔑1174(7)—Any irregularity in bailiff's informing jury that, if they did not reach verdict in 15 minutes, they would be locked up for night, held not prejudicial (Pen. Code, § 1404).

Any irregularity in act of court bailiff in informing jury that, if they were unable to agree on verdict within 15 minutes, judge would order them locked up for the night, *held* not prejudicial, and did not require reversal under Pen. Code, § 1404, in absence of showing that communication influenced jury or verdict.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Ivan Revenko was convicted of rape, and he appeals. Affirmed.

Harry S. Whitthorne and Twain Michelsen, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the State.

KNIGHT, J. Appellant was charged with the crime of rape, alleged to have been committed upon a girl 12 years of age, and upon trial was found guilty. Pursuant to the authority granted under section 264 of the Penal Code, the jury recommended that he be punished by imprisonment in the state prison, and he was sentenced accordingly. The appeal is taken from the judgment of conviction and the order denying his motion for a new trial.

No briefs have been filed by either party to the appeal, and only one point was urged by appellant as ground for reversal at the time the appeal was argued orally before this court. It was to the effect that an irregularity occurred after the jury had retired to the jury room to deliberate upon its verdict, which amounted to a violation of section 1128 of the Penal Code. The point was raised by an affidavit made by appellant's counsel and presented to the trial court at the time the motion for new trial was heard, in which it was averred, in substance, that he was advised by several members of the jury that, while the jury was deliberating upon its verdict, and about the hour of 10:45 o'clock p. m., the bailiff of the court, who had been sworn to take charge of the jury, entered the jury room, after knocking at the door, and informed the jury of the hour and that, if it was unable to agree upon a verdict within fifteen minutes, the judge would order the jury locked up for the night.

Said section 1128 of the Penal Code provides in part that, if the jury does not agree upon a verdict before retiring from the courtroom to deliberate, "an officer must be sworn to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor to do so himself, unless by order of court, or to ask them whether they have agreed upon a verdict; * * *" and appellant concedes that, if the bailiff, in thus communicating with the jury, acted under instructions from the court, there was no irregularity in the proceeding. But, basing his contention upon the assumption that the action of the bailiff was not authorized by the court, he argues that the proceeding constituted a violation of the provisions of said Code section, and therefore entitled him to a new trial, citing People v. Brannigan, 21 Cal. 337.

[1, 2] We find no merit in the point for the following reasons: It is a well-settled rule on appeal in criminal cases that, as to matters not required by law to be entered upon the minutes, it will be presumed, in the absence of anything in the record to the contrary, that the law has been complied with. People v. Russell, 156 Cal. 450, 105 P. 416; 8 Cal. Jur. 570. In other words, error will not be presumed; it being incumbent upon the appellant to produce a record affirmatively showing the same. 8 Cal. Jur. 569. There is no legal requirement that the directions which the court may give to the bailiff after the retirement of the jury as to its custody and care shall be made a matter of record, because such directions are usually given when court is not in session. Therefore, if appellant desired to avail himself of the point now urged, it was incumbent upon him to make some affirmative showing of record at the time the motion for new trial was heard to establish the fact that the action of the bailiff herein complained of was unauthorized by the court. This he has failed to do, because neither in the affidavit of his counsel nor elsewhere in the record is it indicated that the communication in question was not made under the court's direction. We must presume, therefore, that it was.

[3, 4] Moreover, before a judgment of conviction may be reversed for an irregularity, it must affirmatively appear that the substantial rights of the defendant have been prejudicially affected thereby (Pen. Code, § 1404; People v. Watts, 198 Cal. 776, 247 P. 884; 8 Cal. Jur. 599); and the burden of showing such prejudicial tendency is also upon the defendant. In the present case appellant does not claim, nor is there anything in the record before us from which the fair inference could be drawn, that the communication complained of influenced the jury in the slightest degree in its deliberations or that by reason of the communication its verdict did not truly represent its unanimous conclusion, fairly and honestly arrived at. It would seem, therefore, that, whatever irregularity there may have been in the proceeding, it did not operate to appellant's injury.

The case of People v. Brannigan, supra, cited and relied upon by appellant, is essentially different in its facts from the present one, the reversal there being placed upon the ground that the officer who had been sworn to keep the jury together, in violation of his oath, allowed the members thereof to separate; and furthermore, that case was decided in the year 1863, at which time it was the law of this state that substantial error being shown was presumed to be injurious unless the contrary was made to appear, and no such contrary showing was made; whereas in the present state of the law, before a reversal may be ordered, substantial injury as well as error must be made affirmatively to appear. People v. Merritt, 18 Cal. App. 58, 122 P. 839, 844.

Owing to the nature of the crime involved, and the penalties fixed by law as a punishment for its commission, we have examined the evidence, notwithstanding its sufficiency has not been challenged, and find it to be legally sufficient to sustain the conviction.

The judgment and order appealed from are therefore affirmed.

We concur: TYLER, P. J.; CAMPBELL, Justice pro tem.

205 Cal. 102

STARK et al. v. HOEFT et al. (Sac. 3888.)

Supreme Court of California. Aug. 31, 1928.

1. **Appeal and error 🔑277—Order denying motion to strike out supplemental complaint and portions thereof held not deemed excepted to (Code Civ. Proc. § 647).**

Where order denying defendant's motion to strike out supplemental complaint and also portions thereof was not excepted to at the time, it might not be reviewed by the appellate court, under Code Civ. Proc. § 647.

2. **Appeal and error 🔑679(2)—Petition for leave to file supplemental complaint and order granting leave might not be considered, where not set forth in transcript.**

Appellate court might not consider petition for leave to file supplemental complaint or order of trial court granting leave to do so, where they were not set forth in the transcript.

3. **Appeal and error 🔑1078(1)—Assignments of errors of law committed in rulings during trial will be presumed not well taken, where not discussed in appellant's brief.**

Assignments asserting that there were errors of law committed in rulings made during progress of trial will not be examined or considered on appeal, where they are not discussed in appellant's brief, but it will be presumed that no error was made.

4. **Pleading 🔑22—Complaint to quiet title, setting forth deraignment of title and also alleging ownership, held not redundant.**

Complaint to quiet title to mining property, which set forth location of mining claim, posting of notices, recording of notices that plaintiffs were citizens of United States, and also alleged that plaintiffs owned property, *held* not redundant because setting forth deraignment of title in addition to alleging ownership.

5. **Quieting title 🔑35(2)—Allegations in complaint to quiet title, setting forth deraignment of title held not to limit or control allegation of ownership.**

In action to quiet title to mining property, allegations showing deraignment of title by setting forth location of mining claim, posting of notices, and recording of notices that plaintiffs were citizens of United States, *held* not to limit or control further allegation that plaintiffs owned property.

6. **Appeal and error 🔑1041(5)—Permitting filing of supplemental complaint, if error, held harmless, where matters set forth could have been properly set up by amendment to complaint (Code Civ. Proc. § 464; Const. art. 6, § 4½).**

Permitting filing of supplemental complaint setting up judgment rendered before action commenced, if error under Code Civ. Proc. § 464, *held* harmless, where matters set forth therein could have properly been pleaded by amendment to complaint; there being no miscarriage of justice within the meaning of Const. art. 6, § 4½.

7. **Judgment 🔑948(1)—Plaintiffs seeking to quiet title to mining property did not waive rights under previous judgment quieting title in them, by failing to set up judgment by original complaint.**

That plaintiffs in action to quiet title to mining property did not set up previous judgment quieting title in them by original complaint, but set it up only by their supplemental complaint, *held* not to show waiver of rights secured by this judgment, notwithstanding Rev. St. U. S. § 2326 (30 USCA § 30), since such judgment could be introduced in evidence even if not pleaded at all.

8. **Pleading 🔑280—Allegations in answer to original complaint that defendant owned land were to be disregarded, where answer to supplemental complaint admitted plaintiffs' ownership.**

Where answer to original complaint in action to quiet title alleged that defendant was owner of land, but answer to supplemental complaint admitted that plaintiffs were owners thereof, allegations of ownership in first answer could not be considered.

9. **Pleading 🔑349—Where answer in action to quiet title admitted conclusiveness of previous judgment quieting title in plaintiffs, court was bound to grant judgment on the pleadings.**

Where supplemental complaint in action to quiet title to mining property set forth previous judgment quieting title in plaintiffs as conclusive, and answer thereto admitted conclusiveness of judgment, plaintiffs were entitled to judgment on the pleadings.

10. Pleading ⚷238(2)—Denying leave to file amended answer held not error, where defendant failed to comply with statute requiring that notice be given adverse party (Code Civ. Proc. § 473).

Trial court did not abuse discretion in denying motion for leave to file amended answer to supplemental complaint where defendant failed to comply with Code Civ. Proc. § 473, requiring notice of such motion to be given to adverse party.

In Bank.

Appeal from Superior Court, Nevada County; J. B. Landis, Judge.

Action to quiet title to mining property by J. H. Stark and others against Eleonore E. Hoeft, who alleged ownership. From a judgment on the pleadings in favor of plaintiffs, defendant appeals. Affirmed.

For opinion of the District Court of Appeal, see 260 P. 316.

John T. Hennessy and Lynne Kelly, both of Grass Valley, for appellant.

Dozier, Kimball & Dozier, of San Francisco, for respondents.

PER CURIAM. In this action, the trial court gave judgment upon the pleadings in favor of the plaintiffs, and the defendant appealed from the judgment. The judgment was affirmed by the District Court of Appeal, Third Appellate District, Plummer, J., writing the opinion. Because of the earnest insistence of appellant, in her petition for a hearing by this court, that the District Court of Appeal had failed to notice certain allegations of her answer, the cause was ordered transferred to this court for further consideration. Upon a careful examination of the entire record, however, we adopt the opinion of the learned justice of the District Court of Appeal heretofore filed herein, as follows:

Appellant filed an application for a United States patent to certain mining ground situate in Washington mining district, Nevada county, state of California, located and known as Lucky Strike and Lucky Strike Extension mining claims. To this application the respondents filed a protest within the time as provided by law. In pursuance of said protest and in compliance with the law relating thereto, the plaintiffs began this action to quiet title to certain mining property claimed by the respondents and included within the exterior boundaries of the mining premises claimed by the appellant under her application for patent as the Lucky Strike and Lucky Strike Extension mining claims. The mining premises or claims alleged to be owned by the respondents bear the following names: Quartz and Asbestos, January Quartz, The Cotton King Asbestos Quartz, Asbestos Quartz, and Lent Asbestos and Gold mining claims. The right of possession to this mining ground appears to have been determined adversely to the appellant on January 2, 1920, by a judgment then entered in the superior court of Nevada county in an action where the respondents and their predecessors in interest were defendants, and where the appellant in this action was plaintiff. After the filing of the complaint in this action and the answer of the defendant thereto, the plaintiffs, by leave of the court, in a pleading called a supplemental complaint, set forth the fact of the entry of the judgment herein referred to, and that all proceedings relating to the settlement of a bill of exceptions to be used on appeal from said judgment, had been dismissed. To this supplemental complaint the appellant filed a motion to strike out the whole thereof, and also certain paragraphs thereof, and also demurred thereto. Appellant's motion was denied, and her demurrer overruled. Thereupon an answer was filed by the appellant to the supplemental complaint. After appellant's answer to respondents' supplemental complaint had been filed in this action, the respondents moved the court, upon notice for judgment on pleadings. The trial court granted judgment upon the pleadings in favor of the respondents herein. From this judgment the defendant appeals.

The supplemental complaint sets forth the fact: That a complaint in this action was filed in the office of the clerk of the superior court of Nevada county, on the 19th day of January, 1924. That at the time of the filing of said complaint there was pending in the above-entitled court the action to which we have herein referred, where the defendant in this action was plaintiff and the plaintiffs in this action were defendants. That said action was numbered 4726. That on the 19th day of January, 1924, there was pending and undetermined a proceeding instituted by the plaintiff therein to obtain a bill of exceptions on her appeal from the judgment theretofore duly rendered and entered in said action No. 4726. That since the filing of the complaint in the above-entitled action, and on the 26th day of February, 1924, an order was duly made and entered in said action No. 4726 that the said proceedings of the said plaintiff to obtain a bill of exceptions on appeal from said judgment in said action No. 4726, be dismissed. That no appeal has been taken from said last-mentioned order dismissing said proceeding for bill of exceptions, and the said order has become, since the filing of the complaint herein, final, and is now a final order. The supplemental complaint then proceeds to allege the entry of judgment in action No. 4726, wherein it is adjudged and decreed that the defendant in this action possessed no title or interest in and to the mining premises described therein which are alleged to be the same premises set forth and described in the defendant's answer in this action, and also set forth the fact that the defendant in this action was not entitled to have her claim or title to said premises quieted as against the plaintiffs in this action, and that the rights of the plaintiffs in this action to said premises are and were superior to the claim of the defendant herein, and that by reason of said judgment the defendant in this action is estopped from claiming or asserting any right, title or interest in or to said mining property.

[1] As stated herein, the defendant interposed a motion to strike out said supplemental complaint, and also certain portions thereof. This motion was denied. The defendant also demurred to said complaint, which demurrer was overruled. Thereupon the appellant herein filed her answer to said supplemental complaint. Upon this appeal it is first argued that the court erred in denying the appellant's motion to strike out the supplemental complaint filed by the respondents, as herein stated. An examination of the record, however, shows that no exception was taken by the defendant to the order of the court denying the defendant's motion to strike, and for this reason, if for no other, the alleged error of the court is not before us for determination.

[2] Section 647 of the Code of Civil Procedure specifies what action on the part of the trial court is excepted to. It may be further stated that the petition for leave to file a supplemental complaint and the order of the court granting leave to file a supplemental complaint, are not set forth in the transcript, and therefore cannot be considered herein. By a reference to section 647 of the Code of Civil Procedure, which it is not necessary to set forth herein, it will be seen that, in order to avail herself of any error upon the part of the court in relation to the order refusing to strike out the supplemental complaint, an exception should have been taken thereto. This matter was before the court in the case of Davies v. Ramsdell, 40 Cal. App. 424, 181 P. 94. It was there held, quoting from the syllabus:

> "An order refusing to strike out a pleading, or a portion thereof, is not an order deemed excepted to under section 647 of the Code of Civil Procedure, therefore, in order that the objection may be urged on appeal, an exception must be taken at the time the decision is made."

[3] Appellant, in relation to the demurrers interposed by her, sets forth the following: Neither the demurrer to the original complaint nor the demurrer to the so-called supplemental complaint, was waived by appellant's filing answers thereto, and the sufficiency of respondents' said pleading is now before this court for determination—citing Reynolds v. Lincoln, 71 Cal. 183, 9 P. 176, 12 P. 449, to the effect that a demurrer is not waived by filing an answer. Appellant then continues:

> "This applies to the special grounds of demurrer as well as to the general demurrer to the supplemental complaint, which cannot, of course, be waived."

[4, 5] It has been frequently held that assignments of errors of law committed in rulings made during the progress of the trial, which are not discussed in appellant's brief, will not be examined or considered upon appeal, but it must be presumed that no error exists under such rulings. Bell v. Southern Pacific R. R. Co., 144 Cal. 560, 77 P. 1124; Pigeon v. Fuller, 156 Cal. 691, 105 P. 976; Born v. Castle, 175 Cal. 680, 167 P. 138; Frazier v. David, 187 Cal. 724, 204 P. 17. Notwithstanding that there has been no discussion of the alleged errors and no reasons pointed out showing merit in appellants' demurrer, we have examined this complaint in this action and also the supplemental complaint, or the paper called the supplemental complaint. It satisfactorily appears from the plaintiffs' complaint that the complaint in this action substantially follows and sets forth all the facts necessary to constitute a cause of action entitling the plaintiffs to maintain the same in an action to determine their title thereto and any adverse claims of the defendant. The complaint sets forth the location of the mining claim, posting notices, recording notices that the plaintiffs are citizens of the United States, and also alleges ownership of the property. None of these matters are subject to a motion to strike out for redundancy, nor does their presence in the complaint limit or control the allegation of ownership. The objection is made that the plaintiffs have in their pleading set forth their deraignment of title, and that the deraignment of title so set forth is contrary to the allegation of ownership. Some of the cases cited by appellant, such as Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 45 P. 1047, do state that in an action to quiet title plaintiff is not bound to show the source of his title in the complaint, but, as respondents herein say, such a holding is far from deciding that such special facts should be stricken out from the complaint or that such facts limit or controvert an allegation of ownership. It would serve no useful purpose to set forth extensively the allegations of the complaint herein, and we will content ourselves with saying that the complaint complies with the text found in Lindley on Mines (3d Ed.) § 754, p. 833, and the cases there cited.

[6] It is next urged that under section 464, Code of Civil Procedure, a supplemental complaint is improper herein and must be disregarded; that the facts set forth in the supplemental complaint should have been plead-

ed in the original complaint. We are inclined to the opinion that the paper styled a supplemental complaint should have been filed as and named an amendment to the original complaint. It is not quite certain from the pleadings as to whether there was or was not any appeal pending in action No. 4726 referred to in the pleadings; the supplemental complaint simply shows that the proceedings to dismiss the application for a bill of exceptions culminated after the filing of the original complaint. But whether the court erred or did not err in permitting the plaintiff to file the pleading called a supplemental complaint, we think that there has been no miscarriage of justice by reason of the ruling of the court granting permission to the respondents to file the pleading called the supplemental complaint, rather than filing the pleading as and named an amendment to the complaint on file in the action. There is no question in our minds that the matters set forth in the pleading called the supplemental complaint would constitute a proper amendment to the complaint in this action. It therefore follows that under section 4½ of article 6 of the Constitution the error of the court, if any, has not resulted in a miscarriage of justice. The plaintiffs in this action had a final judgment against the defendant determining the rights of the parties to the premises involved, and therefore, no matter what name might be given to the pleading as filed, it did not result in a miscarriage of justice.

[7] It is next argued that, by reason of the failure of the respondents to include in their original complaint herein allegations in relation to the judgment obtained by them in action No. 4726, whatever rights they had thereunder were waived. To support this, our attention is called particularly to section 2326 of the United States Revised Statutes (30 USCA § 30) which, in relation to this subject, reads as follows:

> "It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same, with reasonable diligence, to final judgment; and a failure so to do shall be a waiver of his adverse claim."

There is no mention in this section which bears upon or has any relevancy to what constitutes, or the different facts or right or title to be set forth as an adverse claim. Had no reference been made to the judgment mentioned in the respondents' supplemental complaint in any of the pleadings, the former judgment obtained by the plaintiffs would nevertheless have been admissible in evidence. In Kipp v. Reed, 183 Cal. 49, 190 P. 363, which was an action to quiet title, it was held, quoting from the syllabus:

> "A person who brings an action to quiet title to certain lands, the title to which has been adjudicated to be in him in a former action against the same defendant, is not estopped from offering in evidence the judgment roll in the former action as a muniment in his chain of title, because he did not plead or rely upon such judgment."

Other citations supporting this statement of the law seem unnecessary. Was it error on the part of the trial court to enter judgment for the plaintiffs upon the pleadings?

[8] As we have stated, paragraph III of the supplemental complaint set forth the judgment favorable to the plaintiffs in this action entered in the same court in which this action was pending, in an action numbered 4726; that in that action it was determined that the mining premises described therein did not belong to the defendant in this action, but that the plaintiffs in this action and their predecessors in interest had a superior right thereto; that the premises described in the defendant's answer in this action as being mining property belonging to her were the same premises involved in action No. 4726, wherein it was determined that appellant had no interest therein. We need not follow further the particular statements contained in paragraph III of the supplemental complaint, further than to state that it shows the entry of such judgment and the finality thereof. The only question to be determined is to ascertain whether the allegations of paragraph III and the other allegations of the plaintiffs' complaint have been denied. The denial of the defendant, as set forth in the transcript, is as follows:

> "Denies that the property referred to in the said judgment in said action No. 4726 is the same property described in paragraph I of the answer of defendant, Eleonore E. Hoeft, now on file in the above-entitled action; and in this behalf this defendant alleges that a portion only of the property described in paragraph I of the answer of this defendant now on file in the above-entitled action is a portion only of the property described and referred to in said judgment in said action No. 4726; that the other property described in paragraph I of said answer of this defendant is not described or referred to in nor affected in any way in said judgment in said action No. 4726; and that the other property described in said action No. 4726 and not described in paragraph I of said answer of this defendant is not claimed by defendant."

The answer then contains the further allegation:

> "Denies that the property referred to in the said judgment in said action No. 4726 is the same property described in paragraph I of the answer of defendant Eleonore E. Hoeft, now on file in the above-entitled action; and in this behalf this defendant alleges that a portion only of the property described in paragraph I of the answer of this defendant now on file in the above-entitled action, is a portion only of the property described and referred to in said judgment in said action No. 4726; that the other property described in paragraph I of said an-

swer of this defendant is not described or referred to in, nor affected in any way by, said judgment in said action No. 4726, and not described in paragraph I of said answer of this defendant is not claimed by this defendant. Except as hereinbefore expressly admitted, denied, and alleged by this defendant, this defendant admits all the other allegations in paragraph III of said supplemental complaint."

[9, 10] A reading of the answer as we have set forth herein shows clearly that no denial is made of the respondents' title to the disputed premises, as determined by the judgment entered in action No. 4726. The affirmative matter contained in the answer to the original complaint alleging that the appellant is the owner thereof must be wholly disregarded, in view of the appellant's admissions of the right and title of the respondents set forth in the supplemental complaint founded upon the judgment just referred to. The force, effect, and conclusiveness of the judgment not being denied, wherein it was determined that the respondents in this action possessed the superior right to the premises involved, the trial court could not do otherwise than grant the motion for judgment on the pleadings. After this judgment had been entered, the appellant made a motion to set aside the judgment, and asked leave to file an amended answer to the plaintiffs' supplemental complaint. This was denied. The record does not show compliance with section 473 of the Code of Civil Procedure. Under such circumstances we cannot say that the trial court abused its discretion. And especially is this true when the granting of appellant's motion to set aside the judgment theretofore entered herein and permitting the filing of an amended answer, would only serve to prolong litigation after a judgment had already been entered in a previous action determining the rights of the parties to the premises involved.

The judgment of the trial court is affirmed.

205 Cal. 93

TELEGRAPH AVE. CORPORATION et al. v. RAENTSCH et al. (S. F. 12819.)★

Supreme Court of California. Aug. 31, 1928.

Rehearing Denied Sept. 27, 1928.

1. Statutes 🔑181(2)—Statute capable of reasonable and certain interpretation without straining will not be given unreasonable and uncertain interpretation.

A statute capable of a reasonable and certain interpretation without being strained will not be given an unreasonable and uncertain interpretation.

2. Landlord and tenant 🔑290(1)—Statute held to authorize action in unlawful detainer for possession of building leased for "term" exceeding tenant's life expectancy (Code Civ. Proc. § 1161; Civ. Code, § 761).

Code Civ. Proc. § 1161, providing that "tenant of real property, for a term less than life, is guilty of unlawful detainer," *held* applicable to estates for years and at will, which are classified in Civ. Code, § 761, as estates for less than life, so as to authorize action in unlawful detainer for possession of building leased for 99 years, as against contention that act applies only to tenancy for term of years less than tenant's life expectancy, as word "term" may well refer to "duration of enjoyment" of estate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Term.]

3. Constitutional law 🔑249—Landlord and tenant 🔑289—Unlawful detainer statute held not unconstitutional as depriving lessee of equal protection in denying right to set-off, counterclaim, or cross-complaint (Code Civ. Proc. § 1161).

Code Civ. Proc. § 1161, which provides uniform, though special and summary, proceeding in unlawful detainer for quick and ready determination of forfeiture of lease, is not unconstitutional as depriving lessee of equal protection of law in denying him right to set-off, counterclaim, or cross-complaint; classification being based on natural and reasonable distinction between such cases, which require prompt hearing and particular form of judgment, and ordinary cases at law or in equity.

4. Landlord and tenant 🔑291(8)—Complaint in unlawful detainer held not demurrable for failure to plead service of notice to pay rent or quit on subtenants not shown to be in default.

Lessor's failure to plead in unlawful detainer that it had served notice to pay rent or quit on all subtenants, who were not shown to be in default, *held* not ground for demurrer.

5. Landlord and tenant 🔑291(6)—Subtenants not in default need not be made defendants in unlawful detainer against tenant.

Subtenants not shown to be in default need not be joined as parties defendant in lessor's action of unlawful detainer against tenant.

6. Landlord and tenant 🔑291(1)—Premature service of notice to pay rent or quit premises did not affect lessor's right to proceed in unlawful detainer under later notice.

That notice to pay July rent or quit premises was served on same day as notice of default, whereas lease authorized lessor to claim forfeiture if rent was not paid within 5 days from service of notice on lessee and 20 days after service of notice on leasehold mortgagee, and another claim of forfeiture for nonpayment of August rent was later served, did not affect lessor's right to proceed in unlawful detainer under subsequent notice served over 20 days after service of claim of default for nonpayment of July rent.

7. Landlord and tenant 🔑291(1)—Validity of lessor's notice to pay rent or quit held not affected by disputed claim of offset for amount owed by lessor as subtenant.

Validity of landlord's notice to pay rent or quit premises was not affected by lessee's disputed claim of offset, based on theory that lessor owed amount, remitted by it, as lessee's subtenant under another name, in absence of showing of reason for remission.

★Rehearing denied.

8. Continuance 🔑26(3)—Refusal of continuance for absence of available witness held not abuse of discretion.

Refusal of continuance for absence of witness, who was available and could have been called by defendant during trial, *held* not abuse of discretion.

9. Landlord and tenant 🔑190(1)—Appointment of receiver in unlawful detainer, who assumes full possession and control of premises, is "eviction," relieving tenant from paying rent during receiver's occupancy.

Appointment of receiver in unlawful detainer, who assumes full possession and control of premises and collects rents from subtenants or removes them from possession, is eviction of tenant, and relieves him from payment of rent during receiver's occupancy; receiver being receiver of landlord as party entitled to possession.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Eviction (Of Tenant).]

10. Landlord and tenant 🔑190(1)—Any act of landlord dispossessing tenant amounts to "eviction," relieving him from paying "rent."

Any act of landlord which results in dispossessing tenant and depriving him of use, occupancy, and enjoyment of premises amounts to eviction, relieving tenant from payment of "rent," which is landlord's right to receive compensation from tenant for benefits accruing to him from his possession and enjoyment of land.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Rent.]

11. Landlord and tenant 🔑314—Defendants' right to redeem by depositing in court amount of judgment in unlawful detainer within five days is substantial one, of which they cannot be deprived by trial court (Code Civ. Proc. § 1174).

Privilege granted every defendant in unlawful detainer proceedings by Code Civ. Proc. § 1174, to redeem by depositing in court amount found due within five days from entry of judgment, is a substantial right, of which he cannot be deprived by any action of trial court.

12. Appeal and error 🔑1073(7)—Inclusion of rentals, accruing during receiver's occupancy, in unlawful detainer judgment, held not reversible error, where defendant failed to pay clerk of court sum admitted to be due (Code Civ. Proc. § 1174).

Erroneous inclusion of rentals accruing during receiver's occupancy of premises in judgment for lessor in unlawful detainer *held* not prejudicial, so as to justify reversal, where defendant did not pay to clerk of court sum admitted to be due under proper judgment, as authorized by Code Civ. Proc. § 1174.

In Bank.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action in unlawful detainer by the Telegraph Avenue Corporation and others against Karl Raentsch and others. Judgment for plaintiffs and defendant Karl Raentsch appeals. Modified, and affirmed as modified.

For opinion of the District Court of Appeal, see 261 P. 1053.

Rehearing denied. CURTIS, J., votes for rehearing.

Marvin C. Hix, of San Francisco, for appellant.

Breed, Burpee & Robinson, of Oakland, for respondents.

Dunn, White & Aiken and Chapman, Trefethen & Chapman, all of Oakland, amici curiæ.

PER CURIAM. The petition of appellant for hearing by this court after decision by the District Court of Appeal, First Appellate District, Division 2, was granted because of the importance and novelty of the questions involved upon the appeal, and to enable this court to make a further study of the points so earnestly argued in the briefs. Upon careful consideration, we are satisfied with the solution of these matters in the opinion heretofore filed herein by the District Court of Appeal, Nourse, J., and adopt said opinion as and for the opinion of this court, as follows:

Plaintiff sued in unlawful detainer to recover possession of a block of property located in the city of Oakland. Trial was had before the court sitting without a jury and resulted in a judgment canceling the lease under which the property was held, awarding possession to the plaintiff and a money judgment against the defendant Raentsch in the sum of $38,583.35. This defendant has appealed from the judgment upon a typewritten record.

The lease in question was executed under date of December 31, 1923, and covered a term of 99 years which specified monthly rentals graduating from $2,475 to $5,000 each month. The lease specified, among other things, that in the event of a default in the payment of rent, continuing for a period of 5 days after written notice thereof served upon the lessee, and continuing for a period of 20 days after written notice thereof served upon any mortgagee of the lease who had given written notice of his mortgage, the lessor might, at his option, declare the term of the lease ended and re-enter the premises.

After the lessee had entered into possession under the lease he executed a mortgage of the lease to the defendant Bird and a second mortgage to the defendant Jensen. The latter gave written notice of his mortgage to the lessor entitling him to notice of nonpayment of rent within the provisions of the lease above noted. The premises were occupied as a public market and sublet to some 50 subtenants. On July 30, 1925, the lessor served upon the lessee and mortgagees a notice declaring a default in the payment of the July rent, amounting to $3,850, and at the same time served upon them the statutory notice to pay the rent alleged to be due or to quit the premises within 3 days. On August 7, 1925, similar notices were served by the lessor touching the nonpayment of rent due for the month of August. On September 1, 1925, notice to pay the rentals for July and August or to quit the premises were served upon the lessee, the mortgagees, and eight of the subtenants. On September 10, 1925, this action was commenced against all these parties who had been served with the notice just mentioned. On September 18, 1925, at the instigation of the plaintiff in the action, a receiver was appointed ex parte who took possession and control of the premises, collected all rents from subtenants which were paid by them and remained in possession until the entry of judgment. After numerous delays the cause was brought to trial on April 19, 1926, and this resulted in a judgment for the plaintiff as above stated. The money judgment represented the sum of $40,700, total rent claimed to have been due, less the sum of $2,116.65, which was voluntarily remitted by plaintiff on defendant's claim that this was not due under a separate defense, which was stricken from the answer during the early course of the trial. Of the sum awarded $29,150 represented the rent which accrued during the occupancy of the receiver.

[1, 2] On this appeal the lessee, who is the only defendant appealing, advances the argument that the court was without jurisdiction to try the action because the Code section relating to proceedings of this nature does not include a tenancy for a 99-year period. The argument is that section 1161, Code of Civil Procedure, providing that "a tenant of real property, for a term less than life, is guilty of unlawful detainer," etc., uses the expression, "term less than life," as applying to a term of years less than the usual expectancy of a man's life. In support of the point it is argued that the expectancy of life being less than 61 years at all events for any male person at any age and less than 45 years for any male person capable of entering into a leasing contract, we must assume that the Legislature intended to apply the provisions of the unlawful detainer act to a tenancy for a term of years less than this term of expectancy. The argument is not sound, because it requires an unreasonable and uncertain interpretation of a statute which without being strained at all is capable of a reasonable and certain interpretation. The word "term" as applied to estates is frequently used as referring to the character of the estate as well as to the time or period of enjoyment. Blackstone, vol. 2, p. 144, says: "Thus the word term does not merely signify the time specified in the lease, but the estate also and the interest that passes by the lease; and therefore the term may expire during the continuance of the time." Lang v. Pacific Brewing Co., 44 Cal. App. 618, 187 P. 81. Section 761 of the Civil Code defines estates in real property in respect to "the duration of their enjoyment" as including estates of inheritance, for life, for years, and at will. The word "term" as used in section 1161, Code of Civil Procedure, might well refer to the "duration of enjoyment" of the estate, and as so interpreted the section would become applicable to estates for years and estates at will, which are expressly classified in section 761 of the Civil Code as estates less than life. As so interpreted the section would have a reasonable and certain meaning and it is such an interpretation which should be put upon it.

[3] The argument is made that section 1161, Code of Civil Procedure, is unconstitutional because it deprives the lessee of equal protection of the law in that, as interpreted by the Supreme Court in Arnold v. Krigbaum, 169 Cal. 143, 146 P. 423, Ann. Cas. 1916D, 370, it denies a defendant in an unlawful detainer action to a set-off, counterclaim, or cross-complaint. The trend of the argument is that this is inequitable and unfair to defendants in proceedings of this character because, in an action by the landlord against the tenant for rent, as well as in an action by the tenant against the landlord for breach of covenant, the defendant may plead a set-off, counterclaim, or cross-complaint and that such defenses may be pleaded in other actions in equity and at law. The argument is without merit because the Code sections relating to unlawful detainer provide a uniform, though special and summary, proceeding for a quick and ready determination of the forfeiture of the lease, and these provisions relate to all actions brought for that purpose. The classification which the Legislature has made cannot be said to be arbitrary or made for the mere purpose of classification, but it is based upon a natural and reasonable distinction between cases of this character, which require prompt hearing and a particular form of judgment, and the ordinary cases at law or in equity.

[4, 5] Failure of the respondent to plead that it had served notice on all the subtenants and to join them as parties to the action was raised by demurrer going to the sufficiency of the complaint. It does not appear that the subtenants were in default, and, if they were not, it would certainly have been futile to have given them notice to pay the rent or quit, and it would likewise have been unnecessary to join them as parties defendant in this action. Tujague v. Superior Court, 69 Cal. App. 35, 39, 230 P. 198.

[6, 7] It is argued that the notices given by the respondent to pay rent or to quit the premises were premature because they were served upon the same day as notice of default of the rent; that these were ineffective because they did not take into account a claim for money due the appellant from the respondent and therefore demanded the payment of rent in excess of the amount due; and that there was no proof that the individual who served the notices was authorized to act for the respondent in that particular. The argument is that inasmuch as the lease provided that the lessor might claim a forfeiture if the rent was not paid within 5 days from the serv-

ice of notice upon the lessee and within 20 days after service of notice upon the mortgagee, that the lessor could not institute proceedings under the unlawful detainer statute until these respective periods had passed. There is little merit in the argument because, if we should assume that the notice to pay rent or quit served on July 28, 1925, was premature, the same could not be said as to the notice to the same purpose served on September 1, 1925. The claim of default for nonpayment of the July rent was sufficient in itself to justify a claim of forfeiture of the lease, and this was served more than 20 days before the service on September 1st of the notice to pay rent or quit the premises. The fact that in the interim another claim of forfeiture because of nonpayment of the August rent was served cannot affect the lessor's right to proceed under the September notice. It is equally clear that the validity of the notice to pay rent or quit the premises is not affected by the claim of offset against the lessor. The notice specified the rent which was due under the terms of the lease. The claim of offset was a disputed claim based upon appellant's theory that the respondent was in fact interested under another name as one of his subtenants and as such owed the appellant the sum of $2,000. The validity of this claim was not tried because the trial court properly ruled that a counterclaim was improper in an action of this nature, but the respondent voluntarily remitted from the judgment the sum of $2,000 in addition to interest thereon. There is nothing, however, in the record to show the reason for the remission of this portion of the judgment, and it does not therefore appear that it should have been deducted from either the July or August rent due from the lessee.

[8] Criticism is made of the action of the trial court in refusing to give the appellant a continuance of the trial of the case on his motion made in open court on the day which had been set for the trial. The ground for the motion was the absence of a witness which appellant claimed to be material in the proof of his case, but it appears that this witness was available and could have been called by the appellant during the course of the trial. No effort was made to call the witness and we are satisfied that the trial court did not abuse its discretion in refusing appellant's motion.

[9] The more serious question is the propriety of that portion of the judgment which awarded to the respondent the full amount of rental claimed to be due under the lease during the period of occupancy by the receiver. The receiver was appointed upon the application of the respondent. The trial court found "that on the 18th day of September, 1925, said receiver did * * * enter into the control and possession of said premises as such receiver and ever since said date has been and now is in control of said premises, as such receiver, and has collected the rents from subtenants of said premises, but no part of said rents has been paid to either plaintiff or defendant. * * *" On the part of the appellant it is claimed that the action of the court in giving the receiver the sole possession and control of the premises was in effect an eviction of the tenant at the instance of the landlord, which automatically stopped the accrual of rental from the tenant under the lease. The facts are undisputed that the receiver did take and hold exclusive possession during the period found by the trial court and that he collected all rents that were paid by subtenants during that period and that he ousted or dispossessed other subtenants from the premises.

It is conceded by all parties that there is no liability on the part of the lessee to pay rent if he is evicted. 36 C. J. § 1113. The respondent argues that the appointment of the receiver was for the benefit of all parties and did not in itself oust the tenant from his right to possession, but the facts of this case, as found by the trial court, do not support the respondent. The jurisdiction of the court to appoint a receiver in proceedings of this nature was added to section 564, Code of Civil Procedure, by an amendment in 1919 (St. 1919, p. 251). There are no California cases which have come to our attention interpreting this amendment to the Code in so far as it relates to the question before us. The great weight of authority from other jurisdictions uniformly supports the doctrine that the appointment of a receiver who assumes full possession and control of the premises in a proceeding of this nature is an eviction of the tenant and relieves him from payment of the rent called for by the lease during the period of the receiver's occupancy. The respondent has not called to our attention any authorities in opposition to this rule, and our own examination satisfies us that the rule is practically uniform.

[10] The rule follows the general principle that any act of the landlord which results in dispossessing the tenant and which deprives him of the use, occupancy, and enjoyment of the premises amounts to an eviction. The reason for the rule is that rent is the landlord's right to receive from the tenant compensation for the benefits that are accruing to the tenant from his possession and enjoyment of the land, and that when the tenant is deprived of this right of possession and enjoyment by the action of the landlord, the right of the landlord to receive compensation automatically ceases. Gilbert, Treatise on Rent, p. 145; Hoeveler v. Fleming, 91 Pa. 322; Palmtag v. Doutrick, 59 Cal. 154, 167, 43 Am. Rep. 245; Veysey v. Moriyama, 184 Cal. 802, 805, 195 P. 662; 16 R. C. L. pp. 684, 948; 36 C. J. 255; 15 Cal. Jur. 679.

It is, of course, true that the appointment of a receiver is not in every instance an ousting of possession of the property over which the receiver exercises control, but where, as here, a receiver is appointed at the instance of the plaintiff in an action in unlawful detainer, the very nature of which is to terminate the tenancy and to place the plaintiff in possession of the property, the receiver in such a case must be treated as the receiver of the party entitled to the possession (Sturgis v. Knapp, 33 Vt. 487, 528), and where, as here, this receiver takes exclusive control and possession of the premises, all of which were occupied by subtenants under separate tenancies, and either collects the rents from such subtenants or removes them from possession, he must be treated as a receiver for the landlord, whose entry into possession is an eviction of the lessee. Mariner v. Chamberlain, 21 Wis. 253, 256.

[11, 12] It follows from what has been said that that portion of the judgment awarding the respondent the sum of $29,150 rentals becoming due under the lease during the receiver's occupancy of the premises was error. The appellant insists that because of section 1174, Code of Civil Procedure, the error demands a reversal of the judgment. The Code section permits the tenant, after judgment adverse to him, to redeem by depositing in court the amount found in the judgment to be due within 5 days from the entry of the judgment, and the same privilege is accorded to any subtenant, mortgagee of the term, or other party interested. This is, of course, a privilege granted to every defendant brought in under proceedings of this nature, and it is a substantial right of which he cannot be deprived by any action of the trial court, but it does not follow from this that because the judgment was excessive in this respect it must be reversed. The appellant might have paid to the clerk of the court the sum which he admitted to be due and owing under a proper judgment, and respondent would then have been called upon to confess the error or take the consequences. Nothing of this kind was done, and it seems evident from an examination of the entire record that the appellant was not concerned in any stage of the proceedings with the protection of his rights under the lease, but that his entire course of action was to delay and hamper the respondent in the conduct of the proceedings. We are satisfied from our examination of the record that the judgment should be modified by striking therefrom the sum of $29,150 and that the inclusion of this sum in the judgment, though error of a substantial kind, would not justify a reversal of the judgment under the facts of this case, because it appears from appellant's conduct that this error did not prejudice his rights in this litigation.

The judgment is modified, by striking $29,150 therefrom, and, as so modified, affirmed, with costs to appellant.

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205 Cal. 144

SUGARMAN IRON & METAL CO. v. MILLER & LUX, Inc. (S. F. 12398.)★

Supreme Court of California. Sept. 1, 1928.

Hearing Denied in Bank Oct. 1, 1928.

Sales ⟹68—Seller of scrap iron authorized to reserve materials for new plant held not liable for boilers reserved, though new plant was abandoned.

Under contract for sale of scrap iron from building destroyed by fire, providing seller's engineers could reserve whatever material they deemed necessary for equipment of contemplated new plant, purpose for which reserved material should be used was incidental to sale of junk material, and, when boilers were reserved by seller in good faith for new plant contemplated at time of reservation, and plaintiff was immediately notified thereof, boilers were removed from operation of contract, and value thereof could not be recovered by purchaser of scrap iron, regardless of delay or abandonment of construction of new plant.

Department 2.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action for damages for breach of contract for sale of scrap iron by the Sugarman Iron & Metal Company against Miller & Lux, Inc. Judgment for plaintiff, and defendant appeals. Reversed.

J. E. Woolley, of San Francisco (Vincent McGovern, of San Francisco, of counsel), for appellant.

Brownstone & Goodman, of San Francisco, for respondent.

SHENK, J. This is an appeal from a judgment for $5,000 in favor of the plaintiff, in an action for damages for the breach of a contract to sell certain scrap or salvage material.

Prior to June, 1925, the defendant maintained and operated a meat packing plant in South San Francisco. The plant was destroyed by fire during that month. At that time the plaintiff was a dealer in scrap iron and metals, with offices in San Francisco. Shortly after the fire, and on June 20, 1925, the plaintiff sent to the defendant a letter submitting an offer to buy "all of the scrap iron, metal, pipe, and machinery, boilers, etc.," which had gone through the fire at the price of $7.50 per ton. This letter also contained the following clause:

> "We also agree to permit your engineers to reserve whatever material they may deem necessary for the equipment of your contemplated new plant."

On the same day the defendant replied by letter accepting the offer. Pursuant to the terms of this contract, the plaintiff, during the months of July, August, and December,

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★Hearing denied in bank.

1925, removed from the premises 991,770 pounds of scrap iron, and paid therefor the sum of $5,275.49. In addition to this material, there were five boilers on the premises which were of a value of $5,000 in excess of their value as junk. The engineers of the defendant reserved these five boilers, together with certain other material not involved herein, but the new plant was not built. The plaintiff made demand for the possession of the boilers, and, the demand having been refused, commenced this action on March 16, 1926. The court found that subsequent to the execution of said agreement, and prior to the filing of the complaint herein, the engineers of the defendant reserved the boilers in question and notified the plaintiff of their intention so to reserve the same; that preliminary plans for said then contemplated plant of the defendant were prepared by tne engineers and architects of said defendant prior to the filing of the complaint.

The court found that eight months was a reasonable time to allow the defendant to build the new plant and thus avoid its obligation to deliver the boilers to the plaintiff. An interlocutory judgment was entered on November 9, 1926, wherein it was provided that, unless the defendant actually installed the boilers in a meat-packing plant within eight months from the date of the interlocutory judgment, the plaintiff would be entitled to judgment against the defendant for the sum of $5,000. As the boilers were not installed in a new plant within the time required, and as it further appeared that the defendant had disposed of its packing plant equipment, including said boilers, a final judgment was entered against the defendant on June 8, 1927. This is an appeal from the final judgment.

It is first contended that the judgment is not supported by the findings of fact. It is urged that, when it was found on undisputed evidence that the engineers of the defendant had reserved the boilers, that at the time such reservation was made a new packing plant was in the contemplation of the defendant, and that prior to the commencement of the action preliminary plans for the new plant had been prepared by the engineers and architects of the defendant, judgment should have been entered for the defendant.

We think the defendant's position must be sustained. When the finding is considered in the light of the contract between the parties and the evidence in support of the finding, it would seem to follow that, when the engineers of the defendant set apart the boilers for its then contemplated new plant, the boilers were removed from the operation of the contract the same to all intents and purposes as if they had never been included therein. The good faith of the defendant in making the reservation of the boilers is not questioned. It was in evidence and undisputed that up to the time of the trial the construction of the new plant had not been abandoned, but that the new enterprise had been delayed on advice of the defendant's bankers. The main purpose of the contract of sale of the damaged material was to permit the plaintiff to purchase the material not usable, in the judgment of the defendant's engineers, for packing plant purposes, it would be entirely unreasonable, to assume that the defendant intended to sell as junk material at $7.50 per ton valuable boilers worth $5,000 over and above the junk price. This doubtless would have been the effect of the contract, in the absence of the provision for the reservation of the usable material. The recited purpose for which the reserved material should be used was plainly incidental to the main feature of the contract, to wit, the sale of junk material. When the boilers were reserved in good faith for a new packing plant in contemplation at the time the reservation was made and the plaintiff was, as here, immediately notified of the reservation, we are unable to conclude that it was any concern of the plaintiff as to what later caused a delay or abandonment of the contemplated new plant.

The judgment is reversed.

We concur: RICHARDS, J.; LANGDON, J.

93 Cal. App. 722

KENNARD v. KEELER. (Civ. 6338.) ★

District Court of Appeal, First District, Division 2, California. Aug. 30, 1928.

Rehearing Denied Sept. 26, 1928. Hearing Denied by Supreme Court Oct. 29, 1928.

1. Contracts ⟹319(1)—Judgment allowing partial recovery for constructing plant held error, where contract was entire, and court found plaintiff abandoned plant after performing 80 per cent. of work.

In action to recover for services rendered under written contract of employment by plaintiff, agreeing to take charge of construction of plant for percentage of total cost, judgment allowing plaintiff partial recovery was error, where court found that plaintiff abandoned plant after performing 80 per cent. of work, and where contract on its face was entire, and not separate as to any part, and plaintiff declared on contract as entire and completely executed agreement.

2. Trial ⟹404(2)—Finding that contract sued on was severable held conclusion of law, not finding of fact.

In action on contract of employment, finding that contract was severable was not finding of fact, but conclusion of law.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by E. H. Kennard, doing business under the fictitious firm name and style of

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★Rehearing denied. Hearing denied by Supreme Court.

the Kennard Engineering Company, against Frederick E. Keeler, individually and doing business under the fictitious firm name and style of the American Grinding Company. Judgment for plaintiff, and defendant appeals. Reversed.

Hearing denied by Supreme Court: RICHARDS and SHENK, JJ., voting for a transfer.

Ben S. Hunter, of Los Angeles, for appellant.

John L. Flynn, of Los Angeles, for respondent.

STROTHER, Justice pro tem. This is an appeal from a judgment for money found to be due plaintiff for services rendered to defendant under a written contract of employment for the construction of a grinding plant. The appeal is taken upon the judgment roll alone, on the ground that the judgment is not supported by the findings.

Plaintiff agreed to "take charge of all construction, supervising the installation of all machines and other equipment, employ the men, attend to the purchasing of material, equipment, and supplies in accord with your wishes, and, in general, direct construction of your plant, for a fee of 5 per cent. of the total cost of the plant; it being understood that the cost will include all labor, material, equipment, and supplies used in the plant." The agreement also provided that all bills and wages should be paid by defendant, and payments made on account of plaintiff's fee at the end of each month on total expenditures.

The complaint alleges complete performance of plaintiff's agreement, that the total cost was $80,000, that the fee was $4,000, of which $1,000 had been paid, and asks judgment for the balance of $3,000. The defendant answered that plaintiff did not complete the work contracted for, but abandoned it when only partially completed, and before the installation of the machinery. The answer also set up a counterclaim which it is not necessary to consider here.

[1] The court found that the total cost of the plant was $80,000, and that plaintiff had abandoned it after performing 80 per cent. of the work, or $64,000 worth; that a payment of $1,000 on account of the fee had been made by defendant. As a conclusion of law the court found that plaintiff was entitled to recover the sum of $2,200, and judgment was ordered accordingly and thereupon entered.

The contract, upon its face, was entire. There is nothing in it to indicate that the parties considered any part or parts of its performance as a separate item or items which might be considered apart from the completely equipped structure. "All" of the various classes of work that went to the making of the completed plant were to be taken charge of and supervised by plaintiff, and his compensation was based upon the "total cost" of the plant. Plaintiff declared upon it as an entire and completely executed agreement.

[2] The court in its findings of fact recited merely, "that the contract herein referred to as Exhibit A and the basis of plaintiff's action against these defendants is severable." This is not a finding of fact, but a conclusion of law. The court found no facts from which that conclusion could be drawn, and there is nothing in the pleadings from which it might be assumed that evidence of such facts was before the court.

For the reasons stated, the judgment is reversed.

We concur: KOFORD, P. J.; NOURSE, J.

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93 Cal. App. 654

CASTRIOTIS v. CUMMINS. (Civ. 5817.)

District Court of Appeal, Second District, Division 1, California. Aug. 25, 1928.

1. Action ⟹48(1)—Causes of action for breach of promise to marry and to recover damages for fraud arose out of same transaction, and were properly joined (Code Civ. Proc. § 427).

Under Code Civ. Proc. § 427, authorizing joinder of claims arising out of same transactions or transactions connected with same subject of action, causes of action for breach of promise to marry and to recover damages for fraud, whereby defendant obtained property from plaintiff, *held* to arise out of same transaction, and were properly joined in complaint.

2. Appeal and error ⟹768—Date of commencement of action, stated in appellant's brief and not denied, will be assumed to be conceded fact on appeal.

Date of commencement of action, as stated by appellant in brief and not denied by statement of counsel for respondent, will be assumed on appeal to be conceded fact.

3. Pleading ⟹18—Complaint for breach of marriage promise, alleging oral and written promises and renewal thereof, held sufficiently certain as regards renewal.

Complaint for breach of promise to marry, alleging promises were made both orally and by way of written communications, and that same promise was renewed at subsequent dates, *held* in effect to allege that defendant repeated previous statement of promises, and was sufficiently certain as regards renewal of promise to marry; contract not being required to be in writing.

4. Pleading ⟹18—Complaint for breach of marriage promise should be considered in light of defendant's knowledge of allegations in determining uncertainty.

Complaint for breach of promise to marry should be considered in light of nature of allegations referring to facts which necessarily would be within knowledge of defendant, as respects objection of ambiguity or uncertainty.

5. Limitation of actions 🔑141—Action for breach of marriage promise, commenced within year and three months of last renewal of marriage promise, held not barred by limitations (Code Civ. Proc. § 337, subd. 1; § 338, subds. 3, 4; § 339, subd. 1; § 343).

Where complaint for breach of promise to marry alleged mutual promise to marry made in December, 1917, which promise was renewed on certain specified dates, the latest of which was July 22, 1923, action commenced September 8, 1924, was not barred by limitations under Code Civ. Proc. § 337, subd. 1, section 338, subds. 3, 4, section 339, subd. 1, and section 343.

6. Limitation of actions 🔑100(1)—Complaint for fraud in promises to marry, commenced within year after discovering fraud and last renewal of marriage promise, held not barred by limitations (Code Civ. Proc. § 337, subd. 1; § 338, subds. 3, 4; § 339, subd. 1; § 343).

Where complaint to recover damages for fraud whereby defendant obtained property from plaintiff by promises of marriage, alleged mutual promises to marry in December, 1917, and renewal thereof from time to time until September, 1923, and that plaintiff did not discover defendant's fraud until September 13, 1923, action commenced September 8, 1924, was not barred by limitations, under Code Civ. Proc. § 337, subd. 1, section 338, subds. 3, 4, section 339, subd. 1, and section 343.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Alexander Castriotis against Margaret Cummins, sometimes known as Madge Cummins. Judgment for defendant, and plaintiff appeals. Reversed.

Samuel A. Rosenthal and Benjamin Chipkin, both of Los Angeles, for appellant.

Porter & Sutton, of Los Angeles, for respondent.

CONREY, P. J. Judgment was entered in favor of the defendant, pursuant to an order sustaining demurrer to sixth amended complaint without leave to amend. The plaintiff appeals.

The first count is upon a cause of action to recover damages for breach of promise of marriage. The second count is upon a cause of action to recover damages for fraud and deceit through and by means of which the defendant obtained from the plaintiff certain large sums of money and other personal property.

The demurrer to the first count of the complaint was made upon the ground that said count did not state facts sufficient to constitute a cause of action; that several causes of action were improperly united in the complaint; that the alleged cause of action is barred by the provisions of certain stated sections of the Code of Civil Procedure; that the said count is ambiguous for certain stated reasons; likewise that said count is uncertain for the same reasons. The demurrer to the second count of the complaint is like the first, except that additional grounds of ambiguity and of uncertainty are stated.

In the brief filed on behalf of appellant the various phases of the action as stated in the complaint are discussed, under ten different points, for the purpose of showing that the complaint was not properly subject to any of the objections contained in the demurrer. In answer thereto, respondent has been content to rely upon these two propositions: First, that there is in the complaint a misjoinder of causes of action, in that an action ex contractu has been improperly united with an action ex delicto; and, second, that the second cause of action is barred by the following provisions of the Code of Civil Procedure: Section 337, subd. 1, section 338, subds. 3 and 4, section 339, subd. 1, and section 343.

[1] It is provided by section 427, Code of Civil Procedure, that—

> "The plaintiff may unite several causes of action in the same complaint where they all arise out of: * * * 8. Claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section."

The causes of action stated in the two counts of this complaint manifestly arose out of one and the same transaction, and they were not both included within any one of the other subdivisions of the section. We are satisfied there was no improper joinder of the two causes of action.

[2-4] The transcript does not show the date of commencement of the action. But, since counsel for appellant in their brief state that the action was commenced in the year 1924 and do not deny the statement of counsel for respondent that the date of commencement of the action was September 8, 1924, we assume that this last statement is a conceded fact. According to the first count of the complaint, the first alleged mutual promise to marry between plaintiff and defendant was made in July, 1919, and the defendant "renewed her promise to marry" the plaintiff from time to time, and particularly upon certain specified dates, of which the latest was July 22, 1923. According to the second count of the complaint, the first of the alleged mutual promises to marry was made in December, 1917, and the same were likewise renewed from time to time until September, 1923. It is alleged in the first count that on September 13, 1923, plaintiff demanded that the defendant "live up to her promise to marry him," and that

the defendant refused to marry him, and that this was his first knowledge of her refusal to marry him. The second count alleges that, at the time when defendant made her first and original promise to marry the plaintiff, to wit, in December, 1917, and continuously thereafter, she had no intention of marrying plaintiff, but that the plaintiff first discovered this fact on September 13, 1923, that prior thereto plaintiff was unable to discover said fraud, and particularly that defendant concealed her fraud until said 13th day of September, 1923. It is alleged that, during the period of time covered by said engagement to marry, plaintiff, relying upon said promise of defendant, gave to her the several large sums in money and jewelry, etc., as set forth in detail in the complaint.

One of the grounds of demurrer for ambiguity and for uncertainty, as stated in the demurrer, is that it is not shown in what manner or by what words, whether written or oral, the defendant "renewed" her said promise to marry. The statement in the complaint is that said promises were made "both orally and by way of written communications." We think that this was sufficiently certain. The contract was not one which the law required to be in writing. Where it was alleged in a pleading that, at the time of the renewal of certain notes, the agents of a bank holding the notes "then and there ratified and confirmed" certain statements and representations, it was held that this was not merely an allegation of a conclusion, but was an allegation, that the agent of the bank, in effect, repeated the previous false statements of the other agents to whom reference had been made. Edmonds v. Wilcox, 178 Cal. 222, 224, 172 P. 1101. So here, where it was alleged that a certain promise was made, and was then alleged that the same promise was renewed at the subsequent dates named in the complaint, this was in effect an allegation that the defendant repeated the previous statements of promises which had been made by her. Likewise we think that the complaint should be considered in the light of the nature of the allegations, which all refer to facts which necessarily would be within the knowledge of the defendant, and therefore the uncertainty, if any there was, in the form of the allegations would create no difficulty for defendant in the making or verification of her answer. Harvey v. Meigs, 17 Cal. App. 353, 365, 119 P. 941.

[5, 6] We are satisfied that the plaintiff's action as pleaded is not barred by any of the provisions of the statute of limitations.

The judgment is reversed.

I concur: HOUSER, J.

YORK, J., deeming himself disqualified, takes no part in this decision.

MEMORANDUM DECISIONS

1 93 Cal. App. 369

PEOPLE of the State of California, Plaintiff and Respondent, v. Victorino MADRANO, Defendant and Appellant. (Cr. 1039.) District Court of Appeal, Third District, California. July 30, 1928. Appeal by defendant from a judgment of the Superior Court of Tuolumne County, J. T. B. Warne, Judge, of conviction of murder of the second degree and from an order denying motion for new trial. J. C. Webster, of Sonora, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted in the superior court of Tuolumne county of a felony, to wit, the crime of murder of the second degree. The transcript on appeal was filed in this court May 26, 1928. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on July 30, 1928. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

2 93 Cal. App. 441

PEOPLE of the State of California, Plaintiff and Respondent, v. John MANNERSTAN, Defendant and Appellant. (Cr. 1477.) District Court of Appeal, First District, Division 2, California. Aug. 4, 1928. Appeal by defendant from a judgment of the Superior Court of Alameda County, Leon E. Gray, Judge, of conviction under the firearms act, and from an order denying motion for new trial. Affirmed. Harris & Sullivan, of Oakland, for appellant. U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was tried before a jury upon an information charging a violation of chapter 552 of the Statutes of 1927 (Deering's Codes and General Laws 1925–1927, act 1971). This act proscribes as a felony the possession of a firearm of the kind commonly known as a machine gun, excepting by a member of the police department or other public official, possessing such firearm for official use in the discharge of his duties. The jury returned a verdict of guilty as charged in the information, and from the judgment on the verdict, and from the order denying his motion for a new trial, the defendant has appealed upon a typewritten record. The transcript on appeal was filed in this court April 17, 1928, and the cause placed upon the regular term calendar for argument May 21, 1928. At that time, no brief having been filed on behalf of the appellant, his counsel was given five days' additional time to file a brief, and, though this time has long since expired, no brief has been filed. Notwithstanding this failure of appellant to prosecute his appeal, we have examined the typewritten record, and find the evidence of guilt to be convincing and without conflict, that the defendant was given a fair and impartial trial, and that the record is free from error. Judgment and order are affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

93 Cal. App. 495

In the Matter of the Application of Merrell E. THOMAS for a Writ of Review. Merrell E. THOMAS, Plaintiff and Appellant, v. BOARD OF OSTEOPATHIC EXAMINERS OF THE STATE OF CALIFORNIA and W. W. Vanderburgh, Lester R. Daniels, Albert V. Kalt, Henry F. Miles, and Charles H. Spencer, Defendants and Respondents. (Civ. 6355.) District Court of Appeal, First District, Division 2, California. Aug. 15, 1928. Appeal by plaintiff from a judgment of the Superior Court, City and County of San Francisco, George H. Cabaniss, Judge, in an action to review an order of the Board of Osteopathic Examiners revoking petitioner's license to practice. Affirmed. Clarence W. Morris and Hugh F. Keon, Jr., both of San Francisco, for appellant. Otis D. Babcock, of Sacramento, for respondents.

STURTEVANT, J. A proceeding was commenced before the Board of Osteopathic Examiners to obtain a judgment revoking the certificate and license of the petitioner authorizing him to practice osteopathy. It was alleged that the petitioner had violated the provisions of subdivision 12, section 14, chapter 354, of the Statutes of 1913. Thereafter the Board of Osteopathic Examiners held a trial. Evidence, both oral and documentary, was introduced, and the matter was submitted to the board for its determination. The board made findings against this petitioner and caused to be entered in its records an order revoking the license of the petitioner. Thereafter the petitioner applied to the superior court for a writ of review. An alternative writ was issued and thereafter a full hearing was had on said application. The trial court denied the petitioner a peremptory writ and affirmed the proceedings had before the Board of Osteopathic Examiners. From the judgment of the trial court the petitioner has appealed. In his brief he has set forth apparently a transcript of the proceedings had before the Board of Osteopathic Examiners. Having done so, he argues that the evidence is not such testimony as would be received in a court of law, that one of the witnesses had made inconsistent statements, and that apparently adverse evidence was fully explained. Thereupon the petitioner claims that the trial court erred. The record shows no error whatever on the part of the trial court. The petitioner contends that there was no evidence before the Board of Osteopathic Examiners supporting the jurisdictional facts, that the trial court should have so held, and that there is no evidence in the record upholding the implied finding by the trial court that there was such evidence before the Board of Osteopathic Examiners. The contention cannot be sustained. The basic statute is chapter 354 of the Statutes of 1913. Section 14 was amended by chapter 598 of the Statutes of 1921. Among other things, section 14 deals with what is unprofessional conduct and authorizes the revocation of a license for the violation of the provisions of the statute. Subdivision 12 of section 14, as so amended, is as follows: "The employment of 'cappers' or 'steerers' or other persons in procuring practice for a practitioner for a system or mode of treating the sick or afflicted provided for in this act." The provisions of that statute were carefully pleaded in a complaint filed before the Board of Osteopathic Examiners. A reading of the transcript of proceedings shows that there was an abundance of evidence before the board sustaining every allegation contained in the complaint. The findings made by the trial court are sustained by the evidence. The judgment is affirmed.

We concur: BUCK, P. J. pro tem.; NOURSE, J.

CALIFORNIA REPORTER

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205 Cal. 158

LEWIS v. GRUNBERG et al. (Sac. 3886.)

Supreme Court of California. Sept. 4, 1928.

1. Appeal and error 🔑519—Stipulation and order relative to submission of case to referee, not embodied in bill of exceptions or transcript, cannot be considered (Code Civ. Proc. §§ 650, 953a).

Where neither stipulation nor order that case be submitted to referee to try all issues and report finding and judgment thereon were embodied in bill of exceptions as provided by Code Civ. Proc. § 650, nor in transcript as provided by section 953a, reviewing court cannot consider either stipulation or order.

2. Appeal and error 🔑967(1)—Reference is presumed special unless it may be inferred from recitals in findings of referee and court that it was general (Code Civ. Proc. §§ 638–645).

Unless it may be properly inferred from recitals in findings of referee and those of court that reference to referee was general in character, it must be presumed that it was special reference for benefit of court under Code Civ. Proc. §§ 638–645.

3. Reference 🔑99(2)—Reference held general, in view of its recitals and fact that court had no evidence before it.

Reference *held* general, where referee recited as part of findings that he was appointed to find upon both questions of law and fact, and it was clear from court's findings that there was no trial held by court and no evidence taken by it and that court did not have before it evidence submitted to referee.

4. Reference 🔑99(2)—Where reference was general, judgment must be entered in accordance with referee's findings; aggrieved party's remedy for referee's error being motion for new trial (Code Civ. Proc. § 644).

Where reference was general in nature, judgment should be entered on findings of referee filed in cause, in accordance with such findings, pursuant to Code Civ. Proc. § 644, and, for any error committed by referee, remedy of aggrieved party was by motion for new trial or other appropriate proceeding.

In Bank.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by J. A. Lewis against A. W. Grunberg and another, copartners doing business under the firm name and style of Grunberg & Anderson, to recover money due under a contract for the purchase of merchandise. Judgment for plaintiff, and defendants appeal. Modified, and, as so modified, affirmed.

For opinion of the District Court of Appeal, see 262 P. 1103.

J. Oscar Goldstein, of Chico, for appellants.
Bond & Deirup, of Chico, for respondent.

PER CURIAM. The petition of respondent for a hearing by this court after decision by the District Court of Appeal in and for the Third Appellate District, reversing the judgment of the trial court, with directions, was granted, and this court has considered the points and authorities presented by petitioner in support of his position, and has reached the conclusion arrived at by the said District Court of Appeal, Burroughs, Justice pro tem., writing the opinion, which opinion is hereby adopted as and for the opinion of this court, as follows:

January 10, 1922, plaintiff and defendants entered into a written contract whereby the plaintiff agreed to sell and defendants agreed to buy a stock of merchandise. February 1, 1922, the parties entered into a supplemental contract concerning the same subject-matter. A dispute having arisen between the parties as to the proper construction to be given the contracts as to the price to be paid for the merchandise, and being unable to reach an adjustment of the controversy, this action was commenced by the plaintiff to recover the sum of $5,265.40, together with interest thereon at the rate of 7 per cent. per annum from the 15th day of February, 1922, being the amount claimed by the plaintiff as due under the terms of said contract.

Defendants admit by their answer that there is due the plaintiff the sum of $3,814.23, and no more.

By its judgment, the court awarded the plaintiff the sum of $4,857.74, together with interest thereon at the rate of 7 per cent. per annum from April 1, 1922, and from the judgment so entered the defendants appeal.

The appeal is upon the judgment roll alone. As a part of the judgment roll there appears a report and findings of fact by a referee, which, among other matters, recites:

> "Pursuant to order of reference duly made and filed in the above-entitled action, wherein the undersigned, L. G. Faulkner, Esq., was duly appointed referee with direction to find upon matters of both law and fact, and, after hearings duly held under and by authority of said reference at the city of Chico, county of Butte, state of California, before said referee and all matters and things having been presented in due form and according to law by Bond & Deirup, Esqs., attorneys for plaintiff, and by J. Oscar Goldstein, Esq., attorney for defendants, and all witnesses having been called were duly sworn and testified. Now therefore, the evidence submitted to your referee having been duly considered by him, the said referee begs leave to submit his report as follows: Findings of law and facts upon trial of the issues involved."

While the said findings and conclusions of law therefrom are inartistically drawn, still they respond to the issues raised by the pleadings and the referee recommends a judgment in favor of the plaintiff and against the defendants in the sum of $3,439.76, with interest thereon at the rate of 7 per cent. per annum from the 15th day of February, 1922, together with their costs of suit.

June 30, 1922, the court filed its findings and conclusions of law in this cause, in which it finds that the defendants are indebted to plaintiff in the sum of $4,857.74, with interest thereon at the rate of 7 per cent. per annum from April 1, 1922, and for his costs of suit.

Judgment was accordingly entered by the clerk on July 6, 1922, in favor of the plaintiff for said last-mentioned amount. In its findings the court recites:

> "The above-entitled action came on regularly for hearing before the above-entitled court sitting without a jury, a jury having been waived by the respective parties hereto. Plaintiff was represented by Messrs. Bond & Deirup, his attorneys, and defendants by J. Oscar Goldstein, Esq., their attorney. The cause was heard upon the amended complaint, as amended, and the answer thereto, as amended, and upon the report of L. G. Faulkner, Esq., the referee heretofore appointed herein, the exceptions filed by the plaintiff, and the motion of the defendants to confirm the report, which motion was based and made upon the said report and upon all the files, records, pleadings, proceedings, exhibits, and all other matters pertaining to this cause, and the matter having been argued and submitted to the court for consideration and decision, and the court being fully advised in the premises, now finds."

The appellants complain that, the order of reference having been that the referee find upon questions of both law and fact, and the referee having done so, the court was without authority to set aside the findings of said referee and substitute its own therefor. In other words, it is their contention that the findings and conclusions of the referee have the same force and effect as though made by the court and judgment should have been entered in accordance therewith.

Respondent contends that there is nothing legally before the court from which it may determine the character of the order of reference, and that it must be presumed, in the absence of an affirmative showing of error, that the court acted within its authority, and that the said order of reference was special and not general in its nature.

There appears in the clerk's transcript a stipulation signed by all the attorneys that the cause be ordered to a referee "to try all of the issues in the above-entitled action, whether of fact or of law, and to report a finding and judgment thereon."

In pursuance of said stipulation there appears in said transcript an order signed by the judge of the court appointing L. G. Faulkner, Esq., a referee "to try all of the issues in this action, whether of fact or of law, and to report a finding and judgment thereon."

[1, 2] As neither the stipulation nor the order is embodied in a bill of exceptions, as provided by section 650, Code of Civil Procedure, nor in a transcript, as provided by section 953a of said Code, this court cannot consider either said stipulation or order (Totten v. Barlow, 165 Cal. 378, 132 P. 749; Richmond v. Julian Con. Min. Co., 176 Cal. 600, 169 P. 356), and, unless it may be properly inferred by the court from the recitals in the findings of the referee and those of the court that the reference was general in its character, it must be presumed that it was a special reference for the benefit of the court (sections 638 to 645, inclusive, Code Civ. Proc.; Tyson v. Wells, 2 Cal. 122; Faulkner v. Hendy, 103 Cal. 15, 36 P. 1021).

[3] The referee recites as a part of his findings that he was appointed to find upon both questions of law and fact. The court in its findings recites the proceedings had before it, the various documents presented and considered, and it is clear therefrom that there was no trial held by the court and no evidence taken by it, and also that the court did not have before it the evidence submitted to the referee. The court finds as a fact that the wholesale price of certain merchandise that had been damaged by fire, and concerning which there was a dispute between the parties, was the sum of $2,126.74, being the amount which the referee fixes by his findings as the wholesale price of said merchandise, but the referee finds that the actual value of said merchandise was the sum of $708.98, the latter amount being found by the court to be erroneous. With this exception the court adopted the findings of the referee and ordered a judgment for an amount in excess of that found due by the referee.

[4] We are satisfied from the foregoing recitals contained in the findings of the referee, and also from the recitals in the findings of the court, that the order of reference was general in its nature, and, under the provisions of section 644 of the Code of Civil Procedure, "the finding of the referee or commissioner upon the whole issue must stand as the finding of the court, and upon filing of the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court." This holding is supported by the following authorities: In re Riccardi (Cal. App.) 251 P. 650, Weavering v. Schneider, 52 Cal. App. 182, 198 P. 418, and Clark v. Millsap, 197 Cal. 765, 242 P. 918. In these cases the distinction is pointed out between findings by a referee where the reference is general or special, and holding the findings conclusive where the reference is general, as in the case at bar.

Upon the filing of the findings of the referee in this cause, judgment should have been entered thereon in accordance with the findings, and, for any error committed by the referee, the remedy of the aggrieved party was by motion for a new trial, or other appropriate proceeding. Faulkner v. Hendy, supra.

Having reached the foregoing conclusion, it becomes unnecessary to consider any other question presented by counsel for either party.

The judgment, therefore, should be reduced in the sum of $1,417.98, and the interest should run from February 15, 1922, as found by the referee. The judgment is modified, accordingly, to read as follows:

> "It is ordered, adjudged, and decreed that the plaintiff recover from the defendants, A. W. Grunberg and Homer B. Anderson, copartners doing business under the firm name and style of Grunberg & Anderson, the sum of $3,439.76, with interest thereon at the rate of 7 per cent. per annum from the 15th day of February, 1922, together with costs of suit in the sum of $262.60."

As so modified, the judgment is affirmed, the appellants to recover their costs on appeal.

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205 Cal. 141

GOULD v. WOOD. (S. F. 12392.)

Supreme Court of California. Sept. 1, 1928.

Limitation of actions 🔑54(2)—Account between plaintiff and defendant's testator held "mutual, open, and current" within statute, and action thereon was timely (Code Civ. Proc. §§ 337, 339, subd. 1; § 344).

In action to recover upon a rejected claim for legal services rendered, for which defendant was acting as executrix, where undisputed evidence showed that plaintiff rendered legal services to testator during the years 1914 to 1921 of which he kept an itemized account, that testator during same period was a storekeeper of whom plaintiff purchased items of merchandise, such being embraced in book account kept by testator, and that neither party made any payments of consequence to the other, but attempted settlement of accounts prior to testator's death, *held* that such constituted a "mutual, open, and current" account within the four-year limitation of Code Civ. Proc. §§ 337 and 344, and was not barred under section 339, subd. 1.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mutual Accounts.]

Department 2.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Kitt Gould against Helen G. Wood, as executrix of the estate of R. E. L. Goode, deceased. From the judgment plaintiff appeals. Reversed.

C. K. Bonestell, of San Francisco, and Frank Kauke, of Fresno, for appellant.

Johnson, Gibbs & Backlund, of Fresno, for respondent.

RICHARDS, J. The plaintiff herein brought an action against the executrix of the estate of Robert E. L. Goode to recover upon a rejected claim upon an account for legal services of various sorts alleged to have been performed for and on account of the decedent during the years from 1914 to 1923, and aggregating the sum of $2,962.82, and which the plaintiff in his complaint alleges to have been an open, mutual, and current book account between plaintiff and said decedent because of the fact that during said years the plaintiff from time to time purchased merchandise from said decedent aggregating the sum of $227.51, and which, when applied as an offset to the plaintiff's said account, left a balance due and unpaid to said plaintiff of $2,735.31. The plaintiff presented an itemized claim for this balance to the executrix of the estate of said decedent, who rejected the same, whereupon this action was commenced within the statutory period to recover judgment upon said claim. The defendant, in her answer, for want of information and belief, denied the averments of the plaintiff's complaint with reference to the performance of said legal services and existence of said account or of any balance alleged to be due thereon; and for a further separate and distinct defense defendant pleaded that plaintiff's cause of action was barred by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. The question thus presented to the trial court was twofold: First, as to whether reciprocal accounts existed between the plaintiff and the decedent during the aforesaid years; and, second, whether, if such accounts existed, they amounted in law to such a mutual, open, and current account between the parties as would entitle the plaintiff to the benefit of the provisions of section 337 of the Code of Civil Procedure, which places a limitation of four years within which an action may be brought to recover a balance due upon a mutual, open, and current account.

As to the first of these issues, the undisputed evidence shows that during the years above referred to the plaintiff was an attorney at law, practicing in the town of Clovis, and that during the years between 1914 and 1921 he performed legal services of various sorts for and on behalf of the decedent, Robert E. L. Goode, of the detail of which services he kept a regular and itemized account, that during all of said period the decedent was a storekeeper in that region, and that during said period the plaintiff from time to time purchased groceries and other goods at the decedent's store, the items of which were embraced in a book account kept by the latter, and which aggregated the sum of $227.51. So far as the evidence discloses, neither of the parties made payments of any consequence upon the accounts of the other. It appears, however, that during the lifetime of said Goode, and in the year 1920, an effort was made at an accounting and settlement between the parties, in the course of which each in person or by their representatives examined the accounts of the other, and various propositions passed between them as to a settlement, which ran along for some time, but which were apparently interrupted before fulfillment by the death of Goode, which occurred on April 23, 1923. The plaintiff commenced this action upon his rejected claim on September 14, 1923. The trial court upon the foregoing evidence made a finding to the effect that the account between the said parties was not such as would constitute an open, mutual, and current account, and hence, as a conclusion of law, that the plaintiff's cause of action was barred as to all except the last two items thereof, aggregating the sum of $52.50, by the provisions of subdivision 1 of section 339 of the Code of Civil Procedure. The plaintiff appealed from the judgment rendered and entered in his favor for the latter amount, and the only question presented upon his appeal is as to whether, upon the foregoing undisputed facts, the account sued upon amounted to an open, mutual, and current account within the meaning of that phrase as employed in sections 337 and 344 of the Code of Civil Procedure. We are satisfied that this question must be answered in the affirmative.

An examination into the origin of the aforesaid sections of the Code of Civil Procedure shows that, as to the use of the phrase, "a mutual, open, and current account," these sections of the Code, and particularly this clause therein, were derived from the New York law as it existed in the revised statutes thereof long prior to its incorporation in the so-called Field Code of New York, which formed, in substance, the basis of our own Code of Civil Procedure adopted in 1872. The history of the New York legislation upon this subject is to be found in the case of Green v. Disbrow, 79 N. Y. 1, 35 Am. Rep. 496, from which it appears that a mutual, open, and current account arises between parties whenever, through a course of dealing, reciprocal demands exist which would give to each an offset against the other in an action by either. Green v. Disbrow, supra, became the leading case in New York, to which later decisions of the courts of that state referred with approval. In the case of Miller v. Longshore, 147 App. Div. 214, 131 N. Y. S. 1041, the principles laid down in the former decision were given application to a case wherein the plaintiff's testator was a miller and furnished food and other supplies for use upon the farm of the defendant's testator, who was the family physician of the miller, and who kept a running account of professional services rendered and medicines furnished for the miller and his family. It appeared that neither the miller nor the physician kept any account of the supplies furnished or services rendered by the other, but the court held this to be immaterial, and decided that the accounts between the parties, when taken together, amounted to a mutual, open, and current account within the intent and meaning of the statutes of New York as interpreted in the earlier decision. We are satisfied that no distinction in principle can be found between the foregoing cases and the case at bar, and that, under the authority thereof, the account upon which the plaintiff sues in this action must be held to have been a mutual, open, and current account. This being so, the trial court was in error in its finding to the contrary upon the undisputed facts of the case and its conclusion drawn from such finding, that the action of the plaintiff, except as to the two minor items above referred to, was barred by the statute of limitations.

The judgment is reversed.

We concur: SHENK, J.; LANGDON, J.

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205 Cal. 167

UNITED SECURITY BANK & TRUST CO. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR ORANGE COUNTY et al. (S. F. 12980.)

Supreme Court of California. Sept. 5, 1928.

1. Corporations ⟹49(1)—Generally corporation's right to use its name will be protected by equity court so far as necessary to safeguard property rights and to protect against fraud (Const. art. 6, § 5).

The name of a corporation is a necessary element of its existence, and generally, even aside from statute, the right to use its name will be protected by the courts having equitable jurisdiction, under Const. art. 6, § 5, so far as may be necessary to safeguard property rights developed under it and to protect against fraud, actual or constructive.

2. Prohibition ⟹10(2)—Banking superintendent's approval of bank's corporate name held no limitation on superior court's jurisdiction of action to enjoin use of such name justifying prohibition (Code Civ. Proc. § 1102).

Even if the approval and certificate of superintendent of banks gave bank the absolute right to use of word "security" as part of its corporate name and amounted to an adjudication, this would not affect jurisdiction of superior court to entertain action to enjoin such bank from transacting banking business under such name, and writ of prohibition could therefor not issue to prevent court from proceeding with trial, under Code Civ. Proc. § 1102; matter being one of defense to be decided by trial court.

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3. Prohibition 🔑5(1)—Action of judicial tribunal having jurisdiction may not be controlled by prohibition.

Appellate court may not interfere by writ of prohibition with exercise of jurisdiction actually possessed by a judicial tribunal whose conduct is sought to be controlled.

4. Prohibition 🔑3(5), 10(1)—Court is not deprived of jurisdiction by fact that issue is res judicata; remedy by appeal in case of error being adequate in case of error.

That question arising in suit is res judicata does not deprive court of jurisdiction, but court may pass on that issue and dispose of case accordingly, and, in case of error, remedy by appeal is available and adequate.

5. Prohibition 🔑5(1)—Prohibition does not lie to prevent erroneous decision or to control procedure, where former judgment is relied on as bar.

Where former judgment is relied on as a bar, writ of prohibition may not be utilized for the purpose of preventing the court from deciding the case erroneously or for the purpose of regulating or controlling its procedure.

6. Prohibition 🔑28—Merits of action may not be inquired into in prohibition proceeding; question being whether respondent court has "jurisdiction" to entertain controversy.

Whether plaintiff in action sought to be controlled by writ of prohibition should prevail in whole or in part or not at all may not be inquired into in the prohibition proceeding, but question is, Has the respondent court jurisdiction to entertain the controversy? "jurisdiction" being the power to hear and determine the cause.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction (Of Courts).]

In Bank.

Application by the United Security Bank & Trust Company for a writ of prohibition to be directed to the Superior Court of Orange County and James L. Allen, Judge. Peremptory writ denied.

Cushing & Cushing, of San Francisco, Le Roy M. Edwards, of Los Angeles, H. C. Head, of Santa Ana, and Garret W. McEnerney, of San Francisco, for petitioner.

McCutchen, Olney, Mannon & Greene and Warren Olney, Jr., all of San Francisco, O'Melveny, Tuller & Myers, Louis W. Myers, Walter K. Tuller, and Scarborough, Forgy & Reinhaus, all of Los Angeles, S. M. Reinhaus, of Santa Ana, and Lawler & Degnan and Oscar Lawler, all of Los Angeles, for respondents.

WASTE, C. J. Application for writ of prohibition. By this proceeding the petitioner, United Security Bank & Trust Company, seeks to restrain and prohibit the respondent superior court and the Honorable James L. Allen, as judge thereof, from further proceeding with the trial of that certain action entitled Security Trust & Savings Bank v. Security Bank & Trust Company and United Security Bank & Trust Company. In that action the plaintiff prays the respondent court to enter its decree restraining the defendants from engaging in, carrying on or transacting any banking business in this state under the names of "Security Bank & Trust Company" or "United Security Bank & Trust Company," from acquiring, establishing, or maintaining any branch or office under either of said names, and from further prosecuting a proceeding theretofore commenced in the superior court in and for the city and county of San Francisco, and having for its purpose the entry of a decree changing the original defendant's name from "Security Bank & Trust Company" to "United Security Bank & Trust Company." Examination of the complaint filed in the respondent court and praying the foregoing injunctive relief discloses that the action, the trial of which it is now sought to prohibit, has for its purpose a judicial determination of the respective rights of the parties thereto in and to the use of the word "Security" in their respective titles. This has led petitioner to aver with much of detail a series of transactions and events pointing to the history and development of the opposing institutions.

For the purposes of this proceeding it will suffice to indicate in a general way the salient features brought to light by these allegations. It appears that the Security Trust & Savings Bank, plaintiff in the respondent court, has for a period in excess of 35 years carried on in this state a general banking business with the word "Security" appearing in and constituting part of its name. This institution, while it now maintains some 53 branch offices under and by virtue of permits issued to it by the superintendent of banks, has continuously up to the present time confined its activities, with one exception, to the county of Los Angeles, the exception referred to being the maintenance of a branch office at La Habra in Orange county. The Security Bank & Trust Company, original and sole defendant in the action sought to be prohibited, traces its development to a policy of expansion and consolidation which culminated on October 1, 1927, with the merger of several smaller banking institutions. At least three of the institutions brought within the merger had for many years prior to their amalgamation employed the word "Security" in and as a part of their respective titles. These several consolidations and mergers were, of course, with the prior consent and approval of the superintendent of banks, and resulted in the maintenance by the Security Bank & Trust Company from the date of its inception, in addition to its head office, of approximately 51 branches in 22 counties of the state.

Petitioner, United Security Bank & Trust Company, came into being on March 31, 1928, at which time the Security Bank & Trust Company, with the approval of the superintendent of banks, consolidated with the Humboldt Bank of San Francisco. Since its creation, petitioner has maintained 54 branches in 22 counties of the state. Shortly after the creation of the Security Bank & Trust Company, and at divers other times, the Security Trust & Savings Bank protested both orally and in writing to the superintendent of banks against the use of the word "Security" in the name of the former institution, and to the granting of any further branches to it or to any other banking institution having the word "Security" as a part of its name. At or about this time, Security Bank & Trust Company filed applications with the superintendent of banks requesting authority and permission for the establishment of several new branches in different counties, including one at La Habra, Orange county, where, as already stated, the Security Trust & Savings Bank maintained a branch office. Upon the hearing of these applications, the Security Trust & Savings Bank appeared and opposed the granting thereof on the ground that there has of recent years been introduced into this state a new era of branch banking which in time may result in public loss and economic strife should there be any confusion or possibility of confusion in the names of rival and competing banking institutions. On December 10, 1927, and over the protest of the Security Trust & Savings Bank, the superintendent of banks issued to the Security Bank & Trust Company permits and licenses to establish and maintain the several requested branches. Thereafter, and on February 10, 1928, the Security Trust & Savings Bank instituted the action above referred to, the trial of which petitioner herein seeks to prevent, naming the Security Bank & Trust Company as defendant therein. Service of summons was had upon the manager of the La Habra, Orange county, branch of said defendant. An extension of time within which to plead to the complaint was requested by and granted to the defendant, and thereafter its demurrer to said complaint was overruled. On March 31, 1928, prior to the expiration of the time within which Security Bank & Trust Company was required to file its answer to the complaint, it consolidated, as above indicated, with the Humboldt Bank; the new institution being known as the United Security Bank & Trust Company, petitioner herein. This change of status and name by the Security Bank & Trust Company prompted the Security Trust & Savings Bank to file, over the defendant's objections, an amended and supplemental complaint in its action then pending before the respondent court; the primary purpose of the amendment being to bring the new institution, United Security Bank & Trust Company, into the action as a party defendant. The defendants then before the respondent court objected to and opposed the filing of such amended and supplemental complaint upon the ground that the court was without jurisdiction both as to the subject-matter of the action and the parties defendant. The ground upon which it is sought to prohibit the respondent court from proceeding with the trial of the suit in equity now pending is that the plaintiff there is estopped to maintain the action because of the decision of the superintendent of banks in permitting the use of the name "Security" by the amalgamated banks represented by petitioner, which ruling is claimed to be conclusive. Subsequent to the filing of its petition here, the United Security Bank & Trust Company filed in the respondent court a demurrer to the amended and supplemental complaint, together with notices of motion to dismiss and for change of place of trial, all of which were to be pressed if, and only if, this court should deny relief by way of prohibition.

In response to the alternative writ issued by this court, the respondents on the return date thereof filed their verified return, which, by way of answer to the allegations of the petition, fully covered all matters and proceedings relating to the action. Concurrently with the filing of respondents' return, the Security Trust & Savings Bank, plaintiff in the action in the respondent court, filed herein an application for leave to intervene, on the ground that it is the real party in interest in opposition to the application for prohibition. The request being granted, a complaint in intervention was filed. The intervener thereupon demurred, both generally and specially, to the petition, and also moved to strike out certain portions thereof. Among other matters alleged in the complaint in intervention, it is averred that, should petitioner prevail here in its application for the writ, the intervener will be deprived of its property and property rights, to wit, its business and good will, without due process of law, and will be denied the equal protection of the law. Without waiving, but, on the contrary, expressly reserving, the right to insist upon its demurrer to the petition and its motion to strike portions thereof, the intervener further alleges, upon information and belief, that petitioner and its predecessor, Security Bank & Trust Company, with the design, purpose, and intention of wrongfully taking and appropriating intervener's business and good will, and with the design and purpose of creating and causing confusion on the part of the public, adopted and used a name or title so similar to that of intervener's as to inevitably give rise to such confusion, and that intervener, in order to prevent and preclude the threatened destruction of its property and business and the confusion that would have resulted from the similarity of names, instituted the action, the trial of which is herein sought to be prohibited.

[1] The conclusion we have reached upon the main question of law presented by inter-

vener's general demurrer to the petition, as we see it, renders it unnecessary for us to consider or to determine the many other points raised by the pleadings and the arguments of counsel. As we view this proceeding, the important and the sole question we need consider is whether or not the intervener is conclusively estopped to maintain the action in the superior court of Orange county by reason of the finding and action of the superintendent of banks in the matter of the name of the petitioner. In deciding that question, it is not necessary for us to consider at this time whether the action of the superintendent of banks was, or was not, conclusive, for, in either event, the respondent court has jurisdiction to proceed to a final determination of the issues presented by the action, for the name of a corporation is a necessary element of its existence, and, generally speaking, even aside from statutory provision, the right to its use will be protected by the court sitting in equity, so far as may be necessary to safeguard property rights developed under it and to protect against fraud, actual or constructive. Italian Swiss Colony v. Italian Vineyard Co., 158 Cal. 252, 256, 110 P. 913, 32 L. R. A. (N. S.) 439; Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879; Hainque v. Cyclops Iron Works, 136 Cal. 351, 68 P. 1014; 24 Cal. Jur. pp. 631, 633.

[2] The contention of the petitioner that the action of the superintendent of banks was conclusive is, when reduced to its lowest terms, based on a doctrine analogous to that of res adjudicata in a judicial proceeding. Its theory is that its right to take and use the word "Security" as part of its corporate name has been finally and conclusively established by the action of the superintendent of banks. Assuming, only for the purpose of the decision, that the action of the superintendent of banks was not only conclusive but amounted to an adjudication, that fact does not affect the jurisdiction of the superior court to maintain the action, but enters only into its determination of the question before it. If, as claimed by the petitioner, the approval and certificate of the superintendent of banks gave to it the absolute right to its name, notwithstanding that confusion and injury might ensue from its use, that would operate as a defense upon the issues to be decided by the court on the trial of the cause. The finality of the action would not operate as a limitation upon the court's jurisdiction to entertain the action. Consequently a writ of prohibition cannot issue to prevent the respondent court from proceeding with the cause now before it. Code Civ. Proc. § 1102; Granger v. Superior Court, 159 Cal. 1, 5, 112 P. 854. As it has jurisdiction of the cause, it would be exempt from control by a writ of prohibition, even though it were proceeding erroneously. Dowdall v. Superior Court, 183 Cal. 348, 352, 191 P. 685. If the petitioner is correct in the view that the question involved in the action pending in the respondent court has been concluded, it is its duty to present such objection to that court in the first instance. Grinbaum v. Superior Court, 189 Cal. 741, 209 P. 1005.

[3-5] The settled law of this state on the question we are now deciding is well expressed in a quotation from a very recent decision of the District Court of Appeal, in a case in which it was sought to prohibit the superior court from proceeding with a pending action on the ground that the question before it was res adjudicata:

> "As this question ordinarily arises, the trial court is not necessarily divested of jurisdiction of an action by a judgment which is res adjudicata. It has jurisdiction in the first instance to pass upon that very question and make disposition of the cause accordingly. If it determines the matter erroneously, the injured party has his remedy by an appeal, which has been uniformly held is an available and adequate remedy. Burge v. Justice Court, 11 Cal. App. 213, 104 P. 581; Conlan v. Superior Court, 12 Cal. App. 420, 107 P. 577; So. Pac. M. Co. v. Superior Court, 14 Cal. App. 240, 111 P. 625. In the ordinary case where a judgment is relied upon as a bar, the prohibitive writ could not be utilized for the purpose of preventing the court from deciding erroneously or for the purpose of regulating or controlling its procedure. Van Hoosear v. Railroad Com., 189 Cal. 228, 207 P. 903; Apartment etc., Financing Co. v. Will, 69 Cal. App. 276, 231 P. 349, and cases there cited. In this regard we find nothing to distinguish this from the ordinary case. Undoubtedly, if the respondent court determines that the judgment rendered is a bar to the pending case, it will enter the proper judgment, but, until it shall have rendered some judgment, we are not free to interfere." City of Pasadena v. Superior Court (Cal. App.) 268 P. 664.

[6] Our conclusion in this matter may, therefore, be briefly stated as follows: The pending action is equitable in its nature, and respondent court has original jurisdiction in such cases under section 5 of article 6 of the Constitution. It is well settled that the court in such an action has the power to grant relief against unfair competition by enjoining the use of a name by one who seeks by imitation or other artifice or device to induce persons to deal with him in the belief that they are dealing with another. Such is the purpose of the plaintiff in the pending action. Whether the plaintiff therein should prevail in whole or in part or at all may not be inquired into in a proceeding in prohibition. The question is, has the respondent court jurisdiction to entertain the controversy? Jurisdiction is the power to hear and determine the cause. Having jurisdiction of the parties and the subject-matter of the action, the respondent court has the power to determine all questions of law and fact properly presentable under the issues tendered. One of the issues of law tendered by the defendants in said action is the proper construction of certain provisions of the Bank Act (St. 1909, p. 87). The respondent court has jurisdiction to construe

the provisions of the statute and the effect of the action of the superintendent taken thereunder, and that jurisdiction in the first instance is full and complete. If the court's determination as to that matter, or as to any other issue of law or fact, presented in the case, be erroneous, the remedy of the petitioner, under the record here presented, is by appeal.

The application for a peremptory writ of prohibition is denied.

We concur: RICHARDS, J.; TYLER, Justice pro tem.; SHENK, J.; FINCH, Justice pro tem.; CURTIS, J.

PRESTON, J., deeming himself disqualified, does not participate.

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205 Cal. 128

FOSTER v. FERNANDES et al. (Sac. 4015.)

Supreme Court of California. Sept. 1, 1928.

1. Action 🔑50(6)—Complaint in action to recover dairy cattle held not demurrable for misjoinder of causes of action or defendants; "affect all parties to action" (Code Civ. Proc. § 427).

Where allegations in complaint in action for possession of dairy stock were sufficient to support proof of a relationship between all defendants, either of principal and agent, or of coactors in unlawfully taking possession of cattle, there was no misjoinder of causes of action or of parties defendant, as against objection that, because each defendant was alleged to have possession of a certain number of cattle, the cause of action as to each did not "affect all the parties to the action," as required by Code Civ. Proc. § 427.

2. Limitation of actions 🔑127(3)—Amending complaint, alleging certain defendants claimed interest in cattle, without right, to allege unlawful possession as to all, held germane to original cause, as respects tolling statute.

Where original complaint in action for possession of dairy stock alleged that certain defendants claimed without right some interest in the cattle, and as to other defendants unlawful possession was alleged, and amended complaint, filed thereafter, alleged unlawful possession as to all defendants, *held*, that filing of original complaint tolled statute of limitations, because amendments were germane to original cause of action.

3. Judgment 🔑683—Foreclosure judgment for plaintiff, assignee of chattel mortgage, held binding on defendants in mortgagee's suit for chattels.

Judgment in suit to foreclose chattel mortgage on cattle, in which it was determined in the trial court and on appeal that certain defendants had no interest in cattle, *held* admissible, in evidence against said defendants in subsequent action by chattel mortgagee to recover possession of cattle, in which said defendants set up same claim, notwithstanding plaintiff in foreclosure action was bank to which mortgage was assigned for security; there being such privity between bank and mortgagee as to render parties the same.

4. Appeal and error 🔑1056(1)—Refusing to admit default judgment involving other cattle, recovered by defendants against another, held not prejudicial.

In action to recover possession of dairy cattle, exclusion from evidence of default judgment recovered in another action by defendants against a third person *held* not prejudicial error, where such other action involved other cattle.

5. Replevin 🔑71(2)—Evidence that defendants paid judgment in foreclosure action held properly rejected in subsequent possessory action where foreclosure judgment determined defendants had no interest in cattle.

In action for possession of dairy stock, evidence that defendants paid judgment in previous mortgage foreclosure action involving same cattle *held* properly excluded, on ground that said defendants were strangers to the title under the judgment in the foreclosure action, and that they could not acquire title by payment of the judgment, which determined that they had no interest in cattle.

6. Replevin 🔑72—Evidence that certain defendants were good-faith purchasers from codefendant previously taking possession under claim and delivery process warranted judgment for them as against prior oral transferee (Civ. Code, § 3440).

Purchasers in good faith from one who took possession of cattle under process in claim and delivery action, in which no redelivery bond was filed by defendant, who subsequently suffered default and went into bankruptcy, *held* entitled to protection in their purchases, under Civ. Code, § 3440, against one claiming under prior oral transfer from defendant in such action, not followed by any delivery or change of possession.

In Bank.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by M. Elma Foster against J. V. Fernandes and others. From a judgment for plaintiff, defendants appeal. Reversed in part, and in part modified and affirmed.

See, also, 200 Cal. 274, 252 P. 726; 201 Cal. 450, 257 P. 503.

G. W. Zartman and Russell & Heid, all of Tulare, and Farnsworth, Burke & Maddox, of Visalia, for appellants.

Feemster & Cleary, of Visalia, for respondent.

SHENK, J. This is an appeal from a judgment in favor of the plaintiff in an action for the possession of certain dairy stock. The cause was tried before a jury, which rendered a verdict fixing the value of the stock at $2,250 and $500 damages for detention. Judgment was entered against the several defendants for possession, or, if delivery could not be had, for the value and damages against the defendants Fernandes only.

[1] In support of the appeal it is contended by the defendants that their demurrer to the second amended complaint for misjoinder of causes of action and of parties defendant should have been sustained. Each defendant was alleged to have possession of a certain number of the cattle, and it is insisted that the cause of action as to each defendant did not "affect all the parties to the action," as required by section 427 of the Code of Civil Procedure. The allegations of control of the cattle by the defendants Fernandes were sufficient, we think, to support proof of a relationship, either of principal and agent, or of coactors in unlawfully taking possession of the cattle, between the defendants Fernandes and their codefendants. There was, therefore, no defect of misjoinder. More v. Finger, 128 Cal. 313, 60 P. 933; Costello v. Bell, 27 Cal. App. 102, 148 P. 948; 5 Cal. Jur. p. 175.

[2] It is next contended that the plaintiff's cause of action is barred by the statute of limitations. The original complaint was filed February 20, 1926. The proof was sufficient to support the implied finding of the jury that the cattle came into the possession of the Fernandes not earlier than February 21, 1923. All of the defendants were made parties to the original complaint. As to all of them, except the Fernandes, it was alleged that they claimed without right some interest in the cattle. As to the Fernandes unlawful possession was alleged. An amended complaint, filed some two weeks later, alleged unlawful possession as to all of the defendants. The filing of the original complaint tolled the statute, for the reason that the amendments were germane to the original cause of action.

[3] It is next contended that the court erred in admitting in evidence the judgment in a foreclosure suit involving the title to the same cattle found by the jury to be involved in this action. That action was filed in April, 1923. The plaintiff herein was the mortgagee under the chattel mortgage, and the assignor for purposes of security of the plaintiff bank in the action to foreclose the mortgage. The Fernandes were parties defendant in the foreclosure suit. It was determined therein, both in the trial court and on appeal, that the Fernandes had no interest in said cattle. Trust & Sav. Bk. v. Tulledo, Fernandes et al., 74 Cal. App. 629.[1] The subject-matter of interest of the Fernandes in the cattle was the same in that action as in this action, and it is clear from the record that there was such privity between the bank and Mrs. Foster in that action as to render the parties the same. The judgment was therefore admissible as against the defendants Fernandes.

[4] The next point made by the defendants is that the court erred in refusing to admit in evidence a default judgment in the case of Fernandes v. Tulledo. That was an action commenced in January, 1923, to recover possession of certain cattle sold by the Fernandes to Tulledo under a contract of conditional sale which the Fernandes claimed Tulledo had breached, a portion of which cattle the Fernandes claimed were the cattle involved in the present action. The jury in the present action impliedly found that the cattle involved herein were not included within the cattle conditionally sold to Tulledo under said contract. As the action of Fernandes v. Tulledo involved cattle which were found not to be involved in the present action, we find no prejudicial error in refusing to admit said judgment in evidence.

[5] The defendants Fernandes offered to prove that on the going down of the remittitur in the foreclosure case they paid the judgment in that case, amounting to a balance due on the secured note of $1,578.41. The court refused to admit this evidence, on the ground that the Fernandes were strangers to the title under the judgment in the foreclosure action, and that they could not acquire title by payment of the judgment, which determined that they had no interest in the cattle. We find no error in the ruling.

[6] The plaintiff herein asserts title to and right of possession of said cattle under an oral transfer thereof from Tulledo in November, 1922. The Fernandes claim under the judgment against Tulledo. The other defendants claim as purchasers in good faith from the Fernandes. The evidence shows that the Fernandes took possession of the cattle involved herein in February, 1923, under process in their claim and delivery action against Tulledo. No redelivery bond was filed by Tulledo, and he subsequently suffered default and went into bankruptcy. After the Fernandes thus took possession of said cattle, and before the commencement of this action, they sold them in separate portions to the other defendants herein. The record shows that these purchases were made in good faith. We think they should be protected in their purchases under section 3440 of the Civil Code, for the reason that it is established without conflict in the evidence that the oral transfer of title to Mrs. Foster in November, 1922, was not followed by any delivery or change of possession from Tulledo, who was then and for months thereafter continued to remain in possession of the cattle. We are satisfied that the contentions of the defendants, other than the Fernandes, that the evidence is insufficient to support the judgment for possession as against them, should be sustained.

As to the defendants Fernandes the evidence showed that the cause of action proved against them was one in conversion. They retained possession of 4 head out of the 46 head claimed by the plaintiff, but we treat this as a negligible quantity and unimportant, in view of the relief to which the plaintiff is otherwise entitled. The evidence is abundantly sufficient to support the finding that the Fernandes had no interest in the cattle; that they unlawfully took possession of the same, and disposed of them to innocent parties prior to the commencement of this action. Under the proof, the court should have granted the relief which the evidence called for, by entering a judgment in favor of the plaintiff and against the defendants Fernandes for the value of the cattle, in the amount found by the jury to be their value at the time of the conversion, to wit, $2,250, with interest from the date of the conversion (section 3336, Civ. Code), but without damages for detention.

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[1] 241 P. 574.

The judgment for possession as to all of the defendants is reversed. The judgment as to the defendants Fernandes is modified to read as follows:

> "It is adjudged that plaintiff do have and recover from the defendants J. V. Fernandes and Mary V. Fernandes the sum of $2,250, with interest thereon at the rate of 7 per cent. per annum from February 27, 1922,"

—with costs against said defendants as taxed in the trial court. As so modified, the judgment against the defendants Fernandes is affirmed; the appellants to recover costs on appeal.

We concur: WASTE, C. J.; PRESTON, J.; RICHARDS, J.; SEAWELL, J; LANGDON, J.

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205 Cal. 147

H. K. McCANN CO. v. DENNY et al.★
(S. F. 12447.)

Supreme Court of California. Sept. 1, 1928.

Hearing Denied in Bank Oct. 1, 1928.

1. Limitation of actions ⊂⇒58(4)—Liability of corporation for reimbursement of agent accruing on agent's disbursement for corporation, action on stockholders' liability within three years thereafter was timely (Code Civ. Proc. § 359).

Where advertising contract provided that plaintiff, as agent of corporation, would pay advertising bills, charging such amount to corporation's account, no liability arose until such bills were paid by the agent for the corporation, and hence action against stockholders of corporation, after it became insolvent, commenced within three years after corporation incurred liability to the agent for reimbursement, was timely, under Code Civ. Proc. § 359.

2. Limitations of actions ⊂⇒46(2)—Action against corporation's stockholders on contract, more than three years after date held barred, notwithstanding canceling contingency which did not occur (Code Civ. Proc. § 359).

Action to recover from stockholders of insolvent corporation on advertising contract, terms of which provided for a monthly service charge of $250, not commenced within three years after date, notwithstanding provision that such service charge was to be credited with certain commissions earned by plaintiff in course of advertising campaign, which, amounting to certain sum, would extinguish said fee, such contingency, however, not occurring, *held* barred by Code Civ. Proc. § 359; a present liability on part of corporation arising as of date of agreement.

Department 2.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the H. K. McCann Company against O. Denny and others. Judgment for defendants, and plaintiff appeals. Affirmed in part, and reversed in part.

Winfield Dorn and A. L. Shannon, both of San Francisco, for appellant.

Dunne, Brobeck, Phleger & Harrison and Brobeck, Phleger & Harrison, all of San Francisco, for respondents.

RICHARDS J. In this action the plaintiff sought to recover certain sums alleged to be due to it from the defendants upon the stockholders' liability of said defendants and each of them as stockholders of the Luthy Company, a California corporation, which had been organized for the purpose of manufacturing a certain automobile storage battery, and which had entered into certain agreements with the plaintiff, a national advertising agency, for the performance of certain services by the latter in conducting an advertising campaign and in preparing and placing the advertising to be done by the Luthy Company, in the course of marketing its products, in periodicals and upon signboards throughout the country.

The complaint is in two counts, in the first of which the plaintiff seeks to recover from said defendants the proportionate sums claimed to be due from each under their aforesaid stockholders' liability on account of certain payments of money which were made by the plaintiff to various periodicals with which it had placed the advertising of its principal, the Luthy Company, from time to time, and the bills for which the plaintiff had paid under the terms of its arrangement with its principal; wherein it was in substance agreed that the bills for advertising were to be sent by the publishers thereof to said advertising agency, and when paid by it were to be charged to the account of its principal. The evidence in the case shows, and the court finds, that while the aforesaid agreement between the plaintiff and the Luthy Company was entered into in April, 1921, the first advertising contracts placed by said agency thereunder bore a date not earlier than August

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★Hearing denied in bank.

22, 1921, and such advertising thereafter continued to be placed with various publications up to April 6, 1922, when the Luthy Company, having become involved in financial difficulties, ceased advertising. Between the two foregoing dates the plaintiff, as shown by its bill of particulars, paid on account of its principal the several advertising bills, the sum of which furnishes the basis of recovery sought by the first count of plaintiff's complaint herein.

The main defense urged by the defendants herein is that of the statute of limitations embodied in section 359 of the Code of Civil Procedure, relating to the liability of stockholders of corporations. The trial court sustained the defendants' plea in that regard, and by its judgment determined that as to the plaintiff's first alleged cause of action it should take nothing, but that said defendants were entitled to have judgment in their favor for their costs.

As to the plaintiff's second count or cause of action, it is also based upon the terms of its aforesaid agreement with the Luthy Company, made and entered into on or about April 6, 1921, by the terms of which it was agreed and understood that, beginning from the date thereof, the plaintiff would be entitled to charge a service fee of $250 a month against its said principal for its services in planning and handling the latter's advertising campaign. This initial fee, however, was to be credited with certain commissions which might be earned by said plaintiff in the course of said campaign, and which, when the same amounted to a certain sum, were to extinguish said service fee. It appears from the plaintiff's bill of particulars that at the time of the commencement of this action on May 8, 1924, there was due to said plaintiff from said corporation on account of its aforesaid service fee the sum of $2,934.67 for the proportionate share of which, claimed to be due from said defendants upon their aforesaid stockholders' liability, plaintiff sues in its second count or cause of action.

As to this cause of action the defendants also pleaded the statute of limitations as embodied in section 359 of the Code of Civil Procedure, and as to this count also the trial court by its judgment determined that the plaintiff was entitled to take nothing, but that said defendants were entitled to a judgment in their favor for their costs. From the judgment of the trial court upon both causes of action, the plaintiff prosecutes this appeal.

[1] Upon the plaintiff's first alleged cause of action we are of the opinion that the trial court was in error in holding that it was subject to the plea of the statute of limitations relating to the commencement of an action upon the liability of stockholders of a corporation. It sufficiently appears from the record herein that in entering into and carrying out its agreement with the Luthy Company for the placing of its advertising, the plaintiff was acting throughout as the agent of said corporation and not otherwise; that the advertising which, beginning in the month of August, 1921, it placed for and on account of its said principal, was advertising for which the Luthy Company was primarily liable to the various publications wherein such advertising was published; and that, in providing in its agreement with said corporation that the bills for such advertising were to be sent primarily to the plaintiff for payment, it was to act as the agent of said corporation, and not otherwise, in the payment of these bills, and upon payment of the same was entitled to charge the amount thereof against the account of its said principal. It would seem to be clear that, until such advertising began to be placed and published, no liability of any kind had been created as to such corporation, and it would further seem to be clear that, after the aforesaid date of the placing of such advertising and of the creation for the first time of any liability on the part of the Luthy Company on account of the publication thereof, no liability arose on its part to reimburse the plaintiff for any sums expended by it by virtue solely of its aforesaid agency, until in that capacity the plaintiff had made payment on account of its principal's bills.

The case as thus presented, while not precisely analogous to the cases presently to be discussed, is not distinguishable in principle from these cases as to the rule applicable to the liability of stockholders. In the case of Yule v. Bishop, 133 Cal. 574, 62 P. 68, 65 P. 1094, it was held that the liability of the stockholders of a corporation to one who had become an indorser upon the promissory note of said corporation, and who as such indorser had been required to pay said note and thus extinguish the same, did not arise until the payment of said note by such indorser, and hence that the liability of the stockholders to such indorser would not be barred by the statute of limitations until three years after the date of such payment. In the case of Ryland v. Commercial Savings Bank, 127 Cal. 525, 59 P. 989, which was an action by a surety upon the note of a corporation to recover from the stockholders thereof upon their liability as such upon the payment by said surety of the note of said corporation, it was held that the statute of limitations was not set in motion until the payment by the surety of the corporate note. In the case of Wills v. Woolner, 21 Cal. App. 528, 132 P. 283, the rule laid down in the foregoing cases was followed and distinguished from a line of cases presently to be commented upon.

In the later case of Finch v. Finch, 68 Cal. App. 72, 228 P. 553, the line of cases above referred to, beginning with the case of Hunt v. Ward, 99 Cal. 612, 34 P. 335, 37 Am. St. Rep. 87, was reviewed and followed, and it was held that the liability of the stockholders of a corporation for their proportionate share of its indebtedness took its rise as of the date of the contract creating such indebtedness and that the action upon such stockholders' liability must be commenced within three years from such date. The decision in that case has been consistently followed by this court and the appellate courts in a line of cases depending upon a similar state of facts. Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407, 58 P. 85; Gardiner v. Royer, 167 Cal. 238, 139 P. 75; Pidgeon v. San Diego, etc., Co., 47 Cal. App. 676, 190 P. 1048, Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 P. 939; Chambers v. Farnham, 182 Cal. 191, 194, 187 P. 732. In each of the two cases last above cited it has been pointed out by this court that the conclusions arrived at by it in the line of cases last above cited are in no wise inconsistent with the decisions of this court in the case of Yule v. Bishop, supra, and the cases which have followed it, and the distinction which is therein drawn between these two lines of decisions is this: That, in the payment by a guarantor or surety of the indebtedness of the corporation the obligation of the corporation was thereby extinguished, and that the right of the guarantor or surety to reimbursement from the stockholders of the corporation was a new liability arising at the time of the payment of the corporate note by the indorser or surety.

The distinction thus drawn between these two lines of decision has its exact application in principle to the plaintiff's first cause of action herein, since the obligation of the Luthy Company to reimburse the plaintiff for the payment, in the capacity of its agents, of its advertising bills could not arise until such bills had been paid and the obligation of its principal thereby extinguished; whereupon, for the first time, the liability of the stockholders of the corporation to the plaintiff by reason of such payment would arise. We are thus of the opinion that as to the first cause of action the case of Yule v. Bishop, supra, and the decisions which have followed it, have full application, and hence that the trial court was in error in holding that as to said first cause of action the statute of limitations had run in favor of the defendants.

[2] As to the second cause of action, however, it would seem to be equally clear that the principles announced in the case of Hunt v. Ward, supra, and in the decisions of this court and the appellate courts which have followed it, should be given full application to the state of facts shown to exist as the basis for said second cause of action. By the terms of the agreement between the plaintiff and the Luthy Company, the former was entitled to charge a service fee of $250 a month for its services in planning and carrying forward the advertising campaign of said corporation. A present liability on the part of said corporation for the payment of such service fee thus arose as of the date of such agreement. and hence, of necessity, the liability of the stockholders of said corporation by reason of the obligation thus incurred also took its rise as of the date thereof. The fact that the obligation of the corporation for the payment of such service fee was subject to a contingency in the nature of a condition subsequent which might result in its extinction could in no wise affect the stockholders' liability of these defendants, since such contingency never arose. Under the foregoing decisions applicable to such a situation, the action of the plaintiff against the defendants as such stockholders must have been commenced within three years from and after the date of the creation of their aforesaid liability, and, not having been so commenced, the trial court was correct in sustaining the plea of the statute of limitations as to such second cause of action.

It follows, from the foregoing, that the judgment of the trial court must be reversed in so far as it relates to the plaintiff's first cause of action, and must be affirmed in so far as it affects the plaintiff's second cause of action. It is so ordered.

We concur: SHENK, J.; LANGDON, J.

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205 Cal. 163

CHADWICK v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (L. A. 10787.)

Supreme Court of California. Sept. 4, 1928.

1. Judgment 🔑306—It is court's duty to remedy clerical errors, though carried into judgment.

It is duty of court to remedy clerical errors, even though carried into judgment, by amendment, without vacating judgment, the performance of which will be enforced in the furtherance of justice.

2. Mandamus 🔑52—Mandamus lies to correct clerical mistake in judgment in amount of damages stated for condemnation of property.

Where findings of fact and conclusions of law in condemnation proceedings approved and confirmed referee's award of damages of $1,190 for land and $1,746 for improvements, but total damage was carried into judgment at $1,190, instead of $2,936, as referees reported, in absence of mention of change or modification of such report and no showing otherwise, *held* an obvious clerical error, which court may be compelled by mandamus to remedy, by amending findings and conclusions, without vacating the judgment.

In Bank.

Application by Elizabeth K. Chadwick for a writ of mandate to be directed to the Superior Court of California in and for Los Angeles County and others, to compel respondents to amend findings of fact, conclusions of law, and interlocutory judgment in suit condemning petitioner's property. Writ granted.

Superseding opinion of the District Court of Appeal, 268 P. 918.

Allan Frankel, Sidney A. Wilson, and A. V. Kaufman, all of Los Angeles, for petitioner.

Jess E. Stephens, City Atty., Herman Mohr, Deputy City Atty., and E. H. Delorey, Deputy City Atty., all of Los Angeles, for respondents.

PRESTON, J. Petitioner seeks through this proceeding the issuance of a peremptory writ of mandamus, directing that respondent superior court amend the findings of fact, conclusions of law and interlocutory judgment entered in a certain condemnation suit in which petitioner was a defendant.

The complaint in said condemnation action was filed in September, 1925. In October, 1926, the referees appointed to make the award of damages filed their report, which with reference to the property here in question read as follows:

"That the referees, having viewed said property, have ascertained, assessed, and found the compensation proper to be paid to the persons owning or having an interest in each parcel of land sought to be taken, and they respectfully report as follows:

* * * * * * * *

Parcel 67: Value of land taken	$1,190
Severance damages	——
Value of improvements	1,746
Total compensation proper to be paid to the defendant, Elizabeth K. Chadwick, successor in interest to the defendant Herbert Kaufman, as the owner of said parcel of land	$2,936"

At the hearing upon said referees' report the superior court approved "the said award of $2,936 to the defendant Elizabeth K. Chadwick" as above set forth. The findings of fact and conclusions of law likewise approved and confirmed said report in toto, but the value of petitioner's property was therein listed at the sum of $1,190, instead of $2,936, and later petitioner was notified that a check for said amount, covering her award, was ready for delivery to her. She thereupon moved respondent court to amend said findings of fact and conclusions of law, and also the interlocutory judgment, for the purpose of correcting the amount of the award due her to conform to the sum recommended by said referees, to wit, $2,936, as approved and confirmed by the court. Said motion was predicated upon the affidavit of her attorney, in which he averred that he had never received a copy of said findings of fact and conclusions of law as prepared in said condemnation action; that, when petitioner advised him of the deficiency of $1,746 in the amount of the check tendered to her, he immediately investigated the matter and found that, although said findings stated, " * * * The awards, as set forth in the report of the referees, are proper and correct, and said report should be approved and confirmed, * * *" nevertheless the sum of $1,190 only, instead of $2,936, as awarded by said report, was set forth therein as the total sum due petitioner, and no reference was made to said omitted item of $1,746. Affiant further averred that said discrepancy in the figures "appears to be an error of computation or omission on the part of the clerk or stenographer who transcribed such findings of fact and conclusions of law. * * *"

It was stipulated upon hearing of the motion, as was likewise again stipulated upon the oral arguments before the District Court of Appeal, that the facts contained in said affidavit were true. At the suggestion of the court the motion was then submitted without evidence; that is, the court had before it only the judgment roll and said affidavit, the facts of which were stipulated to be true. It was denied, and petitioner immediately thereafter instituted this proceeding to compel correction of said findings and judgment.

It is the contention of respondents that there was no evidence before the superior court upon hearing of the motion to prove that a clerical or any error was made in stating the sum due petitioner in said findings and judgment; furthermore, assuming that a clerical error was made, there was no abuse of discretion by the court in denying the motion, because of the intervention of rights of third parties. Petitioner, on the contrary, argues that the question of abuse of discretion does not enter into the case; that the error was purely clerical, and it was therefore the duty of the court to amend the findings and judgment to conform to the general finding of approval and confirmation of the referees' award.

[1, 2] Not only has the court power to remedy clerical errors, as distinguished from judicial errors, which may be corrected only through motion for new trial or by appeal, but it is a plain duty to remedy them, the performance of which will be enforced in the furtherance of justice. In other words, a mistake purely clerical, such as one with respect to the computation or statement of a sum, is an obvious error, and, though it appears in the findings and conclusions and is carried into the judgment, it may and should be corrected by amendment without vacating the judgment (Erickson v. Stockton, etc., Co., 148 Cal. 206, 82 P. 961, and cases there cited), and the performance of this duty may be compelled by mandamus (Boust v. Superior Court, 162 Cal. 343, 122 P. 956); hence if the error here before us was purely clerical, it

must follow that the relief sought by petitioner should be afforded her.

To our mind the facts of this case are conclusive, and support the contention of petitioner, for it was at the time the motion was heard, and is now, demonstrable from the record that said item of $1,746 was omitted through a clerical misprision. The findings expressly "approved and confirmed" as "proper and correct" the award set forth in the referees' report, which as to the property here involved was $2,936. There is no mention of any change or modification of said report; the findings approve and confirm it as a whole. In incorporating from the report into the findings the specific awards, there was made an obvious error in the omission of said item of $1,746, plainly due to inadvertence of clerk or copyist. What other possible explanation of it could there be? Respondents offer none.

Under this situation we can see no room for the operation of the contention that the status of the parties has so changed that petitioner must surrender her property for public use without compensation, because not to do so would work an inconvenience to the city of Los Angeles or other parties. Likewise, there is nothing to be found in the cases of McKannay v. McKannay, 68 Cal. App. 709, 230 P. 218, and County of Los Angeles v. Rindge, 69 Cal. App. 72, 230 P. 468, opposed to the holding here made.

Let the writ issue.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

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205 Cal. 153

BORLAND v. KEY SYSTEM TRANSIT CO. et al. (S. F. 12046.)*

Supreme Court of California. Sept. 4, 1928. Rehearing Denied Oct. 4, 1928.

1. Negligence 🔑136(30)—Street railroads 🔑117(28)—Contributory negligence of automobile driver in crossing street car tracks, and whether driver's negligence was imputable to wife, riding with him, held fact questions for jury.

Whether driver of automobile was contributorily negligent in failing to again look in direction of approaching street car, after having previously looked before entering intersection, and whether such negligence was imputable to his wife, who was riding with him, *held* questions of fact for jury.

2. Negligence 🔑136(14, 26)—Negligence and contributory negligence are ordinarily fact questions for jury.

Defendant's negligence and plaintiff's contributory negligence are ordinarily questions of fact for jury.

3. Trial 🔑133(6)—Any harm from alleged improper statement of plaintiff's counsel in argument to jury held cured by court's prompt admonition to disregard.

Any harm caused by alleged misconduct of plaintiff's counsel in making certain remark in his closing argument to jury *held* cured by his request that court instruct jury to disregard it, and court's admonition to that effect.

Department 1.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Lillian Borland against the Key System Transit Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Brobeck, Phleger & Harrison, of San Francisco, and Donahue, Hynes & Hamilton, of Oakland (Frank S. Richards, of San Francisco, of counsel), for appellants.

Albert J. O'Brien, Thomas J. Halpin and Langton A. Madden and Ford, Johnson & Bourquin, all of San Francisco, for respondent.

PRESTON, J. In this action to recover damages for personal injuries received by plaintiff as a result of a collision between an automobile in which she was riding and a street car operated by defendant transit company, defendant has appealed from judgment in her favor upon three grounds, to wit: Insufficiency of the evidence to justify the verdict and judgment, errors in instructions, and prejudicial misconduct of counsel for plaintiff.

[1] The collision occurred August 14, 1924, about 8 p. m., at the intersection of Fifty-Eighth street and Telegraph avenue, a heavily traveled main thoroughfare between Oakland and Berkeley, Cal. Plaintiff and her husband, in their Ford coupé, were proceeding westerly on Fifty-Eighth street. Reaching said intersection, the husband, who was driving, brought the automobile to a complete stop, allowing north-bound vehicular traffic on Telegraph avenue to pass. He then looked to his right and saw a street car southbound on Telegraph avenue. Judging, however, that it was far enough away to permit him to cross in safety, he started up; but, as he was about to pull across onto the south-bound track, his wife screamed "that car is right on top of us," whereupon he immediately swung around to the left to avoid being hit, if possible. He succeeded to such an extent that the street car merely hit the right rear side of the automobile, dragging it some distance. As a result, however, plaintiff sustained injuries of a painful and serious nature.

Although the evidence is to a certain extent conflicting, yet there is ample testimony in support of plaintiff's contention that, when they first saw the street car, it was such

★Rehearing denied.

a distance away as should and would have allowed them to cross Telegraph avenue in perfect safety, had not said street car borne down upon them at a high and unusual rate of speed, and traversed more that a block without any warning of its approach. Appellant's contention of insufficiency of the evidence is predicated upon the claim that the testimony of the driver of the automobile conclusively shows contributory negligence on his part, which negligence is imputable to plaintiff, his wife, and under the established facts becomes solely a question of law. In other words, seeking to invoke the rule that, where the facts are settled and it clearly appears that the injured party did not exercise ordinary care, the question of contributory negligence is a question of law (Green v. Southern California Railway Co., 138 Cal. 1, 70 P. 926), appellant contends that said driver, according to his own testimony, did not look in the direction of the south-bound street car between the time he determined to start up and the time he reached the south-bound car track; whereas, had he but glanced in that direction again, he would have seen the rate of speed at which the car was bearing down upon them and could have avoided the accident, and that such facts establish his contributory negligence as a matter of law.

There is no merit in the contention. Here the question was clearly one of fact, upon which the verdict of the jury is conclusive. The jurors were entitled to weigh the evidence in the light of all inferences favorable to plaintiff and to defendant fairly deducible therefrom, and to finally adopt the view that said driver did in fact use due care, in that he first came to a complete stop, and, before proceeding across the tracks, carefully looked to the right and left; that he then rightfully assumed that he need fear no danger from the street car, which he observed some distance away, and accordingly he operated the automobile slowly across the intervening space.

"In Davis v. Pacific Power Co., 107 Cal. 563, 575, 40 P. 952, 48 Am. St. Rep. 156, it is said: 'It is only where the undisputed facts are such as to leave but one reasonable inference, and that of negligence, that the court is justified in taking the question from the jury.' Where either negligence is set up as a cause of action or contributory negligence pleaded as a defense, it seldom happens that the question is so clear from doubt that the court can undertake to say as a matter of law how the jury should find upon such issues. * * * Whether an inference of negligence on the part of the plaintiff in not further watching the approach of the automobile was justified depended upon whether she was justified in this reasoning. As said in Johnson v. Thomas, 5 Cal. Unrep. 256, 43 P. 578: 'It was certainly an inference upon which minds might well differ, and hence proper to be submitted to a jury, under proper instructions.'" Bellinger v. Hughes, 31 Cal. App. 464, 467, 160 P. 838, 839.

"Contributory negligence is a question of law only when the court is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; Wing v. Western Pacific, 41 Cal. App. 251, 182 P. 969; Bailey v. Market St. Ry. Co., 110 Cal. 320, 328, 42 P. 914." Reaugh v. Cudahy Packing Co., 189 Cal. 335, 343, 208 P. 125, 129.

[2] So numerous are the California cases holding that, as with the negligence of defendant, so the question of contributory negligence of plaintiff is ordinarily one of fact for the jury, it is almost unnecessary to cite authority to this effect. See 19 Cal. Jur. § 141, p. 735, and many cases there cited; Lawrence v. S. P. Co., 189 Cal. 434, 208 P. 966; Morris v. Standard Oil Co., 188 Cal. 468, 205 P. 1073. Clark v. Bennett, 123 Cal. 275, 55 P. 908, which presents facts analogous to those of the instant case, is directly in point, and upholds our conclusion above announced. The same is true of the case of Campbell v. Los Angeles Traction Co., 137 Cal. 565, 70 P. 624. See, also, Scott v. San Bernardino Valley, etc., Co., 152 Cal. 604, 93 P. 677; Commonwealth Bonding Co. v. Pacific Electric Co., 42 Cal. App. 573, 184 P. 29; Smith v. Southern Pacific Co., 201 Cal. 57, 255 P. 500; and Dawson v. San Diego Elec. Ry. Co. (Cal. App.) 255 P. 215.

The instruction which is the subject of appellant's chief attack correctly states the law. It contains the identical language of an instruction, the correctness of which was upheld on appeal in the case of Commonwealth Bonding Co. v. Pacific Electric Co., supra. The other instructions touching the same subject, criticized by appellant, either considered as a whole or standing alone, likewise state the law as set forth in said authority, and are fully sustained by it and by the other cases last hereinabove cited.

[3] The remaining ground urged for reversal, that of alleged misconduct of counsel for plaintiff in the making of a certain remark in his closing argument to the jury, may also be dismissed from consideration. In the first place, counsel did not even finish the sentence which he started and which was immaterial to any issue in this case. He promptly admitted his error, stating he would never have thought of going outside of the record, had not counsel for appellant, by having first done so himself, invited such action. He asked the court to instruct the jury to disregard it on both sides. The jury was so instructed by the court, and the harm done, if in fact there was any, was thus cured by the prompt admonition of the court.

Judgment affirmed.

We concur: SEAWELL, J.; CURTIS, J.

205 Cal. 29

PEOPLE v. MALONE. (Cr. 3122.)

Supreme Court of California. Sept. 17, 1928.

1. Criminal law ⚷1133—Points urged for first time in petitions for rehearing of causes on appeal may be considered in capital cases.

Though ordinarily Supreme Court will not consider points urged for first time in petitions for rehearing of causes on appeal, rule may be relaxed in capital cases, and new point considered on rehearing.

2. Criminal law ⚷823(4)—Instruction on murder, held erroneous, where not bringing homicidal act within Code definition of murder, was not prejudicial, in view of other instructions.

Instruction to convict defendant of murder as charged, if jury believed beyond reasonable doubt that defendant killed deceased, was error for failing to bring homicidal act within terms of earlier instruction containing Code definition of murder, but was not misleading or injurious, in view of instruction defining killing of human being which would constitute murder, and principal instruction stating law defining crime of murder.

In Bank.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

On petition for rehearing. Petition denied. For former opinion, see 269 P. 628.

Ernest Spagnoli and Walter F. Lynch, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, of Los Angeles, and John W. Maltman, Deputy Atty. Gen., for the People.

PER CURIAM. [1, 2] The appellant herein, upon petition for rehearing herein, for the first time urges that the trial court committed prejudicial error in giving to the jury the instruction presently to be considered. While ordinarily this court will not consider points urged for the first time in petitions for the rehearing of causes upon appeal, this rule has been relaxed in capital cases, and will be so in the instant case. The instruction complained of reads as follows:

"All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; all other kinds of murder are of the second degree.

"If you believe from the evidence beyond a reasonable doubt that the defendant, John Joseph Malone, on or about the 7th day of December, 1927, at and in the county of Los Angeles, state of California, killed Ruth Velda Malone, you should find the defendant guilty of murder as charged in the information, and fix the degree of the crime, and also, if you find the defendant guilty of murder in the first degree, the penalty thereof."

This instruction is erroneous as to that portion thereof which states:

"If you believe from the evidence beyond a reasonable doubt that the defendant, John Joseph Malone, on or about the 7th day of December, 1927, at and in the county of Los Angeles, state of California, killed Ruth Velda Malone, you should find the defendant guilty of murder as charged in the information."

The instruction should have contained, after the word "killed," some apt phrase bringing the homicidal act within the terms of the earlier portion of the instruction, which contains the Code definition of murder. We are, however, of the opinion that the jury could not have been misled thereby, for the reason that the killing of a human being which would constitute murder had just been stated in the body of this very instruction, and for the further reason that, in the main body of the instructions already given, the whole law defining and governing the crime of murder and the duty of the jury with relation thereto had been fully, clearly, and correctly set forth. Taken in the light of the circumstances of this particular case, we have concluded that no miscarriage of justice has occurred through the error thus complained of.

The petition for rehearing is denied.

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205 Cal. 133

RICE v. DUNLAP. (Sac. 4054.)

Supreme Court of California. Sept. 1, 1928.

1. Usury ⚷26—Transaction whereby plaintiff discounted defendant's note through agent, retaining half of agent's commission for sale represented by note, in addition to interest on note, held usurious.

Where defendant, executing note for lumber purchased, appointed as agent to discount note salesman of seller, who was entitled to 15 per cent. commission on payment represented by note, and salesman transferred notes to plaintiff under agreement to pay plaintiff 7½ per cent. of face value of note, finding that transaction relating to discounting of note was directly between plaintiff and defendant through medium of salesman, and that retention of 7½ per cent. in addition to interest provided by note was usurious, *held* valid.

2. Usury ⚷146—Plaintiff, discounting defendant's note under usurious transaction, could recover principal loaned, together with costs and attorney's fees provided in note.

Where court found that transaction whereby plaintiff discounted defendant's note through agent was usurious, by reason of plaintiff's retention of part of agent's commission in addition to interest, judgment denying plaintiff all recovery was erroneous; plaintiff being entitled to recover amount of principal loaned to defendant, together with costs and attorney's fees provided for in note, since only illegal portion of contract relating to interest charged was void.

3. Usury 🔑142(2)—Right to recover treble amount of usurious interest must be asserted within year (Gen. Laws, Act 3757, subd. 3).

Under Gen. Laws, Act 3757, subd. 3, authorizing person paying usurious interest for loan to recover treble amount of interest paid, right to interest must be asserted within one year, as provided by statute.

4. Statutes 🔑270—Parties to action reversed for new trial are entitled to benefit of changes in procedural law made up to time of new trial.

Parties to action reversed on appeal are entitled to benefit of any changes in adjective or procedural law which have been made by Legislature up to time of new trial.

5. Usury 🔑143—Defendant, sued on note containing usurious interest provision, may counterclaim for treble interest paid, instead of bringing separate action (Code Civ. Proc. § 438, as amended by St. 1927, p. 1620).

Under Code Civ. Proc. § 438, as amended by St. 1927, p. 1620, enlarging scope of counterclaim, defendant, sued on note containing usurious interest, may counterclaim for treble amount of interest paid on debt, instead of bringing independent action therefor.

Department 2.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by J. Clarence Rice, doing business under the firm name and style of the Rice Securities Company, against J. T. Dunlap, in which plaintiff filed a counterclaim. Judgment for defendant, and plaintiff appeals. Reversed.

J. C. C. Russell, of Hanford, for appellant.
John G. Covert, of Hanford, for respondent.

LANGDON, J. This is an appeal by the plaintiff from a judgment against it in an action to recover upon two promissory notes executed and delivered by the defendant in the sum of $4,020 each, due in six months from the date thereof (September 13, 1923), with interest at the rate of 8 per cent. per annum. The action was tried upon the complaint and the answer and counterclaim of defendant, which set up the alleged usurious character of the transaction evidenced by the notes. Upon this defense the trial court held with the defendant, and gave judgment that plaintiff take nothing.

The record shows that the defendant, J. T. Dunlap, had purchased from the Mitchell Virden Lumber Company $20,000 worth of stock; that it was necessary to pay 40 per cent. of the purchase price in cash. Not having cash, said defendant signed the two notes, payable to himself and aggregating $8,040, which amount represented 40 per cent. of the purchase price of the stock, and gave these notes to Samuel E. Whiting, the stock salesman and agent of the Mitchell Virden Lumber Company. Whiting was expressly made the agent of defendant Dunlap to sell and discount these notes, the notes containing the following provision:

> "The maker or makers hereof hereby severally irrevocably appoint and authorize Samuel E. Whiting as agent to sell and discount this note for value, and hereby consent to, ratify, and confirm any sale or discounting hereof by the said agent, and hereby represent and guarantee to any purchaser hereof that there are no offsets, conditions, or equities in their favor in respect hereto."

It is alleged in the complaint that, by virtue of the aforementioned agreement, said Samuel E. Whiting sold said note to plaintiff herein, and said J. T. Dunlap, defendant, indorsed said note, and said note was delivered by Samuel E. Whiting, agent of said defendant, to plaintiff herein, and that plaintiff is still the owner and holder of said note, and the whole thereof, and entitled to the money due thereon.

It appears that Whiting acted as sales agent for the stock of the lumber company under an agreement whereby he was to receive 15 per cent. commission upon the initial cash payment for 40 per cent. of the purchase price of said stock sold. The plaintiff agreed with Whiting, as agent of defendant, that plaintiff would give cash for defendant's notes, provided Whiting would give to plaintiff one-half of his commission, or 7½ per cent. of the face value of the notes out of their proceeds. Accordingly plaintiff gave a net total of $7,437 cash for the notes, which was their face value, less 7½ per cent. Presumably, and inferable from the record, Whiting took the $7,437 cash to the lumber company and had it credited, together with the portion of his commission retained by the plaintiff, upon the purchase price of the stock bought by defendant. Defendant executed a note for $11,960 directly to the lumber company for the balance of the $20,000 purchase price of the stock.

[1] It is maintained that, as the transaction relating to the discounting of the notes was directly between plaintiff and defendant, through the medium of defendant's agent, Whiting, that the retention of 7½ per cent. of the face value of the notes, in addition to the interest provided therein, was usurious. The trial court so found, and with this finding we agree. As was said in the case of Haines v. Commercial Mortgage Co., 200 Cal. 609, 625, 255 P. 805, 807 (53 A. L. R. 725):

> "Commissions and bonuses may be charged by the lender, but all such charges must, when added to the interest specified and spread over

the whole period of forbearance, be kept within the limit set by law."

[2] This conclusion, however, does not support the judgment in this case, which denied all recovery to the plaintiff. The plaintiff is entitled to recover the amount of the principal loaned to the defendant (Haines v. Commercial Mortgage Co., supra), together with costs and attorney's fees provided for in the note. It is only the illegal portion of the contract—i. e., the portion relative to the interest charge—which is void and unenforceable. Because of the error in denying any recovery to plaintiff, the judgment must be reversed.

The answer alleged that defendant was entitled to a set-off or counterclaim in the sum of $2,894.40, representing treble the amount of interest alleged to have been paid by him upon said notes. The trial court made no finding upon this counterclaim, but merely denied to plaintiff the right to recover anything upon the notes. However, in view of our conclusion that the plaintiff may recover the amount actually loaned to defendant, and the reversal of the judgment upon that ground, it becomes pertinent to consider the right of the defendant to set up a counterclaim for treble the amount of interest alleged to have been paid by him to the defendant. The right to recover treble the amount of usurious interest paid is a statutory right, arising out of the following language:

> "Every person * * * who for any loan * * * shall have paid or delivered any greater sum or value than is allowed to be received under the preceding sections * * * may * * * recover in an action at law against the person * * * who shall have taken or received the same * * * treble the amount of the money so paid or value delivered in violation of said sections, providing such action shall be brought within one year after such payment or delivery." Gen. Laws, Act 3757, subd. 3.

[3] The appellant contends, first, that the right to treble damages must be asserted by independent action, and not by way of counterclaim; and, second, that it must be asserted within the period prescribed by the statute —i. e., one year. About the correctness of the latter contention there can be no doubt, and defendant must show that the right has been asserted within the time prescribed. As to the right to enforce this claim by way of counterclaim, appellant relies upon the case of Farmers' National Bank v. Stover, 60 Cal. 387, holding that, under the federal statute against usury and the construction placed thereon by the Supreme Court of the United States, the right to recover double the amount of usurious interest may be asserted exclusively by way of separate and independent action. However, in the case of Haines v. Commercial Mortgage Co., supra, it was intimated that a different construction was to be placed upon our state statute, for it was said therein:

> "So, also, in this case if the principal obligation is found to be due and on this account, when taken in connection with other charges, it exceeds the amount of the interest paid when trebled, it would be the duty of the court, as above noted, to state the account between the parties and to credit the offset of the interest trebled and generally to dispose of the whole issue presented by the cause."

It is true that this language was unnecessary to the decision of the questions involved in that case, but it expresses a view in harmony with the general policy of our courts to dispose of all phases of litigation in one action, whenever possible to do so.

[4, 5] However, whether or not, at the time of the trial of this action, it was permissible to offset the claim for treble the amount of usurious interest paid as against the principal amount of the debt, we need not decide, because the case is disposed of upon the appeal upon other grounds; however, since the action will probably be retried, and undoubtedly the defendant will then seek to assert a claim for treble the amount of interest paid, he will be entitled to the benefit of any changes in the adjective or procedural law which have been made by the Legislature up to the time of the new trial. This leads us to a consideration of the amendment of 1927 (St. 1927, p. 1620) to section 438, Code of Civil Procedure, enlarging the scope of the counterclaim in this state. It would appear that the section, as amended, covers the cause of action given by statute to the defendant herein against the plaintiff herein for treble the amount of interest paid upon the debt, provided such cause of action be asserted within the time prescribed by the statute of its creation.

The judgment is reversed.

We concur: RICHARDS, J.; SHENK, J.

205 Cal. 138

RICE v. DUNLAP et ux. (Sac. 4055.)

Supreme Court of California. Sept. 1, 1928.

1. Usury 🔑143—Plaintiff, suing on usurious note, could recover amount of original note, plus costs and attorney's fees, subject to defendant's right to recover treble interest by way of counterclaim (Gen. Laws, Act 3757, subd. 3).

In action on note, in which bonus was given by defendant for renewal of prior note, making note sued on usurious, judgment denying any recovery on note was erroneous, but plaintiff was entitled to recover amount of original note, plus costs and attorney's fees provided therein, subject to defendant's right to recover treble interest by way of counterclaim and set-off, under Gen. Laws, Act 3757, subd. 3.

2. Usury 🔑142(2)—Party, paying usurious interest for loan, must exercise right to recover treble damages within year after payment (Gen. Laws, Act 3757, subd. 3).

Under Gen. Laws, Act 3757, subd. 3, authorizing person paying usurious interest for loan to recover treble interest, aggrieved party must exercise statutory right within one year after payment or delivery.

3. Usury 🔑143—Right to recover treble interest paid on usurious loan may be asserted by way of counterclaim to action on loan (Gen. Laws, Act 3757, subd. 3).

Under Gen. Laws, Act 3757, subd. 3, right of aggrieved party to recover treble interest paid on usurious loan may be asserted by way of counterclaim to action to recover loan, and need not be asserted by separate action.

Department 2.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by J. Clarence Rice, doing business under the firm name and style of the Rice Securities Company, against J. T. Dunlap and wife, in which defendant filed a counterclaim. Judgment for defendant, and plaintiff appeals. Reversed.

J. C. C. Russell, of Hanford, for appellant.

John G. Covert, of Hanford, for respondents.

LANGDON, J. This is an appeal by plaintiff from a judgment denying recovery upon a promissory note signed by the defendants. The complaint is the usual one upon a promissory note, and sets forth the note, dated Hanford, Cal., January 30, 1924, payable one year from date, in the sum of $5,550, with interest at the rate of 7 per cent. per annum, and providing for the payment of attorney's fees in the event legal action became necessary to enforce payment.

In the answer it is alleged that the consideration for said note was only $5,000, but the due execution and delivery of the note and its nonpayment are admitted; but it is asserted that $3,251.75 is due upon the note, and no more. This amount is arrived at because of the further allegations of the answer to the effect that the defendants had originally given a note to plaintiff for $5,000, which had become due at the time of the execution of the note involved in this action; that defendants could not pay the same, and that plaintiffs exacted an additional $550 as a bonus for the renewal of this note for one year, and added such bonus to the face of the renewal note, and that interest aggregating $582.75 had been paid upon said renewal note, which interest was usurious because of the inclusion in the principal of the additional $550. The answer prays that treble the amount of said usurious interest so paid by defendants, or the sum of $1,748.25 be allowed as a credit upon the $5,000 note.

The trial court found that the note had been executed by defendants; that the consideration therefor was $5,000 and no more; that the note was unpaid, and that no part of the said note or interest thereon remains due, owing, or payable. The court concluded that the consideration exacted by plaintiff for the execution of said note was usurious, and that plaintiff should recover nothing in the action, and that defendants should recover their costs.

The plaintiff demurred to the answer upon numerous grounds, among which are: That the defense is barred by the provisions of subdivision 3 of Act 3757 of the General Laws of California and by subdivision 1 of section 340 of the Code of Civil Procedure. The demurrer was sustained as to the first and second counterclaims seeking to set-off treble the amount of interest paid on July 31, 1924, and on January 30, 1925, and overruled as to the counterclaim for treble the amount of interest paid on July 30, 1925. The complaint was filed in March, 1926.

[1] The judgment is erroneous under the rule laid down in the case of Haines et al. v. Commercial Mortgage Co. et al., 200 Cal. 609, 622, 255 P. 805, 806 (53 A. L. R. 725), wherein it was said:

> "Even a casual reading of the statute itself shows that the legislative intent was not to declare the whole contract void, but only the portion thereof relating to interest."

Judgment should have been entered for plaintiff for the amount of the original note, $5,000, plus attorney's fees and costs, unless it is permissible for the defendants to recover treble the amount of interest paid by way of counterclaim or set-off. The objections made by plaintiff and appellant to this procedure upon the part of defendants are two-fold and arise out of the provisions of the statute relating to usurious interest. Subdivision 3 of Act 3757, General Laws of California, reads, in part, as follows:

"Every person * * * who for any loan or forbearance of money * * * shall have paid or delivered any greater sum or value than is allowed to be received under the preceding sections, one and two, may * * * recover in an action at law against the person * * * who shall have taken or received the same * * * treble the amount of the money so paid or value delivered in violation of said sections, providing such action shall be brought within one year after such payment or delivery."

[2, 3] It is contended, first, that since the statute creates a new right and also provides a remedy for its enforcement, that remedy is exclusive and the position is taken that the aggrieved party must bring a separate and independent action in order to recover the penalty. The second contention is that the aggrieved party must exercise his statutory right within one year. We think the position of appellant is well taken as to the second objection, and the trial court so concluded in sustaining the demurrers to the first and second counterclaims of defendant.

As to the third counterclaim, which sets up a claim for treble the amount of interest paid within the period of one year, the demurrer was properly overruled. The objection that such claim might only be asserted in a separate action, and not by way of counterclaim, has been considered and answered by us, contrary to the contention of the appellant herein, in an opinion filed this day in the case of J. Clarence Rice, etc., v. J. T. Dunlap (No.) 4053, of the records of this court), 270 P. 196, involving the plaintiff herein and one of the defendants herein, and concerning another transaction between said parties, also held to be usurious. For the reasons stated in that opinion, we hold in the instant case that the assertion of the counterclaim for treble the amount of interest paid is proper, provided it is so asserted within the prescribed period of one year.

The judgment is reversed.

We concur: SHENK, J.; RICHARDS, J.

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205 Cal. 179

GREAT WESTERN SYNDICATE, a Corporation, et al., Petitioners, v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, and Hon. Walter Perry Johnson, as Judge Thereof, Respondents, et al. (S. F. 13134.) ★

Supreme Court of California. Sept. 12, 1928.

Rehearing Denied Oct. 4, 1928.

In Bank.

Application for writ of mandate, prayed to be directed to the Superior Court, City and County of San Francisco, Walter Perry Johnson, Judge, to require settlement of bill of exceptions. Writ granted.

J. L. Smith, of San Francisco, for petitioners.
C. A. Linn, of San Francisco, for respondents.

PER CURIAM. This matter having come on regularly for hearing before this court upon the petition of the appellants for a writ of mandate to be directed to the superior court and the judge thereof, respondents herein, requiring the respondents to settle and approve the bill of exceptions of the appellants and petitioners herein in the case of Una Margaret Locke Paddon v. William Locke Paddon et al., now upon appeal in this court, and which is attached to the petition herein, and the respondents having appeared herein and presented certain specific objections to said bill of exceptions and to the settlement and approval thereof, wherein they have specifically directed the attention of this court and also of these petitioners to certain deficiencies and omissions in said bill of exceptions, and which the petitioners herein, having thus had their attention specifically directed thereto, may, if given a reasonable opportunity, be able to remedy in a revised, amplified, or amended bill of exceptions; and it appearing proper to this court that such reasonable opportunity should be by the respondents herein afforded to the petitioners herein so to do, and good cause appearing therefor:

It is ordered that the petitioners' aforesaid proposed bill of exceptions be and the same is hereby returned and presented to the respondents herein for further proceedings thereon, with a view to the revision, amendment, and eventual settlement thereof; that the order of the respondents, heretofore made and entered, disallowing and striking out said proposed bill of exceptions, be by said respondents so far modified as to permit the petitioners herein a reasonable time, hereby fixed at 60 days from and after the date of said modified order, within which to prepare and present such further revised or amended proposed bill of exceptions as would entitle the petitioners herein to have the same presented and treated as their proposed bill of exceptions in said cause, and to have the same considered amended and settled as provided by law, and as and for the appellants' bill of exceptions in said cause now on appeal in this court.

WASTE, C. J. I dissent. The matter comes here on a petition by the appellants for an order directing the respondent court and the judge thereof to settle and approve a bill of exceptions. There is attached to the petition a copy of a motion made in the lower court to dismiss all proceedings taken by the defendants (appellants) touching or concerning the preparation or settlement of the proposed bill of exceptions and to strike the same from the files. From the answer to the petition for this writ, verified by the trial judge, it appears that at the time of the hearing of the motion to strike the bill of exceptions from the files the petitioners represented to respondents that their proposed bill of exceptions contained all the material matters which should be set forth; that at that time the trial judge pointed out many material and important matters which were omitted from the proposed bill, that the testimony of many witnesses was omitted therefrom, and that the testimony of other witnesses was garbled or fabricated. The trial court and counsel for the plaintiff below pointed out, and now specify, some 33 particulars in that regard.

★Rehearing denied.

The petitioners contended that said matters were not proper matters to be contained in the bill, and petitioners failed and neglected to redraft the bill or embody therein the suggestions of court and counsel, or to make the same conform to the truth, but persisted and insisted that the draft as proposed by them was sufficient for all purposes. Thereupon the court made an order "finding that defendants' proposed bill of exceptions is entirely inadequate to explain the specifications of insufficiency of evidence to justify the decision or the exceptions or proceedings relied upon by defendants, and that it presented such a one-sided and garbled statement of but a small portion of the evidence as to be a sham, and that it is not susceptible of amendment or revision, so as to conform to the truth except by means of a complete new draft, the settlement of defendants' proposed bill of exceptions is disallowed, and the motion to strike out the same is granted."

From the verified return it appears that "then and only then did petitioners offer to amend or redraft their bill, and at that time petitioners did not state the particulars in which they would amend or redraft their bill, nor have they ever at any time prepared a proposed bill of exceptions other than the one annexed to their petition on file herein."

For these reasons, in my judgment, the writ of mandate should be denied.

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205 Cal. 111

TULARE COUNTY v. CITY OF DINUBA et al. (S. F. 11781.)

Supreme Court of California. Aug. 31, 1928.

1. Counties 🔑153½—Court cannot award part of public fund paid for use of county for legal services rendered county without contract or statute or equitable reason (Pol. Code, § 470, subd. 5; §§ 4000, 4001; § 4003, subd. 1; § 4041, subd. 16; § 4151; § 4153, subd. 3; § 4154; Const. 1879, art. 11).

In view of Pol. Code, § 470, subd. 5, sections 4000, 4001, section 4003, subd. 1, section 4041, subd. 16, section 4151, section 4153, subd. 3, and section 4154, power to award for legal services rendered county part of public fund paid into court for use of political subdivision of state, such as county, cannot be exercised, in absence of contract authorizing statute, or some exceptional equitable reason, without violating act creating scheme of county and township government in accordance with Const. 1879, art. 11.

2. Counties 🔑1—Counties are governmental agencies of state, whose property is public property.

Counties are governmental agencies of state, and property intrusted to their governmental management is public property.

3. Evidence 🔑83(1)—Official duty will be presumed performed, in absence of contrary showing.

In absence of contrary showing, it must be presumed that official duty will be performed.

4. Counties 🔑196(9)—Necessity of private citizen or public subdivision of state to sue to preserve rights of county, sufficient to justify allowance of attorney's fees against county, held not shown.

Where county, sought to be charged for attorney's fees, had filed suit prior in time to accomplish same general purpose as suit subsequently filed, and had refused to employ attorney seeking to charge it with attorney's fees, necessity for private citizen or political subdivision to bring suit to preserve rights of another county, or save it from loss, so as to justify allowance of attorney's fees, did not appear.

5. Attorney and client 🔑166(3)—Claim that attorney for counties rendered service of great value held not sustained by evidence showing case was settled by rules formulated by opposing party's representatives (St. 1905, p. 777).

Claim that service rendered by attorney for several counties in actions prosecuted against public utility companies, franchised under St. 1905, p. 777, were of greater value than those performed by others interested in formulating rules for settlement of action in determining amount due by utility corporations to counties, *held* not sustained by evidence showing case was settled on rules formulated by technical and legal representatives of public utility companies, and not rules suggested by attorney.

6. Counties 🔑126—Counties and municipalities hiring attorney held bound by contracts made, and award to attorney for services payable out of fund recovered for use of several counties would afford counties no relief.

Counties and municipalities hiring attorney to prosecute action in their behalf are bound by contracts made with attorney, and any award made to attorney payable out of fund recovered in court for use of several counties, would afford them no relief.

7. Counties 🔑125—Counties contracting for payment of attorney fees could not recoup against county not party to contract.

Where various counties contracted for payment of fees to attorney, to be paid out of funds recovered, such counties could not recoup amount payable to attorney against county not party to contract.

8. Costs 🔑103—Recovery of compensation out of common fund for services rendered common interest is based on agency, and requires contract expressly made, or superimposed by law.

Compensation is allowable to one out of common fund belonging to others for expenses incurred and services rendered on behalf of common interest on basis of representation or agency, and requires contract of employment expressly made, or superimposed by law on facts.

9. Liens 🔑7—Party preserving fund from waste arising from neglect of trustees is entitled to compensation payable from fund.

Where party rendering services for common interest has sought to preserve fund from waste and destruction arising from neglect and misconduct of trustees, such party may recover compensation for services payable out of fund.

10. Costs 🔑99—Party profiting by action cannot thereby be charged with costs to party bringing action, in absence of contractual relation or equitable reason.

That person may be benefited by action brought by another is not of itself sufficient to justify court in assessing costs against person, who also profits by such action, in absence of some contractual relation or equitable reason sufficient to support allowance of costs.

11. Counties 🔑125—County, prosecuting action against utility companies through own agencies, could not be compelled to pay part of fund recovered to attorney employed by other counties having no power to bind it (Broughton Act).

Where county was conducting litigation first brought to test validity of Broughton Act (St. 1905, p. 777), in good faith for benefit of state, until action was intercepted by another county, and first county was willing to go forward in action to reduce to possession funds to which it was entitled, it would not be equitable under evidence to compel such county, having district attorney of its own actively engaged in prosecuting action, and also employing special counsel, to pay substantial part of funds it is entitled to receive from public utilities company to attorney employed by other counties, brought into action, whose fee was fixed by other counties having no power to bind first county in employing such attorney.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by the County of Tulare against the City of Dinuba and another. From a portion of a decree denying application for attorney fees, defendant named and others appeal. Affirmed.

Superseding opinion of iDstrict Court of Appeal, 263 P. 252.

J. E. Greene, City Atty., of Dinuba, for city of Dinuba; W. W. Middlecoff, of Los Angeles, for counties of Mariposa, Merced, and Madera, and cities of Atwater, Gustine, Livingston, Dinuba, Taft, McKittrick, and Maricopa; H. K. Landram, of Merced, for city of Livingston and W. W. Middlecoff; M. E. Power, of Visalia, for W. W. Middlecoff; Mason A. Bailey, Dist. Atty., of Madera, for Madera county; H. E. Schmidt, Dist. Atty., of Bakersfield, for Kern county—and Thomas C. Ridgway, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., Leroy McCormick, Dist. Atty., and Frank Lamberson, Asst. Dist. Atty. both of Visalia, and Sherrill Halbert, Asst. Dist. Atty., of Porterville, for respondent.

Lindsay & Gearhart, of Fresno, for San Joaquin Light & Power Corporation.

Wm. R. McKay, of Hanford, amicus curiæ.

Chester L. Coffin, City Atty., and Orlando H. Rhodes, Asst. City Atty., both of Santa Monica, for petitioner city of Santa Monica.

C. W. Braswell, City Atty., of Lindsay, for city of Lindsay.

SEAWELL, J. This appeal was taken from that part of a judgment entered in the superior court of the county of Fresno, to which court the questions involved in this appeal had been transferred by the superior court of the county of Tulare for decision, wherein said superior court of the county of Fresno refused to tax as costs of suit an attorney fee in favor of W. W. Middlecoff, Esq., in the sum of $11,980.47 against the share of a fund allocated to the county of Tulare and paid into court by the defendant San Joaquin Light & Power Corporation for the use and benefit of said county, on account of an action brought in the superior court of the county of Merced, in the name of the counties of Kings, Merced, and Madera and several municipalities situate within said counties, or within counties contiguous to one or more of said counties, to compel defendant San Joaquin Light & Power Corporation, a public utility engaged in the business of furnishing and transmitting to the public electricity for purposes of light, heat, and power by means of poles and wires placed upon public highways in the counties and municipalities herein named, to account to said counties and municipalities for the grant and use of said franchise privileges as provided by an act commonly designated the "Broughton Act," entitled "An act providing for the sale of street railroad and other franchises in counties and municipalities, and providing conditions for the granting of such franchises," etc. Chapter dlxxviii, Stats. 1905, p. 777. The refusal of the court to set aside and vacate that portion of said judgment decreeing that Attorney Middlecoff was not entitled to the allowance of an attorney's fee from the fund allocated to the county of Tulare, and its further refusal to enter a decree upon the findings made by the court that he was entitled to said attorney's fee, is made an additional ground of appeal.

Appellant Middlecoff in his individual capacity and the city of Dinuba gave notice of intention to move for a new trial, and also notice of intention to move for an order vacating the judgment as entered and for the entry of a different judgment on the findings. No other parties were joined with Mr. Middlecoff and said city in either notice of motion. On August 20, 1925, the motion for a new trial was withdrawn and dismissed. On the same day, August 20, 1925, the motion to vacate said judgment and enter a different judgment was denied. On August 28, 1925, W. W. Middlecoff, in his individual capacity and as the attorney for said city of Dinuba, gave notice of appeal and a notice to the clerk to prepare the transcript on appeal as provided by sections 953a, 953b and 953c, Code of Civil Procedure. In the notice of appeal and the notice to the clerk to prepare the transcript, other parties consisting of counties and cities, interested in the main question of an accounting to them under the interpretation given to said act in County of Tulare v. City of Dinuba, 188 Cal. 664, 206 P. 983, were also joined as appellants. It is perfectly obvious from the records before us that none of the other parties to the action, except Mr. Middlecoff, the county of Tulare, and the city of Dinuba were concerned or interested in the question as to what portion, if any, of the fund allocated to the county of Tulare properly belonged to the city of Dinuba, or whether Middlecoff was legally entitled to a fee to be paid out of the fund allocated to said county of Tulare. The amounts which all of the appellants, except the city of Dinuba, were indebted to Middlecoff by their respective contracts of employment, had been definitely fixed by a decree of court from which no appeal was taken, and none of said appellants, but the city of Dinuba and Middlecoff, could in any wise be benefited or injured by the result of this appeal. The presence of said parties to the record has no bearing whatever on the merits of the questions presented for decision, and they will receive no further consideration as appellants.

The cause comes to us on a petition for hearing after decision by the District Court of Appeal, First Appellate District, Division 2; Koford, P. J., writing the opinion. The order of transfer to this court was made mainly because of appellants' challenge to that portion of the opinion which expressed doubt as to "whether the principles of the equitable rule contended for can be applied to any county of the state of California where the Political Code has made a complete scheme providing when and by whom the county shall be represented. The scheme includes only the district attorneys, Attorney General, and special counsel employed in a designated way in certain cases." While it is true that this question was raised by counsel and responded to by the court as above set out, we nevertheless do not regard a decision on that single point to be absolutely necessary to an affirmance of the judgment, which will abundantly appear from our subsequent brief résumé of the early actions instituted by the County of Tulare against the San Joaquin Light & Power Corporation, and its continuous efforts to make effective the Broughton Act and compel the public utility corporations of the state doing business within its borders to comply with its provisions, considered with respect to the part taken in the later stages of said litigation by Mr. Middlecoff. There is, however, much force in the observation made by the District Court of Appeal.

Appellants have cited occasional cases from other jurisdictions wherein attorney's fees were taxed as costs of suit against a common fund reduced to a judgment as the result of an action brought by a private citizen on behalf of and for the benefit of a county, municipality or other branch of government, as authorities which should rule the decision in the instant case. We think none of the cases cited by appellants can be applied to governmental affairs in this state, in view of the very complete system which prevails in this state in the form of township and county government acts and general laws prescribing the powers and duties of state, township, and county officers, and which laws reserve to certain other public officers and boards supervisory control of the acts and conduct of its said ministerial and administrative officers in the performance of official duties.

[1] The power of the court to make an award or allocation of a part of a public fund paid into court for the use and benefit of a political subdivision of the state, such as a county, without the consent of and in the absence of any contractual agreement on the part of said county through its authorized agents to do so, and which county is by statute expressly provided with a law department charged with the exclusive duty of prosecuting and defnding against all actions that should be brought in its behalf or defended against, subject only to the control and direction of its governing board and the supervisory control of the Attorney General of the state, may not only be doubted, but we may take a forward step into the field of assurance and say that an attempt to exercise such power in the absence of an authorizing statute or some exceptional and pressing equitable reason for so doing, which does not appear in the instant case, would be to violate the implied if not express language, meaning, and intent of the act creating our system or scheme of county and township government and general administrative laws in accordance with a policy that was adopted and which has been continuously followed since the adoption of our present Constitution of 1879.

Section 4000, Political Code, provides:

> "Every county is a body corporate and politic, and as such has the powers specified in this title, [title II] and such other powers as are necessarily implied from those expressed."

Section 4001:

> "Their powers can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law."

A county has power to sue and be sued. Section 4003, subd. 1, Pol. Code. Section 4041, subd. 16, of said Code, provides that the board of supervisors has jurisdiction and power "to direct and control the prosecution and defense of all suits to which the county is a party and by a two-thirds vote of all the members, may employ counsel to assist the district attorney in conducting the same."

The general permanent powers of the board of supervisors are many and plenary in the exercise of its exclusive executive and legislative jurisdiction and power. It is given power to supervise the official conduct of all county officers and it is held to strict accounting in its duty of conserving and caring for the revenues and guarding the rights of the county. It is made the duty of the judge of the superior court of each county annually to call the attention of the grand jury to the provisions of law prescribing the duties of boards of supervisors and all county officers charged with protecting the interests and rights of the people to ascertain by a careful and diligent investigation whether the provisions of the law have been complied with and to note the result of the same in their report. Section 4151, Pol. Code.

Turning to the duties of district attorneys, we find by section 4153 and its subdivisions that the district attorney is the public prosecutor, and must attend the courts and conduct on behalf of the people all prosecutions for public offenses, and when not engaged in criminal proceedings in the superior court or in civil cases on behalf of the people must attend upon the magistrates, when requested by them, and perform other specific duties.

Subdivision 3, said section 4153, provides that the district attorney must "draw all indictments and informations, defend all suits brought in his county against the state or his county wherever brought, prosecute all recognizances forfeited in the courts of record, and all actions for the recovery of debts, fines, penalties, and forfeitures accruing to the state or his county." He is expressly made the legal adviser of the board of supervisors. Section 4154, Pol. Code.

By section 470, subd. 5, Political Code, it is made the duty of the Attorney General "to exercise supervisory powers over district attorneys in all matters pertaining to the duties of their offices, and perform any of such duties when, in his judgment, such action is advisable, and, from time to time require of them reports as to the condition of public business intrusted to their charge. * * *"

[2-4] We have set out the foregoing sections of the Political Code as illustrative of the complete system of state, county, and township government under which the public business of the state is conducted. The counties are governmental agencies of the state and the property intrusted to their governmental management is public property. Reclamation District v. Superior Court, 171 Cal. 672, 154 P. 845. The statute casts upon boards of supervisors and district attorneys the duty of protecting the public's interests, and to the end that there may not be a failure of performance of said duties the law subjects their official acts and duties to review, inspection, and supervision by still higher powers. Under such a scheme as is provided by our system for the transaction of public business the *necessity* for a private citizen or another public subdivision of the state of equal rank, such as a county, to bring a suit in order to preserve the rights of another county or to save it from a loss, such as would justify the allowance of attorney's fees against the latter, could scarcely arise; certainly not in a case such as this, in which the county sought to be charged had filed a suit prior in time and designed to accomplish the same general purpose as the suit last filed and which was pending, and had refused before the later case was filed to employ the attorney here seeking to charge it with an attorney's fee. In the absence of a contrary showing, it must be presumed that official duty will be performed.

The authorities cited by appellants do not deal with a system of county government such as we have briefly outlined. Doubtless no such complete systems existed in the jurisdictions where the actions arose. The cases relied upon by appellants present three conditions upon which an attorney's fee has been allowed to the party instituting and prosecuting to a finality the suit. One is where an action is brought by a party who has created or discovered a fund which inures to the common benefit of several persons and has borne the expense of the litigation that established the rights of all. In the instant case appellant Middlecoff neither created nor discovered the fund in suit, as will appear from the facts hereafter stated.

The second class of cases turns upon questions of fraud, corruption or the willful neglect of public officers, such as ruled State ex rel. Bonner v. Andrews, 131 Tenn. 554, 175 S. W. 563, a case cited by appellants. In that case Judge Dillon is quoted as announcing the equitable rule that, when a municipal or other public corporation has a cause of action which should be prosecuted for its use, whether that cause of action be legal or equitable, and its governing body or other proper officers *wrongfully neglect* or *wrongfully refuse* to commence an action thereon, a taxpayer may, on behalf of himself and all others similarly situated, commence an action in equity to redress the wrong to the corporation, making the corporation a defendant as trustee for all its members. In the Andrews Case the municipal authorities willfully refused to take any steps to collect a tax which the Supreme Court of Tennessee had held to be valid. A taxpayer by writ of mandate caused the taxes to be collected, and he was allowed his expenses and counsel fees. Doubtless the writ of mandate was the only remedy available to compel a compliance with the law, as the court in its opinion remarked that, but for the activity of the taxpayer, the money would not have reached the treasury. A similar situation did not exist as to the county of Tulare. In the instant case neither willful neglect, fraud, nor corruption can be urged as a reason for the institution of suits in the county of Merced which involved the same questions in the large sense that were involved in the causes pending in the county of Tulare.

The third class of cases in which attorney's fees have been allowed to a party who institutes and prosecutes a cause to judgment at his own expense for the benefit of a municipality and its inhabitants are those in which there is express statutory authority for such allowance. Kimble v. Board of Commissioners of Franklin County, 32 Ind. App. 377, 66 N. E. 1023, a case cited and seemingly relied upon by appellants, cannot be regarded as authority on any principle of the case. A few cases in bankruptcy are also cited, but there is no analogy between those cases and the case made by the record before us.

The case of Fox v. Hale & Norcross S. M. Co., 108 Cal. 475, 41 P. 328, is relied upon to support the contention that a court of equity can compel the payment of attorney's fees out of a common fund collected and paid into court in an action brought by one on behalf of others. The question of the allowance of an attorney's fee was dismissed from a consideration of the case upon appeal. This court, in passing upon the questions before it, said that the receiver was entitled to an allowance out of the moneys collected of his reasonable expenses, including counsel fees. The receiver was an *officer of the court.* The main case is reported in the same volume at page 369 (41 P. 308). It was an action involving the corrupt and fraudulent acts of the board of directors of a mining corporation engaged in a conspiracy to defraud the corporation, and, as there were no officers authorized to maintain the action willing to bring it, suit was commenced by a stockholder. The corporation was a private corporation, and not a county or municipality, which can act only through its governing board, and in strict compliance with the prescribed provisions of law. Fraud, corruption, and conspiracy were the gravamen of the charge made against the governing body of the private corporation by a defrauded stockholder. His action was sustained after long, vexatious, and expensive litigation. The costs properly incurred by him were allowed.

In the more recent case of Los Angeles Trust & Savings Bank, etc., v. Ward, 197 Cal. 103, 239 P. 847, supported by an array of authorities, the rule is announced that attorney's fees are not recoverable by a successful party to an action, either at law or in equity, except in the instances where they are expressly allowed by statute. It is further noted in 7 Cal. Jur. 287, that in an action for the preservation or distribution of a fund, where all the parties have a common interest, courts of equity in some cases, where justice requires it, allow attorney's fees as a part of the relief granted.

This brings us to a consideration of Attorney Middlecoff's claim as urged upon solely equitable grounds. The Broughton Act was approved March 22, 1905. By its provisions no percentage of the total gross receipts of utility corporations was to be paid for the first five years succeeding the date of each franchise granted by the respective counties, but thereafter said percentage became payable annually. On May 4, 1914, the county of Tulare commenced an action in the superior court of that county against the city of Dinuba, a municipality situate within said county and which claimed a portion of the fund sued for, and the San Joaquin Light & Power Corporation. The purpose of the action was to bring to the treasury of said county the gross receipts due it as provided by the Broughton Act. The nature of the action as against the utility corporation was for an accounting and for general relief. Frank Lamberson, Esq., and James M. Burk, respectively district attorney and deputy district attorney of said county, were the attorneys for plaintiff county. This was the first action commenced, and the only action ever carried forward to a finality, by any of the group of counties or municipalities affected by the Broughton Act. The case was delayed in the trial court on account of an order made reopening the cause for the taking of further evidence, and because of the importance of the cause and the difficulty encountered in interpreting the exact meaning and scope of the Broughton Act. Judgment was rendered in favor of the county of Tulare and against the city of Dinuba and said utility corporation. In 1917 another case was filed by Mr. Lamberson and his deputy to preserve the rights of the county of Tulare to accruing annual gross receipts arising under said Broughton Act. A third suit was filed for the same reasons in 1919 by Mr. Scott, district attorney and successor in office to Mr. Lamberson. Mr. Middlecoff appeared in this action as deputy district attorney.

Upon coming into the office of district attorney in January, 1919, as the successor of Mr. Lamberson, Mr. Scott appointed his law associates or copartners, Mr. Middlecoff and Mr. I. H. Ham, as deputy district attorneys. The trial of the first case, begun under the régime of Mr. Lamberson, was brought to a conclusion, and judgment went for plaintiff and against both defendants. An appeal was taken by the utility corporation to this court. Mr. Middlecoff, as deputy district attorney, was the principal attorney in said cause, as well as upon appeal, having at all times the advice and assistance of his superior and his fellow deputy, Mr. Ham. Upon appeal the cause of County of Tulare v. City of Dinuba and San Joaquin Light & Power Corporation, 188 Cal. 664, 206 P. 983, was reversed, but this court sustained the act against the assaults made on constitutional grounds, and against the claim that it was void on grounds of uncertainty and that it was not capable of practical application.

Mr. Middlecoff served as deputy district attorney of Tulare county commencing with January, 1919, to December 31, 1921, when he resigned. At the time of his resignation the test case, reported in 188 Cal. at page 664, 206 P. 983, had not been finally submitted to this court. He was upon his resignation immediately employed by the county of Tulare as its special counsel in conducting and presenting said cause to this court at a salary of $250 per month. On March 16, 1922, he was dismissed from employment by said county of Tulare. On May 4, 1922, this court filed its opinion in said cause, reported in 188 Cal. 664, 206 P. 983, entitled "County of Tulare v. City of Dinuba, defendant, and San Joaquin Light & Power Corporation, defendant and appellant." This court in that case went to great pains to point out a plan by which the Broughton Act could be applied in a practical way to a difficult situation. In so doing it advised that all counties and municipalities claiming the benefits of said act should join in one action or be made parties defendant. The important question decided was that the 2 per cent. charge on the gross receipts for the use of the highway was neither a tax nor a license, but a toll, which the holder of the franchise undertakes to pay for the privilege of using the highway, and therefore it was not repealed by the provisions of section 14, article 13, of the Constitution, adopted since the Broughton Act.

The above decision settled every material question raised against the validity of the act and it became the law of the case. There was nothing further to be done, but to determine a just basis on which the gross revenues should be computed. The remittitur from the Supreme Court was filed June 7, 1922. Mr. Middlecoff applied to the county of Tulare to be specially employed to prosecute its claim, but his services were rejected. With unusual expedition he negotiated contracts with several counties and municipalities to represent them specially in prosecuting their claims against the defendant San Joaquin Light & Power Corporation for an accounting in accordance with the plan announced by this court. On June 19, 1922, 11 days after the filing of the remittitur, he filed suit in the county of Merced, in which he named Kings, Merced, and Madera counties and the city of Dinuba plaintiffs, "suing for the benefit of all counties and municipalities interested in moneys due from the defendant under the Broughton Act franchises," and prayed for an accounting as outlined in the Tulare County decision. The complaint seems to have been amended so as to include in its caption the county of Mariposa and a number of municipalities situate in Tulare, Kern, and other counties. The county of Kern afterwards came in as an intervener. Nowhere did the appellant assume directly to represent Tulare county. He alleged that Tulare county was beneficially interested in the litigation, but that is all. Defendant's demurrer to the complaint was overruled, and it waived its right to answer, as it had protected itself by stipulation as to the rule that would be observed in fixing its liability.

Many of the municipalities named as beneficially interested in the result of the suit, which were not originally represented by appellant, afterwards entered into contracts of employment with Mr. Middlecoff, agreeing to pay him such fee as the court might allow. Tulare county, which had initiated the suit that settled the law of the case, and which had two other suits as well as the original proceeding pending in its superior court, had had but 11 days from the filing of the remittitur to determine its future course at the time Mr. Middlecoff filed the Merced county action. Tulare county's district attorney and Mr. Lamberson, the former district attorney of Tulare county, who was employed by said county as special counsel to assist in the prosecution of said cases, found themselves embarrassed by the recent suit filed in Merced county, which was framed for the accomplishment of the same object which Tulare county for a number of years had been endeavoring to accomplish at its own cost, and which it would doubtless have accomplished, but for the interference with its plan by the filing of the Merced county case. A simple amendment of the Tulare county complaint, bringing in, either as plaintiffs or defendants, all the counties and cities interested in the subject-matter, as pointed out by this court upon the appeal of the Tulare county case, which course would doubtless have been adopted, but for the action filed in Merced county, would have rendered it unnecessary to bring a new action in the latter county, and the contention as to the allowance of attorney's fees against Tulare county would not have arisen. Under such procedure it is quite likely that the other counties and cities would not have deemed it necessary to employ special counsel for the performance of a service which the statute of the state imposed upon its law officers. The county of Tulare refused to join in the Merced county suit at the request of Mr. Middlecoff. Finally he caused it to be served with summons, and in obedience to that command said county came in as an intervener After considerable negotiation, the utility corporation paid into court a fund allocated to the several counties and cities interested, which was accepted by all as a fair settlement of the controversy.

The complaint in intervention by the county of Tulare was filed by the district attorney and its special counsel, Frank Lamberson, January 3, 1924. It prayed for a judgment commanding said utility corporation to pay into court, for the benefit of Tulare county and all other counties and municipalities, the gross receipts found to be due each, with interest at the rate of 7 per cent. per annum, for costs, and general relief. By a stipulation dated February 13, 1924, and filed in court March 24, 1924, the Merced county action as to the county of Tulare and city of Dinuba was dismissed without prejudice to the right of the county of Tulare and city of Dinuba, and saving to them "the right to have all their rights in the matter involved in the action determined and adjudged and decreed in those certain actions now pending in the superior court of the county of Tulare [three in number], in each of said actions said county of Tulare is plaintiff and said city of Dinuba and the San Joaquin Light & Power Corporation, a corporation, are defendants, as fully as such rights could be determined and adjudged and decreed in this action, and the joinder of said county of Tulare and city of Dinuba in this action is hereby waived." The rules for the computation of the gross revenues due to all said counties were settled in the Merced county action.

The judgment, entered May 7, 1924, adjudged the amount then due from said utility corporation (not including gross revenues which would annually accrue during the life of the franchises, unless repealed by subsequent legislation, and which revenues would yield a considerable net sum to said counties and cities) to be $30,748.53, and fixed the attorney's fees under the various contracts of employment made with attorney Middlecoff at something more than $36,000, not including the city of Dinuba's share, which sum was assessed against the several counties and cities in proportion to the benefits received by each. Said judgment did not conclude the rights of either the county of Tulare or the city of Dinuba, in their controversy as to the division of the fund between the county of Tulare and the city of Dinuba, nor the right of the former to contest the claim made by Mr. Middlecoff as to attorney's fees against said county. He held a contract of employment with the city of Dinuba, the amount of his compensation being dependent upon the amount that would be awarded to said city in its controversy with the county of Tulare as to that issue. By stipulation the instant case was transferred to the superior court of Tulare county and by further stipulation to the superior court of the county of Fresno, where the issues were tried.

A number of irrelevant recitals appear in the findings of fact made by the superior court in the Fresno case, which could have no bearing on the judgment, so far as the question of the attorney's fee is concerned. The court found, however, that Attorney W. W. Middlecoff was paid in full for all services rendered by him in the main case, reported in 188 Cal. 664, 206 P. 983, while he was deputy district attorney of Tulare county, and for services rendered thereafter as special counsel, and that nothing further was due him from said county. It also found that the Merced county suit was important, and the questions of law and fact involved therein were difficult, and the services extended over a period of practically two years and were of the value of $50,000; that all the counties and municipalities interested in said fund, except the county of Tulare, stipulated and agreed that the counsel fees of said W. W. Middlecoff should be fixed at the sum of $50,000, and should be paid out of said fund by deducting from the fund payable to each respective party a sum proportionate to the benefits received, and then proceeded to assess the same amount against each party as is set out in the Merced county judgment. The amount of $1,405.53 was allowed against the city of Dinuba, as a reasonable fee to be paid by that city, which was specially represented by Mr. Middlecoff.

Under the rules adopted as the basis of computation, it was found that there was due to the county of Tulare from the utility corporation, ending December 31, 1924, the sum of $17,561.04 and to the city of Dinuba $2,064.24. From the latter fund Mr. Middlecoff, as special counsel for said city, under his contract was allowed $1,405.53. The court found that the services which he rendered in said original cases as deputy district attorney of Tulare county and thereafter as special counsel had been fully paid for, and therefore nothing was due him for services from Tulare county. It further found that at the time the action was commenced in Merced county the three actions heretofore mentioned were pending in the superior court of Tulare county, which was represented by the district attorney and special counsel, all of which was known to Mr. Middlecoff. Further, that said county of Tulare did not at any time during the pending of the Merced proceedings, by resolution of its board of supervisors or otherwise, employ Mr. Middlecoff as its attorney, and did not, by resolution or otherwise, agree to pay him anything for any services rendered by him as attorney at law or otherwise. His demand for an attorney's fee to be taken out of Tulare county's allotment was therefore denied.

Appellant Middlecoff insists that an exceptionally important work was done by him in bringing about the settlement made by the utility corporation with all counties and cities in or through which its power lines passed and that his compensation should be great. The work of first and prime importance was the bringing of the suit by Tulare county before Mr. Middlecoff was connected with the litigation and carrying it forward at its own cost to a finality. That Mr. Middlecoff, with others, rendered valuable services in the later days of that suit, we have no reason to doubt. For those services he has been paid. That he rendered service in the action which he brought to compel an accounting there is no room for doubt. His services, however, were rendered under a contract made in the first instance with several certain counties and cities, in the expectation that others would make like contracts of employment. Practically all but Tulare county did make similar contracts.

[5] As to the claim that the services rendered by him were greater in value than those performed by others interested in formulating the rules which should be acceptable to all as the basis upon which computations should be made in determining the amount due from said utility corporation to the claimants, it is not sustained by the record. The law of the case having been settled, the only task left was the devising of a plan that would be fair to all. The testimony of Mr. Carl E. Lindsay, chief counsel of the San Joaquin Light & Power Corporation, was to the effect that the set of rules which was finally adopted as furnishing a fair and just method of adjustment as between the contending parties, and one which also was a compliance with the plan or scheme outlined by this court in County of Tulare v. City of Dinuba, 188 Cal. 664, 206 P. 983, was the result of the study and investigation given to the subject by the technicians and the legal representatives of a number of public service corporations of this state and their auditing departments, including the Southern California Edison Company, Southern Sierras Power Company, Pacific Electric Railway Company, Southern Counties Gas Company, and the San Joaquin Light & Power Company, at a conference held at the city of Los Angeles for the special purpose of devising a plan that would be fair and just, as between the counties and municipalities, on the one hand, and the public utility corporations, on the other hand. These rules were submitted to Mr. Middlecoff and the other interested parties, and afterwards, by consent of all, they were adopted by the trial court as furnishing the basis on which the settlement of the whole question was to be made. Mr. Middlecoff submitted his views as to what the rules should be, and the county of Tulare had its notion on the subject, but the set of rules as worked out by said experts at the Los Angeles conference was the one that was adopted. He testified that Mr. Middlecoff's difficulties were not as to the rules, but largely with those whom he represented. No doubt he, as well as the attorneys for the county of Tulare, assisted in composing differences and bringing together disaffected claimants. For his services, however, he was, in our view, well compensated by the counties and cities which employed him.

[6, 7] There was some conflict existing between the interests of Tulare county and the city of Dinuba, specially represented by Mr. Middlecoff. This conflict did not go to the main question involved, but it did go to the question as to what portion of the fund allocated to Tulare county the city of Dinuba was entitled to possess. This same question was involved in all cases in which the municipalities were situate within Tulare county. There was also a difference of opinion between Mr. Middlecoff and Tulare county's attorneys as to whether that county was entitled to interest on installments, which, whether disqualifying or not, would, in a court of equity, constitute a sufficient answer to bar an action to compel an acceptance of his services by said county. Again, this case differs from all the cases cited, in that this is an action maintained in the interests of the attorney in which the litigants cannot possibly be benefited. Such actions as this are countenanced as affording relief to the litigant, who has disbursed moneys for which a return should be made by the parties benefited by the action. The counties and municipalities in this action are bound by the contracts made by them, and any award that might be made to Mr. Middlecoff would afford them no relief whatsoever. The payment of the fee of $50,000, which all the counties and municipalities represented by Mr. Middlecoff agreed or stipulated was a reasonable amount, was to be paid out of the funds recoverable by the parties who brought the Merced county action and those who afterwards joined them and obligated themselves by contract. But the county of Tulare was not one of them. Therefore they cannot recoup from Tulare county's share.

[8-10] The underlying principle in all the cases, where one has been allowed compensation out of a common fund belonging to others for expenses incurred and services rendered on behalf of the common interest, is the principle of representation or agency. There must be a contract of employment expressly made or superimposed by the law upon the facts. Hand v. Railway Co., 21 S. C. 162. This has been done where the moving party has sought to preserve a fund from waste and destruction arising from the neglect and misconduct of trustees. Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157. The fact that one may be benefited by an action brought by another is not of itself sufficient to justify a court in assessing costs against the one who also profits by said action. Some contractual relation or some equitable reason sufficient to support an allowance of costs must be shown to exist to justify a court of equity in making such assessment.

[11] In the instant case there is no principle of equity upon which a judgment against the county of Tulare can be sustained. It was conducting its actions, the first brought in the state to test the validity of the Broughton Act, in good faith and for the benefit of the state of California, until its actions were intercepted by the Merced county action. It has borne the brunt of the litigation to establish the law, and it was at all times will-

ing to go forward in an orderly manner and in its own way to reduce to possession that which this court said, in the decision of the case made by it, it was entitled to possess. It would be most inequitable, in the light of the history of this action, to compel the county of Tulare, which not only has had its district attorney actively engaged in representing it through a series of years in litigating the questions out of which this action springs, but which has also specially employed counsel to assist said district attorney, to pay a substantial part of all that it is entitled to receive as compensaion to the attorney whose fee was fixed by others, who had no power or right to bind it or direct it as to the course it should take in pursuing its remedies.

The judgment and order appealed from are affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.

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205 Cal. 186

BOUST v. BOUST. (S. F. 12667.)

Supreme Court of California. Sept. 13, 1928.

Divorce ⚷165(1)—Trial court had jurisdiction to vacate order setting aside interlocutory divorce, under petition alleging fraud on court in procuring order.

Petition to vacate order setting aside interlocutory decree of divorce, based on fraudulent procurement of plaintiff's consent to setting aside of interlocutory decree and dismissal of action, through fraudulent misrepresentations and promises by plaintiff's husband, without intention of performing same, but made solely to mislead plaintiff into signing stipulation for dismissal, presented case of extrinsic fraud practiced on trial court, inducing it to dismiss action, and hence court possessed inherent power to vacate order made, predicated on stipulation fraudulently procured.

In Bank.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Petition by Mary Boust against E. J. Boust for an order vacating order dismissing divorce action and restoring interlocutory decree. From an order denying the motion to vacate an order setting aside an interlocutory decree of divorce, plaintiff appeals. Reversed.

Lindsay & Gearhart and B. W. Gearhart, all of Fresno, for appellant.

E. J. Boust, in pro. per.

RICHARDS, J. This was an action for divorce. The defendant, being served with process, failed to appear. His default being entered, the cause was tried on September 17, 1926, and an interlocutory decree entered in plaintiff's favor, to the effect that she was entitled to a divorce and the custody of the minor child of the parties, and further entitled to an award of a monthly sum of $30, to be paid by the defendant for the support and maintenance of said child. On May 19, 1927, a written stipulation and agreement of the parties was presented to the court, requesting that the interlocutory decree be vacated and the action dismissed. It was recited therein that the parties had become reconciled, and were living and cohabiting together as husband and wife, and that it would be for the best interest of both parties and their child that the interlocutory decree should be vacated and set aside and the action dismissed. Upon the presentation of said stipulation and agreement the trial court made and entered an order vacating and setting aside the interlocutory decree and directing a dismissal of the action.

Thereafter, and on the 17th day of June, 1927, the plaintiff presented and filed with said court her petition for an order vacating the order dismissing said action, and reviving and restoring said interlocutory decree. The basis of her petition consisted in her verified statement as set forth therein that the aforesaid stipulation and agreement entered into between her husband and herself had been procured by the latter through false and fraudulent misrepresentations, and through promises made with no intention on the part of the plaintiff's husband of performing the same, but made solely for the purpose of deceiving and misleading the plaintiff into making and signing said stipulation and agreement. The plaintiff's petition was duly served upon the defendant, who failed to appear or respond thereto. The matter came on regularly for hearing before the trial court, but upon such hearing the court ruled that it was without jurisdiction to entertain said petition, or to hear any evidence, or take any action thereon, except to dismiss the same, and upon that ground it made its order denying said petition, from which order this appeal has been taken.

We have examined the record herein, and are satisfied from such examination that the trial court was in error in the making and entry of its order. The basis of the appellant's seasonable application for relief was the alleged fraudulent procurement of her consent to the setting aside of the interlocutory judgment and to the dismissal of said action. Assuming the facts stated in her petition to be true, it would seem to be clear that the fraudulent acts of the defendant whereby the consent of plaintiff was procured to the setting aside of the interlocutory decree and the dismissal of the action amounted also to a fraud practiced upon the trial court, and by which it was induced to set aside its said order and to enter a dismissal of said action. This being so, we are entirely satisfied that the trial court possessed inherent power to

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

vacate and set aside whatever orders it had made in the premises, and which were predicated upon the stipulation and agreement of the parties thus fraudulently procured and presented to said court as a basis for its order, which would not otherwise have been made. The fraud in this case was extrinsic, and amounted to an imposition practiced upon the trial court resulting in the procurement of its said order.

In the recent case of McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A. L. R. 1110, it was held, upon a somewhat similar state of facts, that the trial court had jurisdiction to set aside its judgments and orders thus fraudulently procured. It is not necessary to review all of the authorities cited by the appellant in support of her position herein, and her application to the trial court having been seasonably made, we are satisfied that said court possesses and should have exercised its jurisdiction to hear and determine the appellant's said petition, and upon a proper showing grant the relief prayed for therein.

The order is reversed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

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205 Cal. 181

LA COUNT v. PASARICH et al. (S. F. 11801.)

Supreme Court of California. Sept. 13, 1928.

1. **Automobiles ⚷245(82)—Contributory negligence of bicyclist, colliding with truck, in failing to have proper light, held for jury, under evidence of attempted compliance with law and accident on lighted street (Motor Vehicle Act).**

Where plaintiff, riding bicycle colliding with truck, was carrying flashlight in endeavor to comply with Motor Vehicle Act (St. 1913, p. 639, as amended), requiring light, and accident occurred at point on street which was so lighted as to render presence of plaintiff visible to approaching driver of truck, and as to make presence or absence of light on plaintiff's bicycle probably inconsequential, contributory negligence by plaintiff in failing to have proper light was for jury.

2. **Trial ⚷260(1)—Requested instructions, covered by instructions given, held properly refused.**

Requested instructions, sufficiently covered by instructions given, *held* properly refused.

In Bank.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action for damages for personal injuries by A. La Count against Mateo Pasarich and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Henry L. Ford and J. T. Fraser, both of Eureka, for appellants.

Metzler & Mitchell, of Eureka, for respondent.

RICHARDS, J. This appeal is from a judgment in the plaintiff's favor in an action for damages for injuries received by him through a collision between the delivery truck of the defendants and the bicycle upon which the plaintiff was riding, upon one of the public streets of the city of Eureka. The defendants, in their answer, denied any negligence on the part of the driver of their truck, and alleged contributory negligence on the part of the plaintiff, consisting in the alleged failure of the plaintiff to have his bicycle equipped with the sort of lamp or light required by the provisions of the Motor Vehicle Act, St. 1913, p. 639, as amended. The cause was tried before a jury. The evidence as to how the accident occurred was conflicting, and an examination of the record shows the existence of a substantial conflict, which would have justified the jury in finding that the driver of the defendants' truck was guilty of negligence proximately causing the collision.

[1, 2] Upon the issue of the plaintiff's contributory negligence in failing to have his bicycle equipped with a lamp or light, as required by the Motor Vehicle Act, the evidence discloses that the plaintiff's bicycle was not provided with such lamp or light in strict compliance with the Motor Vehicle Act, but that plaintiff, at the time of the accident in question, was carrying a flashlight in an apparent endeavor to comply with the law. The evidence further sufficiently discloses that the accident occurred at a point upon said street or crossing which was at the time so flooded with the light of a street lamp as to render the presence of the plaintiff so far visible to the approaching driver of the truck as to render the presence or absence upon the plaintiff's bicycle of the lamp or light required by the Motor Vehicle Act probably inconsequential. Under such conditions, it was the province of the jury to determine whether any negligence on the part of the plaintiff in the respect above indicated in any degree contributed to the accident, or was an approximate cause thereof. The jury resolved this issue against the defendants. Under proper instructions of the trial court, it was its province so to do.

The appellants, however, contend that the trial court was in error in giving and refusing to give certain instructions pertinent to this issue. We have examined the instructions which the trial court gave, and are satisfied that they correctly state the law. We have also examined the instructions which were requested by the defendants, and which the trial court refused to give, and we find that each and all of said instructions were either sufficiently covered by the instructions already given or that said requested instructions incorrectly stated the law, and were for that reason properly refused.

The respondent filed no brief herein, but in lieu thereof submitted an affidavit setting forth that he was the father of 14 children and was too poor to pay the cost of printing a brief, but that upon the face of the appellants' brief herein no sufficient error was shown to justify a reversal of the judgment. We have carefully examined the record, in view of the foregoing facts, and are satisfied that the respondent is correct in so stating, and for that reason the judgment should be and the same is hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

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205 Cal. 184

McCARTHY v. McCARTHY et al.

(S. F. 12468.)

Supreme Court of California. Sept. 13, 1928.

1. Courts 🔑472(4)—Probate court held without jurisdiction over action to quiet title against tenants in common, including estate being probated, brought by tenant not interested in estate.

In action by tenant in common against other tenants in common to quiet title, in which one defendant was an estate, probate court, in which estate was being administered, did not have jurisdiction to determine adverse rights of plaintiff, who was not administrator or executor of estate, or otherwise connected with estate, except in capacity as tenant in common of decedent, and hence probate court did not have sole jurisdiction to quiet title to property, because defendant estate was in course of probate.

2. Appeal and error 🔑187(2)—Administrator, answering complaint without alleging misjoinder of parties, could not, on appeal, object that heir was not made party.

Administrator of estate, made defendant in action by tenant in common to quiet title to property, who appeared and both demurred and answered in action, without setting up misjoinder of parties defendant, and without insisting on presence of heir as party to action, *held* bound by judgment, and could not, on appeal, raise issue whether heir of estate was necessary party or was bound by judgment.

In Bank.

Appeal from Superior Court, Monterey County; Fred A. Treat, Judge.

Action to quiet title by Mary J. McCarthy against D. E. McCarthy and others. Judgment for plaintiff. Motion by Thomas C. Butler, as administrator of the estate of Anna Butler, deceased, to vacate and set aside judgment was overruled, and such defendant appeals. Affirmed.

Thomas C. Butler, of Watsonville Junction, in pro. per.

Chas. B. Rosendale and Albert E. Warth, both of Salinas, for respondents.

RICHARDS, J. This cause was placed upon a special calendar upon order to show cause, it appearing that no respondents' brief has been filed herein, and was thereafter ordered submitted.

[1] An examination of the appellant's brief convinces us that the appeal is without merit. The action was one instituted in the superior court in and for the county of Monterey by one tenant in common of a piece of real estate against other tenants in common thereof to quiet title. One of said defendants in common was the estate of one Anna Butler, of which the appellant herein, Thomas C. Butler, was the administrator. All the parties who were made defendants were served with process and either appeared or defaulted. Among those appearing and answering was the appellant herein. Upon the hearing the trial court rendered its judgment in favor of the plaintiff and against the defendants, quieting title to said property. Thereafter the appellant moved the court for an order vacating and setting aside such judgment, upon the ground, apparently, that the trial court was without jurisdiction of the subject-matter of the action and of the person of the appellant. The basis of said motion seems to be that, since the estate of said decedent was in the course of probate and since the property involved in this action was a portion of her estate, the sole jurisdiction to quiet title to said property was in the probate court. The plaintiff herein was not an administrator or executor of the estate of said decedent, and was not otherwise connected with said estate, except in her capacity as a tenant in common of the decedent. The probate court, therefore, was without jurisdiction to determine her adverse rights in the property in question. Bauer v. Bauer, 201 Cal. 267, 256 P. 820.

[2] The only other point presented by the appellant is that a certain heir or devisee of the decedent was not made a party to this action. This point, however, was not available to this appellant, for, if such heir or devisee was not a party to the action the judgment herein might not be binding as to him. But with that matter the appellant is not concerned. The record shows that the appellant, in his capacity as administrator of the estate of said decedent, appeared and both demurred and answered herein, without setting up any misjoinder of parties defendant, and without, either before the trial or upon the motion to

vacate the judgment, insisting upon the presence of said heir or devisee as a party to this action. Having thus submitted himself and whatever interest he may have, officially or otherwise, in said estate, he is bound by the judgment and cannot bring in question upon this appeal the issue as to whether the heir or devisee of said estate is either bound or affected thereby.

The judgment and order are affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

LAKE et al. v. DOWD et al. (L. A. 9476.)★

Supreme Court of California. Sept. 7, 1928.

Hearing Granted in Bank Oct. 5, 1928.

1. Cancellation of Instruments 🔑35(1)—All owners of undivided interests in tract joining in agreement to convey to trustee held necessary parties in action to set aside agreement (Code Civ. Proc. § 378).

Where plaintiffs and other owners of undivided interests in tract of land conveyed property to trustee, to carry out their written contract to convey to defendant, *held* that, in action by plaintiffs against trustee and defendant to set aside trust agreement, and for cancellation of deed as to them, owners of other undivided interests were necessary parties under Code Civ. Proc. § 378; section 369, authorizing trustee of express trust to sue without joining beneficiaries, being inapplicable.

2. Vendor and purchaser 🔑89—After purchaser made at least two payments, owners of certain undivided interests held not entitled to withdraw for delay in perfecting contract.

Where plaintiffs and other owners of undivided interests in tract of land conveyed property to trustee to carry out their written contract to convey tract to defendant, *held*, that plaintiffs, having actively participated in proceedings to remedy defects in title, were not entitled to withdraw from agreement for alleged delay in perfecting contract of sale, due to such defects in title, after at least two payments had been made by defendant and two deeds delivered to him by trustee.

3. Trusts 🔑11(2)—Written agreement between owners of undivided interests to convey to trustee to carry out sale contract held valid trust (Civ. Code, § 857).

Written agreement by owners of undivided interests in tract of land to convey property to trustee, for purpose of having him convey tract to purchaser, *held* valid trust, within Civ. Code, § 857.

Department 1.

Appeals from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Fred W. Lake and another against Mervyn R. Dowd and others. From the judgment, both parties appeal. Reversed, and plaintiff's appeal dismissed.

Henry C. McPike and Fred W. Lake, both of Oakland, for plaintiffs.

Charles Reagh, of San Francisco, for defendants.

PRESTON, J. By stipulation cross-appeals are submitted on one bill of exceptions. Defendants appeal from the whole judgment. Plaintiffs appeal from that portion of the judgment only which withholds the full relief prayed for by them. If the defendants prevail upon their appeal, the whole judgment must be reversed, and the appeal by plaintiffs becomes abortive.

[1] A careful consideration of this cause, together with independent search of the authorities, convinces us that the appeal of defendants must be sustained, and the whole judgment reversed. Plaintiffs and some 10 other persons owned in undivided interests 240 acres of a half section of 320 acres of land in the county of Kern. The remaining 80 acres were held in a like undivided interest by one C. T. Dunkle. Dunkle desired to purchase in 10-acre blocks the interests of the other owners. On December 14, 1923, plaintiffs and their associates, binding themselves together by mutual covenants, entered into a written contract wherein they constituted Mervyn R. Dowd as a trustee for the purpose of selling their said property to said C. T. Dunkle, and to that end and for that purpose agreed to and did execute and deliver to the said Dowd, as grantee, an ordinary grant, bargain, and sale deed of their respective interests in said property. The written agreement above mentioned contained the terms and conditions of sale, and rested upon the mutual covenants therein contained, the last and most significant of which was as follows:

> "Upon receipt by the said trustee of the first payment of one thousand ($1,000.00) dollars, each of the grantors hereby agrees with all of the other grantors that his or her interest in said lands shall thereupon be converted into and deemed to be and held as an interest in common in said entire half section with all other owners and not in severalty."

Acting under said contract and the deed made pursuant thereto, said trustee Dowd transferred and conveyed certain portions of said land to the said Dunkle and received certain moneys from him on account thereof. Plaintiffs brought this action against the said Dowd as trustee and against the said Dunkle to have said trust agreement declared void as to them, to have the deed canceled as to them, and to have their title to their former interest in said lands declared and quieted against the claims of said defendants. The defendant Dunkle, it is claimed, was a purchaser with notice of their rights, and further plaintiffs alleged that they had been damaged in the

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★Superseded by opinion, 277 P. 1047.

premises in the sum of $5,000. Defendants answered, denying the grounds set up for the cancellation of said deed and for the quieting of plaintiff's title to said land, and in addition thereto filed their cross-complaint, asking that said underlying agreement be declared valid, and that the title of said trustee be quieted as to said real property as against said plaintiffs and cross-defendants Fred W. Lake and Fannie D. Lake, and that said plaintiffs be estopped, enjoined, and forbidden from asserting any right, title, or interest in and to the premises, save such interest as they might have under the written contract above described.

The court made findings and gave judgment in favor of the plaintiffs quieting their title to five-twelfths, or 180 acres, of said tract, and restraining and enjoining defendants from claiming or asserting any interest therein adverse to them, but refused to give plaintiffs judgment for the sum of $5,000, or any other sum, as damages. Defendants, as above stated, appealed from the whole of said judgment, and plaintiffs appealed from so much thereof as refused their prayer for damages.

It will be noted from the above description of the pleadings that the 10 other persons who joined with plaintiffs in the agreement between themselves to sell said lands through said defendant trustee were not made parties to the suit by plaintiffs, nor were they made parties to said suit by defendants under their cross-complaint. Defendants, at the opening of plaintiffs' case, objected to the introduction of any evidence, upon the ground that the other signatories to said contract had not been joined as parties defendant, and were not before the court, and at the close of plaintiffs' case said defendants moved for nonsuit upon the same grounds, taking the position that all the parties to said contract were necessary to a full determination of the issues, and the court could make no decree in the premises, unless said parties were before it. This motion was denied.

Defendants' position is well taken. Plaintiffs seem to overlook the fact that the mutual covenants between the signers of said contract were sufficient to give to each of said signers a joint interest in the whole subject-matter. The contributing of the several interests of the parties signing said contract and the surrender to a common agent or trustee of their rights and interests therein were a sufficient consideration to make said contract binding as between themselves and the contract is in reality as though it were made between them for the direct sale of the property, instead of the sale through a trustee. Each party to said contract is, therefore, a proper and necessary party for a determination of any rights in said property held by the trustee under said deed. Code Civ. Proc., § 378.

A case not cited by either counsel and determinative of this question is Mitau v. Roddan, 149 Cal. 1, 6, 7, 84 P. 145, 6 L. R. A. (N. S.) 275. There a debtor executed a deed of trust to secure debts to two persons. The trustees brought a suit to have the court declare the interests of the respective parties under the deed of trust and to foreclose same. But one of the persons for whose benefit the trust was created was not made a party thereto, and the point was made that a court of equity could not properly dispose of the case until such party was before it, and that the trustee could not properly represent such absent creditor or beneficiary. Lengthy quotations from this case are unnecessary; a reference thereto will reveal the rule, the reason for it, and the equitable principles upon which it is founded. The cases of McPherson v. Parker, 30 Cal. 455, 89 Am. Dec. 129, and O'Connor v. Irvine, 74 Cal. 444, 16 P. 236, cited in the above-mentioned case, also fully sustain the holding here announced.

It will be noted that section 369 of the Code of Civil Procedure, which authorizes a trustee of an express trust to sue without joining the beneficiaries, is inapplicable to this case, as this is not a controversy between a trustee and strangers to the trust. Said section is for the same reason inapplicable to the cross-complainants, who undertook to try their title against the claims of said plaintiffs without joining the other beneficiaries.

[2] This position determines the issues involved in this appeal. We have, however, in view of a probable retrial of the cause, examined the record on the merits as to the other questions presented. It is our conclusion that in this aspect also the cause must be reversed, upon the insufficiency of the evidence to support the findings and judgment. The judgment is predicated upon the asserted right of the plaintiffs to withdraw from said agreement at any time because of the delay or failure of the trustee to complete the sales contract with Dunkle so long as the withdrawal was prior to the actual consummation of any such binding contract; the theory being doubtless that, the trustee having paid no consideration to plaintiffs, they could withdraw at any time prior to action on his part under the trust. The assertion is that such withdrawal occurred in this manner and at such time.

This argument is, as above stated, a misconception of the relation of the parties to said agreement. The question is not, May plaintiffs withdraw because of the failure of the trustee to act? But the true question is, Do plaintiffs show grounds upon which to withdraw from the agreement for failure of consideration, or other cause, as against all of the cosigners of said agreement? The trustee is but the agent upon whom authority has been conferred. The real contract is between the parties of the first part thereto. The delay in perfecting a contract of sale was a defect in the title of said parties of the first part to the said lands to be conveyed. In other words, the delay was in perfecting their title, and such defect affected the owners alike. Plaintiffs actively advocated the remedying of this defect, participated in the proceedings necessary therefor, and paid a large portion of the expense thereof from moneys paid to the trustee by Dunkle. The formal notice of withdrawal of May 17, 1924, was nullified by their own admitted conduct. The attempted withdrawal of November 17, 1924, was after the consummation of the contract with Dunkle, and after at least two payments by him, and after at least two deeds to him had been made by the trustee.

There is no substantial conflict in any of the evidence material to this issue. The evidence shows no ground whatever to cancel this agreement as against any one, and particularly as against the coparties to same. The contention that plaintiffs did what they did upon an understanding that Dunkle would complete at once a cash purchase of the whole tract does not, under the admitted facts and under the circumstances then obtaining, raise a conflict in the evidence.

[3] Neither do we discern any ground upon which it may be said that said trust is invalid or void upon its face. The instrument is clearly a trust to convey, and the powers conferred are succinctly and clearly set forth. Section 857, Civ. Code.

The judgment is reversed and the appeal of plaintiffs is dismissed.

We concur: CURTIS, J.; SEAWELL, J.

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205 Cal. 174

GOLDEN GATE BLDG. MATERIALS CO. v. FIREMAN et al. (S. F. 12385.)

Supreme Court of California. Sept. 7, 1928.

1. Mechanics' liens 🔑281(1)—Evidence held to warrant finding that materials furnished contractor were actually used on defendant's building.

In action to foreclose mechanic's lien for materials furnished general contractor, evidence *held* sufficient to warrant finding that all of materials furnished to contractor were actually used on defendant owner's building, and finding as to value of such material.

2. Accord and satisfaction 🔑26(3)—Evidence held to establish that there was no accord and satisfaction between owner and plaintiff, claiming lien for materials furnished.

In an action to foreclose mechanic's lien for materials furnished general contractor, evidence *held* to establish that there was no accord and satisfaction between plaintiff and defendant owner as claimed by latter.

3. Mechanics' liens 🔑304(3)—Furnisher of material at contractor's instance is not entitled to personal or deficiency judgment against owner, in absence of contract, express or implied, with owner.

Lien claimant, who has furnished material at instance of contractor, is entitled to a personal or deficiency judgment against contractor, but not against owner, unless complaint shows existence of a contract, express or implied, between owner and claimant.

Department 1.

Appeal from Superior Court, City and County of San Francisco; C. P. Vicini, Judge.

Action by the Golden Gate Building Materials Company against Benjamin Fireman and others. Judgment for plaintiff, and defendants Fireman appeal. Modified and affirmed.

A. P. Dessouslavy and P. A. Bergerot, both of San Francisco, for appellants.

Philip B. Beggs and Frank L. Hatch, both of San Francisco, for respondent.

PRESTON, J. Appeal by defendants Benjamin and Helen Fireman from judgment for plaintiff in an action to foreclose on certain real property owned by them, a mechanic's lien for building materials furnished to defendant Sexton, the general contractor employed by his said codefendants to repair, alter, and add to the building situate on said premises. The facts, as shown by the evidence and found by the court, are in substance as follows:

That in April, 1925, defendants Fireman, the owners of said real property, employed defendant Sexton to furnish materials and perform labor in plastering a building situate thereon; that while so engaged said defendant Sexton "employed plaintiff to furnish for use, and which actually were used, in said building for the alterations, addition to and repair thereof, materials" consisting of mortar and other plastering materials, and agreed to pay plaintiff $1,232.68, the reasonable value thereof; that plaintiff performed all the conditions of its contract on its part to be performed, but said defendants failed to pay any part of said sum, save the amount of $687.60, thus leaving a balance of $545.08 due plaintiff. The court further found that, although no notice of completion or cessation from labor as provided by section 1187 of the Code of Civil Procedure was filed, said labor was duly completed on June 15, 1925; that defendant, as a lien claimant, at an expense of $1.70 duly perfected and filed for record its claim of lien. Complaint and summons were not served upon defendant Sexton, and he made no appearance in the case. Judgment in accordance with said findings was duly entered for plaintiff for said sums of $545.08, $1.70, interest and costs, which sums the sheriff was directed to pay from the proceeds of sale of said real property, and it was further adjudged that in case said property should not sell for enough to satisfy the amount in said decree provided, plaintiff have a deficiency judgment for the balance against defendants Benjamin and Helen Fireman.

Said defendants, in prosecuting this appeal, urge four grounds for reversal of said judgment, to wit: (1) Admission, over objection, of hearsay, evidence as to amount and value of said building materials; (2) lack of evidence that said materials were used in appellants' building; (3) failure of the court to find upon an alleged accord and satisfaction; (4) error in directing a deficiency judgment against appellants.

[1] The first three contentions we find to be without merit. The only witness for plaintiff was J. D. Murphy, its salesman; nevertheless he testified that he was the very person who solicited the order from defendant Sexton and got the job, and that he knew of his own knowledge that goods and materials of the amount and value specified in the itemized statement rendered the buyer, which was made an exhibit in the case, were actually delivered on the job, signed for, and that he was on the job at times and actually saw and knew that they were used in the work. In other words, the testimony of this witness, considered with the other evidence, amply supports the conclusion of the trial court. His position with plaintiff apparently was, and the court believed it to be, such that it was possible for him to speak of his own knowledge, and not through hearsay, as to the various matters which were the subject of his testimony, and that testimony, being believed, was amply sufficient to establish plaintiff's case.

[2] With respect to the alleged accord and satisfaction, defendant Benjamin Fireman testified that on April 16, 1925, Mr. Murphy, plaintiff's said salesman, came to him and stated that he would be satisfied with a payment of $500 to cover materials for the whole job, all of which had been delivered and that the empty sacks would take care of the small balance; that accordingly defendant gave Mr. Murphy his check for that amount, saying he would not be responsible for any more materials, and received in return a receipt, introduced in evidence, which was partially torn and reads in part, "Received $500.20 from B. Fireman covering (tear) in full for plastering materials. * * *" He further testified that defendant Sexton abandoned the job and on several mornings thereafter a truck came and carried away plaster and other materials. Another witness also stated that he had seen materials removed by a truck from the job. In conflict with the above evidence is further testimony of Mr. Murphy to the effect that he received said $500 payment on account and gave therefor a receipt "to date in full"; that the portion torn from said receipt had contained the words "to date"; that some materials were returned to plaintiff by truck, because they were unsatisfactory, but that they were replaced by other goods suitable to defendants' need, as shown by credits appearing on the statement of account. Under such conflicting evidence support is found for the decision of the trial court that there was no accord and satisfaction, but a finding to this effect was not required. If made, it would have been adverse to appellants and its omission was immaterial as the findings made fully determine the cause. Hertel v. Emireck, 178 Cal. 534, 174 P. 30; Alberti v. Jubb (Cal. Sup.) 267 P. 1085.

[3] The contention that the decree errs in directing a deficiency judgment against appellants must be sustained. Said decree, as to any deficiency shown by the sheriff's return on the sale of the property, constitutes a personal judgment against the owners thereof (Hines v. Miller, 126 Cal. 683, 59 P. 142; 17 Cal. Jur. § 157, p. 219), and under the pleadings here a personal judgment against said property owners is not justified. A lien claimant who has furnished material at the instance of a contractor is entitled to a personal or deficiency judgment against the contractor, but not against the owner, unless the complaint shows the existence of a contract, express or implied, between said owner and the claimant. Gibson v. Wheeler, 110 Cal. 243, 42 P. 810; Beard v. Lancaster, 72 Cal. App. 148, 150, 236 P. 970; Roberts v. Security T. & S. Bank, 196 Cal. 557, 574, 238 P. 673; 17 Cal. Jur. § 156, p. 217. The complaint in this case is predicated solely upon the employment of plaintiff by the contractor, alleging that, "while so engaged in the plastering of said building, * * * defendant Sexton employed plaintiff" to furnish said material and "agreed to pay plaintiff therefor the reasonable value thereof." There is no allegation in any way indicating the existence of an express or implied contract between plaintiff and defendant owners. The claim of lien likewise alleges that said Sexton was "the contractor employed by said owners * * * and is the person who employed claimant to furnish materials. * * *" Under such pleadings, the evidence as to the subsequent dealings of said owners direct with plaintiff is ineffective as a basis for a deficiency judgment against the owners. The case of Gibson v. Wheeler, supra, is directly in point and determinative of this issue.

The portion of said decree providing for said deficiency judgment, which reads, "That in case said real property should not sell for enough to pay and satisfy said sums in this decree above provided, that plaintiff have a deficiency judgment for the balance against defendants Benjamin and Helen Fireman, his wife," is hereby stricken out, but, as otherwise rendered, said decree is affirmed.

We concur: SEAWELL, J.; CURTIS, J.

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93 Cal. App. 704

MIDSTATE OIL CO. v. OCEAN SHORE R. CO. et al. (Civ. 6300.)★

District Court of Appeal, First District, Division 2, California. Aug. 29, 1928.

Rehearing Denied Sept. 26, 1928. Hearing Denied by Supreme Court Oct. 25, 1928.

1. **Railroads 🔑69—Fee-simple land title may vest in railroad company.**

Title in fee simple to land purchased directly from owner may vest in a railroad company.

2. **Railroads 🔑67(1)—Deed of land to railroad company, containing no provision limiting use thereof, held to convey fee.**

In action to quiet title, where deed of land to defendant railroad company contained no provision limiting the use thereof, *held*, that it conveyed the fee title.

3. **Railroads 🔑82(5)—Land owned in fee simple by railroad company, used in operation of railroad, did not revert to grantors or their successors, on terminating operation of road, as authorized by Railroad Commission (Civ. Code, §§ 354, 465, and 468).**

In action to quiet title, where railroad company, under Civ. Code, §§ 354, 465, had the power to receive title in fee simple to land directly purchased, *held*, that land so purchased and used in operation of railroad did not revert to original owners thereof, or their successors in interest, on railroad's company's successor ceasing to operate its railroad as authorized by Railroad Commission, in accordance with section 468, which thereby did not work a forfeiture of defendant railroad's franchise.

4. **Estoppel 🔑27(2)—Successor of grantors who deeded land in fee to railroad company held estopped, in action to quiet title after railroad ceased operation, to deny company's power to take fee.**

Where railroad company was deeded fee-simple title to land to be used as a right of way, and grantors were succeeded in interest by plaintiff, *held*, that plaintiff, in action to quiet title, on defendant railroad company ceasing to operate its road and conveying such land by deed to purchasers thereof, was estopped, the same as the grantors of the land, to deny such company's power to take title in fee simple to the land.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the Midstate Oil Company against the Ocean Shore Railroad Company and others. Judgment for plaintiff, and defendants appeal. Reversed.

Fred L. Dreher, of San Francisco, and Ross & Ross, of Redwood City, for appellants.

Thomas R. White, of San Francisco, and Charles W. White, of Hayward, for respondent.

WARNE, Presiding Justice pro tem. This is an appeal from a judgment quieting plaintiff's title to a strip of land 60 feet in width and running on a curve for approximately a mile through a tract of land owned by the respondent. Said strip of land was formerly a part of said tract of land. The lands are situate in San Mateo county, and said strip of land was formerly used by appellant for a roadbed for its railroad. Both the appellant and the respondent claim title in fee simple to the property under mesne conveyances from Henry J. F. Butts, Herman F. J. Butts, and Annie S. K. Butts.

The cause was submitted to the trial court upon an agreed statement of facts which are substantially as follows:

In May, 1905, the Ocean Shore Railway Company was incorporated to build and operate a railroad from Army street in San Francisco to the city of Santa Cruz, along the shore line of the Pacific Ocean. By its articles of incorporation it was empowered to acquire such real estate as it might need. Thereafter, on November 15, 1906, Henry J. F. Butts, Herman F. J. Butts, and Annie S. K. Butts, then the owners in fee simple of the lands in controversy, executed and delivered to the Ocean Shore Railway Company, for a valuable and substantial consideration, a grant, bargain, and sale deed to said strip of land. The recitals and words of conveyance in said deed are as follows:

"That the said party of the first part, for and in consideration of the sum of ten dollars, ($10.00), gold coin of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, conveyed, and confirmed, and by these presents do grant, bargain, and sell, convey, and confirm, unto the said party of the second part, and to its successors and assigns, forever, all that certain lot, piece, or parcel of land, situate, lying, and being in the county of San Mateo, state of California, and bounded and particularly described as follows, to wit: A strip of ground sixty feet in width through property of Henry J. F. Butts, Herman F. J. Butts, and Annie S. K. Butts, situate in the county of San Mateo, state of California, bounded on the north and south by property of Henry Cowell; said right of way being bounded by the northerly and southerly boundaries of said property of Henry J. F. Butts, Herman F. J. Butts, and Annie Butts, and by lines drawn parallel to and twenty-four (24) feet on the westerly and thirty-six (36) feet on the easterly side of a line described as follows: * * * To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to its successors and assigns, forever."

★Rehearing denied. Hearing denied by Supreme Court.

Thereafter, during the month of October, 1911, the Ocean Shore Railway Company, for a valuable and substantial consideration, conveyed to the Ocean Shore Railroad Company, a corporation, all its "right, title, and interest" in and to the land involved. The Ocean Shore Railroad Company has been organized to take over the property and privileges of the Ocean Shore Railway Company, and was duly authorized to acquire such property and privileges, and to own and hold real property in San Mateo county. Soon after the conveyances from Henry J. F. Butts et al. to the Ocean Shore Railway Company, the company constructed a railroad over the strip of land, and thereafter the Ocean Shore Railway Company and its successor, the Ocean Shore Railroad Company, operated the railroad until February, 1921. The operation of the railroad, however, did not yield income sufficient to pay the expenses of maintaining and operating it, and the Railroad Commission of the state of California so determined, in proceedings duly had and taken before it, and on October 9, 1920, authorized the Ocean Shore Railroad Company to discontinue its service as a common carrier on the railroad. And the Railroad Commission, in so far as authority was necessary, authorized the Ocean Shore Railroad Company to dismantle and dispose of its property. In February, 1921, the railroad company discontinued its operations, and on May 28, 1924, for a valuable and substantial consideration said Ocean Shore Railroad Company, in good faith, made, executed, and delivered to the defendants Giovanni Pera and Frank B. Russi a deed of all its "right, title, and interest" in and to the lands in question.

From the agreed statement of facts the trial court found in part that on November 15, 1906, Henry J. F. Butts, Herman F. J. Butts, and Annie S. K. Butts conveyed the strip of land in question to the Ocean Shore Railway Company "only for a right of way for its railroad"; that the respondent is the successor in interest of Henry J. F. Butts et al.; that pursuant to the permit issued to it by the Railroad Commission the railroad company ceased operating the railroad, removed the railroad tracks and other equipment from the strip of land, and discontinued permanently its service as a common carrier on the railroad and abandoned the use of the strip of land for any and every railroad purpose, and has ever since continued to abandon the land for railroad purposes; that the appellant railroad company on May 28, 1924, conveyed by quitclaim deed any interest it then had in said strip of land to the appellants Pera and Russi. The trial court concluded as a matter of law that respondent is the owner in fee simple of the land in question, and that appellants have no estate, right, title, claim, or interest in or to said lands.

[1] It is contended by appellants that the deed from Henry J. F. Butts et al. to the Ocean Shore Railway Company conveyed title in fee simple absolute, and that, where a railroad company takes title in fee, it does not revert to the original grantors or their successors on abandonment or nonuser by the railroad company. Title in fee simple to land may vest in a railroad company. Behlow v. Southern Pacific Railroad Co., 130 Cal. 16, 62 P. 295; Hannah v. Southern Pacific Railroad Co., 48 Cal. App. 517, 192 P. 304; Palmer v. Los Angeles, etc., Ry. Co., 55 Cal. App. 519, 203 P. 1012. And in the case of City of Oakland v. Schenck, 197 Cal. 456, 241 P. 545, Mr. Justice Waste, speaking for the court, said:

> "In Illinois, a railroad company can acquire land, whether by voluntary purchase or otherwise, for railroad purposes as defined in its charter. It does not hold land, as does the ordinary owner, with the right of using it for any purpose to which it may be adapted. * * * In this state there is no such restriction on the right of a railroad company. It may acquire the fee in land by direct purchase, although it may obtain only an easement for railroad purposes if it resort to proceedings in eminent domain."

[2] The deed from Henry J. F. Butts et al. to the Ocean Shore Railway Company must be measured by its own terms. There is nothing in the deed which in any way limited the company in the use that it might make of the land. The fact that the deed makes use of the words "right of way" in one of its calls in the description does not limit the use to which the lands may be put. We must hold that the deed conveyed the fee. Such being the case, did the railroad company lose its fee to the lands by nonuser or abandonment? The question is one of first impression in this state.

In 33 Cyc. at page 221, the general rule concerning loss of lands or right by a railroad company by reason of forfeiture or abandonment is stated as follows:

> "A railroad company's easement in its right of way or other land may be lost by abandonment or surrendered (citing McLemore v. Charleston, etc., R. Co., 111 Tenn. 636 [639] 69 S. W. 338); but where the land is conveyed to the railroad company in fee its title thereto is not lost by nonuser or abandonment (citing Watkins v. Iowa Cent. R. Co., 123 Iowa, 390, 98 N. W. 910; Enfield Mfg. Co. v. Ward, 190 Mass. 314, 76 N. E. 1053)."

To the same effect are the following cases: Carr v. Miller, 105 Neb. 623, 181 N. W. 557; Spierling v. Ohl, 232 Ill. 581, 83 N. E. 1068, 13 Ann. Cas. 430; Concklin v. N. Y. Central & H. R. R. Co., 149 App. Div. 739, 134 N. Y. S. 191; Kynerd v. Hulen (C. C. A.) 5 F.(2d) 160; New York, Bridgeport & E. Ry. Co. v. Motil, 81 Conn. 466, 71 A. 563; Chamberlain v. Northeastern R. R. Co., 41 S. C. 399, 19 S. E. 743, 996, 25 L. R. A. 139, 44 Am. St. Rep.

717; Page v. Heineberg, 40 Vt. 81, 94 Am. Dec. 378.

As opposed to this rule, respondent relies principally on the case of Abercrombie v. Simmons, 71 Kan. 538, 81 P. 208, 1 L. R. A. (N. S.) 806, and note, 114 Am. St. Rep. 509. In that case the court, in holding a railroad company takes a mere easement, and not a title in fee, under a deed conveying to it land for purposes of right of way, and that the title reverts to the grantor upon the abandonment of the road, even though the deed contains covenants of warranty, confined its decision to cases where the contract of conveyance shows that it "was sold and received for use as a right of way," and did not pass upon the power generally of railroads to purchase land in fee. The decision as thus restricted is supported by the authorities. There is nothing in the deed, in the case at bar, however, showing that the land was "sold and received for use as a right of way."

[3] Respondent says that it bases its right to prevail in this action upon sections 465 and 468 of the Civil Code of California, relating to the powers of railroad companies. Respondent argues that under section 465 of the Civil Code a railroad company cannot acquire a fee in land acquired for a right of way, although the deed may be absolute in form, and upon abandonment of the land so conveyed for right of way purposes it reverts to the original owners or their successors in interest. We have already pointed out that a railroad company may acquire the fee to lands by direct purchase, and we cannot construe section 465 of the Civil Code, when read as a whole, so as to change the rule when the land is acquired for right of way purposes. Subdivision 7 of the section specifically provides that railroad companies have—

> "power * * * to purchase lands, timber, stone, gravel or other materials to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts, or acquire them in the manner provided in title 7, part 3, Code of Civil Procedure, for the condemnation of lands. * * *"

And section 354 of the Civil Code provides that:

> "Every corporation, as such, has power: * * * to purchase, hold, and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in this part."

Section 468 of the Civil Code provides that:

> "After the completion of any railroad, or any part thereof, capable of being operated, its owner must operate it, and upon his failure to keep it, or any part thereof, in full operation for the period of six months, his right to operate it in whole or in part, as the case may be, is forfeited, and the lands occupied for the purposes of the road, so far as the same is not operated, revert to the original owners or their successors in interest. * * * This section must not be construed to require the operation of a road * * * when the operation of the road, together with its branch and trunk lines, does not yield income sufficient to defray the expenses of maintaining and operating it in connection with its branch and trunk lines. The railroad commission of California has the power to examine and determine whether a railroad, together with its branch and trunk lines, yields income sufficient to operate the same."

There could be no forfeiture of the railroad company's right to its franchise in the case at bar for the reason that the Railroad Commission of California expressly authorized the Ocean Shore Railroad Company to terminate its service as a common carrier and likewise we do not think there was a forfeiture of the right to the lands by the railroad company under this section. Assuming that there could be a forfeiture by virtue of this section it would not apply in this case because the Ocean Shore Railroad Company brought itself within the exception.

> "Forfeitures are not favored in law, and conditions providing for the forfeiture of an estate are to be construed liberally in favor of the holder of the estate, and strictly against an enforcement of the forfeiture." Hannah v. Southern Pacific R. R. Co., 48 Cal. App. 521, 192 P. 306.

> "Statutes and contracts are construed strictly against forfeitures, or as liberally as possible to prevent them. A statute declaring a forfeiture is not to be extended beyond its direct meaning by implication, unless such implication is imperatively necessary by reason of the subject matter or terms of the statute." 12 Cal. Jur. p. 634.

[4] We are also of the opinion that the respondent is estopped to deny the power of the Ocean Shore Railway Company to receive the title purported to be conveyed by Henry J. F. Butts et al. The general rule is that a grantor is estopped by his deed to question the power of his grantee to take fee simple title. And the case of Palmer v. Los Angeles, etc., Ry. Co., 55 Cal. App. 519, 203 P. 1012, is authority for the proposition that one who conveys to a railroad company by grant deed, for the purposes of a roadbed, cannot thereafter deny the power of the railroad company to receive the title in fee.

We are of the opinion that the trial court was in error in concluding that the respondent is the owner in fee simple of the land in question and that the defendants "have no estate, right, title, claim, or interest in or to said lands."

The motion for a new trial should have been granted.

The judgment is reversed.

We concur: STURTEVANT, J.; NOURSE, J.

HUTCHINS v. SECURITY TRUST & SAVINGS BANK et al. (Civ. 6231.)★

District Court of Appeal, First District, Division 1, California. Aug. 31, 1928.

Rehearing Denied Sept. 28, 1928. Hearing Granted by Supreme Court Oct. 29, 1928.

1. Trusts ⟾54—Wife's acceptance of benefits of deed of trust, after all alleged undue influence causing her execution thereof ceased, constituted ratification of trust (Civ. Code, § 1566).

Wife's acceptance of benefits of trust executed by her and her husband for four years after husband's death, when all alleged coercion and undue influence exercised by husband ceased, constituted a waiver of the alleged fraud or undue influence, and ratified her written consent; deed of trust, even if result of undue influence, not being absolutely void, but subject to rescission or ratification, under Civ. Code, § 1566.

2. Perpetuities ⟾9(2)—Trust provision, directing application of trust income to pay mortgage on trust realty before paying income to beneficiaries, held void as unlawful accumulation (Civ. Code, §§ 723, 724).

Where deed of trust executed by husband and wife directed trustee to pay certain sum from income of trust realty to wife for life, to apply balance of income in payment of mortgage on trust realty, and after trustors' death to pay all income therefrom on mortgage, before paying any part thereof to beneficiaries, who were trustors' three adult sons and minor grandchild, *held*, that direction to pay income on mortgage indebtedness was void, under Civ. Code, §§ 723, 724, as directing unlawful accumulation, in view of section 748.

3. Trusts ⟾52—Invalidity of trust deed provision directing application of income to pay mortgage held to render entire trust void (Civ. Code, §§ 723, 724).

Invalidity, under Civ. Code, §§ 723, 724, of trust provision of deed of trust directing application of income from trust realty to pay on mortgage before any part of income should be paid to beneficiaries, *held* to render entire trust, at least from death of one of trustors, who was entitled to part of income, void; such provision being essential part of trust scheme.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action by Burtis L. Hutchins, as administrator with the will annexed of the estate of Caroline L. Hutchins, deceased, against the Security Trust & Savings Bank and others. From the judgment, both parties appeal. Reversed.

W. W. Middlecoff and Milton K. Young, both of Los Angeles, for plaintiff.

Lucius K. Chase, of Los Angeles (Alan Nichols, of Los Angeles, of counsel), for defendant Security Trust & Savings Bank.

CAMPBELL, Justice pro tem. In this action there are cross-appeals, included in one record, prepared under the alternative method. The plaintiff recovered judgment for one-half of the property sued for, and defendant Security Trust & Savings Bank, the only real defendant in this action, has appealed from this judgment in favor of plaintiff, while plaintiff has appealed from the part of the judgment in favor of defendant, and from the order of the court refusing to give plaintiff possession of the other half of the property. The action is one in which plaintiff seeks to quiet title to a one-half interest in certain real property, to recover possession thereof, and to obtain an injunction restraining defendant Security Trust & Savings Bank from asserting any claim to the real property in question, and for equitable relief.

The complaint alleges that Caroline L. Hutchins died testate in the county of Los Angeles on June 26, 1923, and letters of administration with the will annexed were issued to Burtis L. Hutchins; that at the time of her death Caroline L. Hutchins was the owner and entitled to the possession of an undivided one-half interest in certain real property described in the complaint, and referred to as the "Hotel Spokane property," and, as against defendant Security Trust & Savings Bank, was entitled to the possession thereof; that the estate of Caroline L. Hutchins is still the owner of such undivided one-half interest in the real property; that Security Trust & Savings Bank is in the exclusive possession thereof, and claims an estate therein adverse to the estate of Caroline L. Hutchins; and alleging that the claim of defendant Security Trust & Savings Bank is without any right whatever. The answer denies ownership in plaintiff, puts in issue the material allegations of the complaint, admits that it is in the exclusive possession of the real property, and claims ownership of the whole thereof under and by virtue of a deed of trust, dated December 24, 1913, executed by Caroline L. Hutchins and John S. Hutchins, her husband, whereby and whereunder it holds the property in trust. A copy of the deed of trust is set out in the answer, which is duly verified.

The case was tried before a jury. When the case was called, defendant objected to a trial by jury, contending that the case was one of equitable cognizance, and that it was entitled to findings by the court on the issues raised by the pleadings. The objection of defendant was overruled, and the case was determined by the jury.

Counsel for plaintiff offered in evidence a deed executed March 30, 1905, by which the property in question was acquired by John S. Hutchins, being then the husband of Caroline L. Hutchins, and proved that John S. Hutchins and Caroline L. Hutchins moved to California in 1886, and lived in

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★Superseded by opinion of Supreme Court, 281 P. 1026.

California ever since that time until the death of John S. Hutchins on May 7, 1919, and that at the time the deed of trust was signed they had surviving three children, Day Hutchins, Ray Hutchins, and Burtis L. Hutchins, and that the property was community property. Plaintiff's counsel then stated that he would claim in rebuttal, as a defense to the deed of trust set up in the answer, that it was obtained from Caroline L. Hutchins by the undue influence of her husband, John S. Hutchins, and was signed by her through mistake and without adequate consideration; that on account of being the wife, and of the fiduciary relationship existing, the deed of trust was invalid and subject to rescission; and that she had served upon the defendant trustee a written rescission and offer to restore.

Defendant moved for a nonsuit, contending that the genuineness and due execution of the deed of trust were admitted by the pleadings, by reason of plaintiff having failed to file his affidavit under section 448 of the Code of Civil Procedure; that J. S. Hutchins and Caroline L. Hutchins had conveyed the entire fee to defendant bank. The motion for nonsuit was denied, and thereupon defendant introduced in evidence the deed of trust, by the terms of which John S. Hutchins and Caroline L. Hutchins conveyed to the defendant bank the Spokane Hotel property, reserving, however, to the grantors during their joint lives, and to John S. Hutchins in case he should survive his wife, the possession, occupation, rents, and profits of the aforesaid premises, such conveyance being in trust, nevertheless, for the purposes set forth in the deed.

The deed of trust in substance provides that the bank shall have the custody, control, and management of the property conveyed, shall lease and release the property and collect all rents, issues, profits, and income accruing therefrom, and from such income shall first pay all costs and charges of administration of the trust, and thereafter apply the net income as follows: Unto Caroline L. Hutchins, if still living, quarterly on the 1st day of January, April, July, and October of each year, to and until the end or termination of the trust, or until her death, whichever shall happen first, the sum of $900, or such lesser sum as she may by writing delivered to the trustee elect to accept, and the balance of the net income at the end of such quarters shall be applied and paid as rapidly as allowable in discharge and satisfaction, in whole or in part, of any and all mortgages or like incumbrances affecting such trust estate. After the discharge of the incumbrances and the demise of Caroline L. Hutchins, the whole quarterly income shall be by the trustee paid to their sons in the following parts or shares: Day S. Hutchins five-twentieths, Ray Hutchins eight-twentieths, Burtis L. Hutchins six-twentieths, and to their grandson, Reason D. Hutchins, one-twentieth. The trust deed further contains the provision for the distribution of the property at the termination of the trust to the grandchildren of Caroline L. Hutchins, the termination thereof to take place at the death of the last survivor of the grantors' three sons.

It was then shown by defendant, and not contradicted, that Mr. and Mrs. Hutchins signed a written authorization for the delivery of the deed of trust; that John S. Hutchins paid out of his personal funds $5,000 on the note secured by mortgage on the Spokane Hotel property; that subsequent to the execution of the deed of trust Mrs. Hutchins joined with her husband in a joint account at the Security Trust & Savings Bank; that she joined with him in a declaration, dated June 14, 1916, stating that all deeds of trust to the defendant bank had been voluntarily executed; joined with him in the letter of April 2, 1919, in which the bank was directed during the remainder of his lifetime to pay to her all the rentals from the trust property, and that she accepted such rentals; that subsequent to the death of her husband on May 7, 1919, until the time of her death, June 26, 1923, a period of four years, she accepted the entire fruits of the trust; that at various times in writing she directed the bank as to the manner and method in which it should pay the moneys payable to her under the trust; that after the notice of rescission was served upon defendant bank she accepted the entire fruits of the trust, and continued to do so up to the time of her death.

In rebuttal plaintiff read in evidence the deposition of Caroline L. Hutchins, in which she testified that she signed the deed of trust with her husband, John S. Hutchins, because he threatened that, if she did not do so, he would sell the property, give her one-half of the proceeds thereof, and give the balance to charity; that her husband made her life so miserable that she did not care what became of the property; that she did not deserve to be treated the way she was treated; that when she signed the ratification on January 14, 1916, she was sick in bed, and she had gotten to a pass where she did not care; that the ratification was all lies, but she signed it, and said she was signing it of her own accord and without any compulsion on the part of her husband.

The jury rendered a general verdict in favor of plaintiff, and in response to special interrogatories the jury found that Caroline L. Hutchins, under the document of April 2, 1919, received from defendant the balance of the funds remaining in its hands; that under the letter of August 1, 1919, she received from defendant $150 a month from the trust; that under the letter of June 8, 1921, she received $250 a month from the trust; that under the letter of November 25, 1922, she received $300 a month from the trust; but also found that she did not execute these respective letters "without coercion or fraud practiced upon her."

[1] Defendant urges a number of objections, several of which present serious questions; but, as the determination of assignments 6 and 7, "Assuming the evidence of undue influence, the deed of trust was not void, but merely voidable," and "The undisputed evidence shows that subsequent to the execution of the deed of trust it was confirmed and ratified," is determinative of defendant's appeal, we deem it unnecessary to discuss the other points urged by it.

Assuming that plaintiff's contention is correct, and that the execution of the deed of trust by Caroline L. Hutchins was procured by the coercion and undue influence of her husband, John S. Hutchins, and that he continued his coercion of and undue influence over her until the day of his death, there is no evidence in the record that any coercion or undue influence, or any influence of any character, was exercised over her during the four years that intervened between her husband's death and her passing, or that the acceptance of the entire fruits of the trust during that period was other than free and voluntary on her part. Plaintiff has directed our attention to no evidence of coercion or undue influence during such period, nor have we by a perusal of the entire record found any. On the contrary, the record shows that, subsequent to the death of her husband, Caroline L. Hutchins accepted the entire fruits of the trust, covering the entire fee, for four years, receiving the sum of $10,895.68; that she accepted these payments, even after she had consulted an attorney and served the notice of rescission prepared for her, and up to the time of her death.

The deed of trust, if not executed freely, is nevertheless not absolutely void, and was subject to rescission by the parties (Civ. Code, § 1566), and was also subject to ratification. Mrs. Hutchins not only did not rescind within the time and in the manner precribed by the chapter of the Code on rescission, but she waived the alleged fraud or undue influence and ratified the trust by treating the consent as existing and binding. The acceptance of the fruits of the trust and benefits thereunder, after all coercion and undue influence ceased, constituted a waiver and ratification of the written consent. Bancroft v. Woodward, 183 Cal. 99, 190 P. 445; Harrington v. Paterson, 124 Cal. 542, 57 P. 476; Nounnan v. Sutter Land Co., 81 Cal. 7, 22 P. 515, 6 L. R. A. 219; Marten v. Burns Wine Co., 99 Cal. 355, 33 P. 1107. Acts evincive of an intent to abide by the contract, with knowledge of its invalidity, constitute an affirmance thereof, and a waiver of the right of rescission (Matteson v. Wagoner, 147 Cal. 739, 82 P. 436; Montgomery v. McLaury, 143 Cal. 83, 76 P. 964; Ruhl v. Mott, 120 Cal. 668, 53 P. 304); as, for instance, where a party, after discovering the facts which give the right to rescind, proceeds to deal with the property involved as if the contract were valid (4 Cal. Jur. 803; Greene v. Locke-Paddon Co., 36 Cal. App. 372, 172 P. 168).

The disposal of this point renders discussion of the remaining points urged by defendant unnecessary.

[2] The objection urged by plaintiff on his cross-appeal that the trust for the receipt of rents and the payment thereof upon the mortgage indebtedness was in violation of the law forbidding accumulations, and therefore void, presents an important question, not only as it affects this particular case, but from the standpoint of public policy. While the question seems to be one of first impression, in this state the statute concerning accumulations is clear, and the laws concerning accumulations, perpetuities, and suspension of the power of alienation of property have been before the courts in numerous cases, and the public policy on these questions is well established.

It appears from the face of the deed of trust that it was executed December 24, 1913, and from the uncontradicted evidence it appears that at such time the defendant Security Trust & Savings Bank was the holder of a mortgage on the property described in the deed of trust for the sum of $21,000, dated December 31, 1912, due in ten years; that when the deed of trust was executed $19,000 remained unpaid; that the three sons of the testator were then all over the age of majority, in fact, over 40 years of age, and that the trustee, according to the deed, was to apply the rents on the payment of this mortgage, after the death of the trustors, until it was fully paid, before payment of any of the income to the beneficiaries. John S. Hutchins died in May, 1919, and Caroline L. Hutchins died in June, 1923, and the evidence shows that at the time of the death of John S. Hutchins there was still unpaid on the mortgage $14,000, and at the death of Caroline L. Hutchins there was $12,000 unpaid. By the payment of this mortgage out of the income to accrue after the death of the trustors, the trust estate out of which the beneficiaries were to be paid was to be established. The trust estate would then consist of the original real property, augmented by and mingled with the accumulated income to the extent of the amount paid on the mortgage.

Section 723 of the Civil Code provides:

> "All directions for the accumulation of the income of property, except such as are allowed by this title, are void."

Section 724 of the same Code declares:

> "An accumulation of the income of property, for the benefit of one or more persons, may be directed by any will or transfer in writing suf-

ficient to pass the property out of which the fund is to arise, as follows: 1. If such accumulation is directed to commence on the creation of the interest out of which the income is to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; or, 2. If such accumulation is directed to commence at any time subsequent to the creation of the interest out of which the income is to arise, it must commence within the time in this title permitted for the vesting of future interests, and during the minority of the beneficiaries, and terminate at the expiration of such minority."

Rents and profits of real property are income. Civ. Code, § 748; Estate of Whitney, 176 Cal. 12, 167 P. 399. A trust to receive rents and profits and apply them on the payment of a mortgage, other than during the minority of the beneficiary, violates the provisions of the statute, and is void. Hascall v. King, 162 N. Y. 134, 56 N. E. 515, 76 Am. St. Rep. 302; Mann-Vynne v. Equitable Trust Co., 201 App. Div. 149, 194 N. Y. S. 52; In re Lutz Estate, 27 Wkly. Notes Cas. (Pa.) 403; Pray v. Hegeman, 92 N. Y. 508; Hawley v. James, 5 Paige [N. Y.] 318. The law relating to trusts was never intended to permit accumulations forbidden by the Code. Minnesota Loan & Trust Co. v. Douglas, 135 Minn. 413, 161 N. W. 158.

In Hascall v. King, supra, the leading New York case, in which this question is exhaustively discussed and all previously decided cases reviewed, from Hawley v. James, 16 Wend. 62, the first case decided after the adoption of the New York statute (which statute formed the basis of our own statute and from which our statute is practically copied), the court says:

> "Since 1828 the Revised Statutes have in terms prohibited the accumulation of the rents and profits of real estate and of the income of personal property, except during the minority and for the sole benefit of minors. 1 Rev. St. §§ 37, 38, p. 726. The last sentence of section 38 establishes the penalty to be visited upon all attempts to offend against these provisions, and reads as follows: 'And all directions for the accumulation of the rents and profits of real estate, except such as are herein allowed, shall be void.' The revisers, in their report, assigned as a reason for limiting the power of accumulation to one of the three cases specified in St. 39 and 40 George III, c. 98, namely, 'during the minority of any person or persons who, under the deed or will directing the accumulation, would, if then of full age, be entitled to such rents and profits,' that 'it is to the period last indicated that the revisers propose to confine the power of accumulation, conceiving that this restriction furnishes the most effectual means of guarding against the abuses to which directions of this nature are admitted to be liable, and believing that it embraces the only case in which the purpose of the accumulation is such as ought to be sanctioned, namely, for the benefit of infants entitled to the next eventual estate.' * * * 'The general policy of our law favors the greatest freedom of alienation of property consistent with the necessities of families, and the making of reasonable provision for the various contingencies which may be expected to arise, requiring the postponement of the vesting of estates, and the suspense of the power of alienating the corpus of property is permitted only within narrow limits. But the right to direct the accumulation of the fruits and profits of property is much more restricted than the right to control the property itself. It is permitted only in a single case and for a single purpose, viz., during minority, and for the benefit of the minor during whose minority the accumulation is directed.'"

In Re Lutz's Estate, supra, the court makes use of this illustration:

> "The estate which a testator has the power to give away, without restriction, consists only of what remains after payment of his debts. If, for example, the gross value of his assets is $100,000, and his liabilities $25,000, the sum available for the purposes of his will is $75,000, and if he should give legacies amounting to $100,000, it is apparent there would have to be an abatement of 25 per cent. But if the estate can be withheld from distribution until the debts have been paid with income, say for ten years, it will then be large enough to pay the legacies in full. Thus, rents and income might be withheld from beneficial enjoyment and made to do the duty of principal for a period measured only by the rule against perpetuities; and the owner of an estate worth $1,000,000 desiring to increase it for posterity to $2,000,000, need only borrow $500,000, on mortgage or collaterals, and leave everything to his executors in trust, during any number of well-selected lives in being at the time of his death, to apply the rents and income to the payment of debts and incumbrances, and then to sell and distribute the proceeds among such of his descendants as might have the good fortune to be living when that has been accomplished. If this can be done, the enactments regulating and restraining accumulations have been to very little purpose."

In Re Dolan, 79 Cal. 65, 21 P. 545, cited by appellant, touches on this question; and while it is true that in that case the court says:

> "As we read the will, it gave the property to Michael Dolan in trust to collect and receive the rents and profits thereof, and to use them (1) to pay the mortgage on the property; (2) to pay the legacies to Celia Jordan and Margaret Platt; (3) to pay the legacy to Sister Frances McEnnis; and (4) to pay all the residue thereof to James Dolan during his natural life. This was an express trust, and was authorized by law,"

—the question here presented was not before the court, and therefore not adjudicated. In the briefs on appeal and in the decision in that case it is said:

> "From this decree Michael Dolan has appealed, and the only questions presented relate to that part of the decree which gives to his brother, James P., a life estate in and a right to the possession of the said property."

And with respect to this question the court held that there existed an express trust as authorized by section 857 of the Civil Code, subdivision 3:

> "To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family during the life of such person, or for any shorter term, subject to the rules of title 2 of this chapter."

Defendant contends that, at the time of the adoption of the Codes in California, it was the law of New York that a trust to lease lands and apply the proceeds of the rents in the payment of the principal of a mortgage then upon the property was valid, and cites us to Parks v. Parks, 9 Paige Ch. (N. Y.) 111, as so holding, and to Estate of Potter, 188 Cal. 68, 204 P. 826, as holding that, when a statute is borrowed from another state, it is to be given the construction placed upon it at the time it is borrowed, and that hence the subsequent authorities overruling Parks v. Parks do not concern us. It was some eight years after the case of Hawley v. James, supra, was decided that the chancellor in the Parks Case, without reference to the Hawley Case, held that the authority of a trustee to pay the interest of the incumbrances out of the rents and profits of lots of lands in the first place, and to apply so much of those rents and profits as might be spared from the support of cestui que trust to the payment of the incumbrance, was valid and should be carried into effect according to the intention of the testator. In commenting upon the Parks Case in Hascall v. King, supra, the court says:

> "The subject was not otherwise considered, and, in view of the elaborate discussion of the question when it was before the court in Hawley v. James, 16 Wend. 62, it would seem as if that question had not been the subject of debate by the counsel who appeared before the chancellor and that his disposition of it was one of first impression. * * * In Cowen v. Rinaldo, 82 Hun, 479–485 [31 N. Y. S. 554] the very question now before us was under consideration, and the court, upon the authority of Hawley v. James, 16 Wend. 62, and in a very careful opinion by the presiding justice of the court, holds that a trust providing for the collection of rents, income, and profits of real estate, and, after the payment of certain legacies and the interest on mortgages, the applying of the remainder of the rents, together with the income and principal of the personal estate, to the paying off and discharging of the principal of mortgages on the real estate, was void."

[3] In the present case the first object in paying off the mortgage is to increase the trust estate, then the income so created is to be paid to adult sons except one-twentieth, which is payable to the minor grandson, Reason D. Hutchins, not during his minority, but until the termination of the trust, which occurs at the death of the last survivor of the three sons, irrespective of the age then of the now minor grandson. As the trusts in the deed of trust, subsequent to the trust to pay off the mortgage, are wholly dependent upon its full performance, and could not be carried out until that trust has been performed, they are void, and, at least from the death of Caroline L. Hutchins, the trust became extinguished and ceased to exist. Furthermore:

> "It is a familiar principle, that if several trusts are so inextricably interwoven, so mutually interdependent, that the destruction of one mutilates and maims in essential particulars the trust scheme, the whole must fall." Carpenter v. Cook, 132 Cal. 621, 625, 64 P. 997, 999 (84 Am. St. Rep. 118).

The intention of the trustors was to make a complete scheme of trust. There is no declaration in the instrument that any part of it is to survive, if other parts were destroyed. If the complete scheme cannot be carried out, according to the intent of the trustors as expressed in the deed of trust, then the whole trust fails. Estate of Maltman, 195 Cal. 643, 234 P. 898.

The deed of trust here is different from the one considered in Sacramento Bank v. Alcorn, 121 Cal. 379, 53 P. 813, cited, and cases where the contract involves good faith and value. This trust is testamentary in character, and neither the trustee nor any of the beneficiaries are purchasers or incumbranches for value, nor has the rule become —as contended by defendant—a rule of property involving the application of the doctrine of stare decisis.

The judgment is reversed. Appellant in each appeal prevailing, each is entitled to costs.

We concur: TYLER, P. J.; KNIGHT, J.

93 Cal. App. 753

MILLS et al. v. CITY OF ELSINORE et al.
(Civ. 6280.)★

District Court of Appeal, First District, Division 1, California. Sept. 6, 1928.

Hearing Denied by Supreme Court. Nov. 1, 1928.

1. Municipal corporations ⚷271—City trustees held empowered to construct necessary buildings in connection with waterworks system (Improvement Act 1911, § 2, as amended by St. 1923, p. 104).

Under Improvement Act 1911 (St. 1911, p. 730) § 2, as amended by St. 1923, p. 104, authorizing the ordering, on any street, public property, or right of way, of wells, pumps, dams, reservoirs, storage tanks, tunnels, conduits, pipes, hydrants, meters, or other appurtenances for distributing domestic water supply, and in subdivisions (j) and (k), providing for general incidental powers with reference to improvement of streets and public property, and for all other work auxiliary thereto, city trustees had power to construct necessary buildings required for waterworks system, notwithstanding buildings are not specifically mentioned in statute.

2. Municipal corporations ⚷304(1)—Resolution of intention to construct water supply system held sufficient as "brief description" of work (Improvement Act 1911; Improvement Bond Act 1915).

In resolution of city trustees declaring intention to construct water supply and distributing system, recital that well and pumping plant at certain location should include construction of pipe line from station on straight line across an alley over certain property belonging to city, and along a right of way therefor across specified street to point adjacent to the east line of certain lot *held* sufficient as "brief description" of work, within Improvement Act 1911 (St. 1911, p. 730) and Improvement Bond Act 1915 (St. 1915, p. 1441).

3. Municipal corporations ⚷304(13)—That plan for water supply system provided for "overload relay," while resolution of intention provided for "overload relays," held not to create inconsistency.

That plan for city water supply system provided for "overload relay," while resolution of intention to construction system provided for "overload relays," without definitely specifying that there were to be more or less than one, *held* not to create inconsistency, since it is a rule of construction that the plural may mean a singular, or the singular may mean a plural, wherever from the context the definite meaning is clearly ascertainable.

4. Municipal corporations ⚷314(1)—Specification that water pump should be of "underground discharge type" merely required that it be constructed so that water could be conveyed to underground line.

Specifications for construction of city water supply system, providing that certain pump should be of "underground discharge type," *held* merely to mean that pump should be so constructed that, with its appurtenances and connections, water could be conveyed directly from immediate vicinity of pump to underground line.

5. Municipal corporations ⚷314(1)—Plans involving intricate construction work must be considered together, in determining work to be done.

Where intricate construction work in installing city water supply system is indicated, plans must all be considered together, to determine what the work to be done consists of.

6. Words and phrases—"Screw pipe" means that threads are placed on ends of each pipe, to permit it to be screwed to next connecting pipe.

A wrought steel "screw pipe" means that on the ends of each pipe threads are placed, to permit it to be screwed to the next connecting pipe to be laid.

7. Words and phrases—"Wrought steel welded pipe" means that longitudinal break formed in center of pipe in rolling steel plate forming it is welded.

"Wrought steel welded pipe" does not mean that it is to be welded to next connecting pipe but that in manufacture of pipe longitudinal break, which is formed in the center of the pipe in the rolling of the steel plate forming it, is welded, instead of being joined in some other manner.

8. Municipal corporations ⚷304(1), 314(1)—Plans, specifications, and resolution of intention calling for particular type of water pump manufactured by certain company, or "equivalent," held sufficient.

Where plans, specifications, and resolution of intention for construction of water supply system indicate that certain type of pump manufactured by certain company, or its "equivalent," is to be used, it is not necessary to show cross-sections and specifications of foundry make, manufacturers' details, and patterns, where pump named is a standard article and can be supplied in general market; word "equivalent," in mechanical matters, having distinctive meaning indicating a device of practical equivalence in value and effect and of substantially same design, performing same functions in practically same manner.

[Ed. Note.—For other definitions, see Words and Phrases First and Second Series, Equivalent.]

9. Municipal corporations ⚷314(1)—Discretionary power, by which materials or extent of improvement may be varied, cannot be delegated, but specification must definitely describe work, except where details do not permit.

The law requiring certainty and definiteness in special assessment proceedings prohibits delegation of any discretionary power by which the materials or extent or costs of improvement may be varied, and rule requiring that specifications must definitely and with certainty describe extent of the work to be done, is subject only to exception in cases where details of construction do not permit.

★Hearing denied by Supreme Court.

10. Municipal corporations ⚷=314(1)—Specifications requiring refilling of trenches and removal of excavated earth to satisfaction of engineer and street superintendent held not invalid.

In specifications for construction of city water supply system, provisions that filling of trenches should be settled with water at not more than two intermediate depths, to be determined by street superintendent, and that no excavating material should be removed from street until back-filling is completed in manner satisfactory to engineer, *held* not invalid, since matters concern things which could not with reasonable diligence and cost be ascertained in advance, and would be disclosed only in the doing of the work.

11. Municipal corporations ⚷=438—Test of right to create public improvement by special assessment is existence of special benefit to property assessed.

A test of the right to create a public improvement by special assessment does not resolve itself on the point whether there exists some general public benefit, but test is: Does there exist, with relation to the work, a special and peculiar benefit to the property assessed?

12. Municipal corporations ⚷=438—Where no part of city, except part included in improvement district, received benefits of water supply system, requiring payment from general funds would be unreasonable (Improvement Act 1911; Improvement Bond Act 1915).

Where there was no evidence that any part of city could be benefited by construction of city water supply system, under Improvement Act 1911 (St. 1911, p. 730) and Improvement Bond Act 1915 (St. 1915, p. 1441), except that part of city which was included within the improvement district, it would be unreasonable to require payment for improvement to be made from general funds, or by bond issue over whole city.

13. Municipal corporations ⚷=303(1), 314(1)—Discrepancies in specifications and resolution, not increasing cost of constructing water system, held not to vitiate proceedings (Improvement Act 1911; Improvement Bond Act 1915).

Where variances and discrepancies in plans, specifications, and resolution of intention, relating to construction of city water supply system, were slight, and cost of work was not shown to be materially increased or decreased because thereof, or on account of discretion vested in engineer, they did not vitiate proceedings under Improvement Act 1911 (St. 1911, p. 730) and Improvement Bond Act 1915 (St. 1915, p. 1441).

14. Municipal corporations ⚷=304(1), 314(1)—Resolution of intention, plans, and specifications, if sufficiently definite to enable bidders to know outlay with reasonable accuracy, are sufficient (Improvement Act 1911; Improvement Bond Act 1915).

Under Improvement Act 1911 (St. 1911, p. 730) and Improvement Bond Act 1915 (St. 1915, p. 1441), purpose of resolution of intention of city trustees to construct improvement, and plans and specifications therefor, is for the benefit of property owners and contractors who are to bid on the work, and, if they are sufficiently definite on details of work materially affecting its cost to apprise bidders of all essential parts of work and enable them to know with reasonable accuracy the outlay they will have to make in performing the work, they are sufficient.

Appeal from Superior Court, Riverside County; George R. Freeman, Judge.

Action by J. E. Mills and another against the City of Elsinore and others. From an adverse judgment, plaintiffs appeal. Affirmed.

Sarau & Thompson, of Riverside, and Swing & Wilson, of San Bernardino, for appellants.

George W. Crouch, City Atty., of Los Angeles, Wm. G. Irving, of Riverside, Wm. M. Brown, of Los Angeles, and Loyal C. Kelley, of Riverside, for respondents.

CAMPBELL, Justice pro tem. The board of trustees of the city of Elsinore, a city of the sixth class, on March 12, 1925, passed resolution of intention No. 117, declaring its intention to construct a water supply and distributing system for fire protection and domestic water supply; it being declared therein that the proceedings were being taken pursuant to the "Improvement Act of 1911" (St. 1911, p. 730) and the "Improvement Bond Act of 1915" (St. 1915, p. 1441). Steps were subsequently taken, resulting in the acceptance of the bid of the defendant Claude Fisher for the performance of the work, and a resolution was adopted by the board awarding the contract therefor to defendant Fisher. Within 10 days from the first publication of the notice of award of the contract to defendant Fisher, the plaintiffs, J. E. Mills and Mabel A. Mills, with others, all owners of land liable to assessment, filed with the clerk of the board a written notice and protest, claiming that the previous acts and proceedings relating to the improvement were irregular, defective, erroneous, and faulty, which notice stated that it was given and the protest made pursuant to the provisions of section 16 of the Improvement Act of 1911, and specified that the acts and proceedings were irregular, defective, erroneous, and faulty in a number of respects, the following being set forth in appellants' brief, to which our attention is directed:

"(1) That the resolution of intention does not correctly describe the location of the work and improvement; (2) that the character and dimensions of the reservoirs to be constructed are not delineated upon the plans and profiles; * * * (4) that the specifications unlawfully delegate discretion to the superintendent of streets; (5) that neither the materials, nor the character nor quality thereof, to be used in making said improvements, are described with any degree of certainty; * * * (10) that the resolution of intention does not refer to the streets to be improved by their lawful or official names; (11) that the property and rights of way upon which a portion of said improvement is to be constructed are not described in the resolution of intention; (12) that the resolution of intention does not briefly describe the work to be done; (13) that the resolution of intention does not give the location of the proposed improvement; (14) that the plans, profiles, and specifications do not give a full and detailed description of said work and improvement; (15) that no detailed description of said work or improvement is set forth in said proceedings; * * * (21) that authority is illegally and improperly vested in the city engineer."

Curt Miller, superintendent of streets, entered into the contract with defendant Fisher, who entered upon the execution of the work. Plaintiffs thereupon brought this action against the city of Elsinore, the five persons constituting its board of trustees, the clerk, treasurer, and street superintendent, and the contractor, Claude Fisher, praying for an injunction pendente lite, as well as a permanent injunction, restraining the performance of the work and improvement, the making of any assessments or the issuing of any bonds to cover the cost thereof, and restraining the imposing or creating of any cloud, lien, or assessment upon the land of the plaintiffs, and praying for a decree adjudging that the contract is invalid, and that the proceedings leading up to the execution of the contract were irregular, defective, erroneous, and faulty. The application for an injunction pendente lite was denied, and upon the trial on the merits judgment was rendered for defendants, and from this judgment plaintiffs have appealed.

It is contended that the judgment should be reversed for the following reasons: (a) That the board of trustees have no power under the act to construct buildings, or purchase or install motors and electrical apparatus; (b) that because of defects in the resolution of intention the board never acquired jurisdiction to order the improvement; (c) that variance and ambiguities invalidate the proceedings and the contract; (d) that the work and improvement is not sufficiently described; and (e) that unlawful discretion and power is delegated to the superintendent of streets and the city engineer.

[1] We shall discuss the points in the rotation in which they are urged. As to assignment (a), that the board of trustees has no power under the act to construct buildings or install motors and electrical apparatus, it may be said that authority to do such is contained in section 2 of the Improvement Act of 1911, as amended (St. 1923, p. 104), which provides for the ordering upon any street, public property or right of way of a city "wells, pumps, dams, reservoirs, storage tanks, tunnels, conduits, pipes, hydrants, meters or other appurtenances for supplying or distributing a domestic water supply." In addition to the general power, subdivision (j) of section 2 provides for general incidental powers with reference to the improvement of streets, public property, etc., and subdivision (k) of section 2 provides for all other work auxiliary to any of the above which may be required to carry out the same.

Appellants contend that, because the resolution of intention provided for certain buildings, and electric motors to operate the pumps, the power granted by the Legislature has been exceeded, and in support of their contention cite Thompson v. Hance, 174 Cal. 572, 163 P. 1021, Federal Construction Co. v. Ensign, 59 Cal. App. 200, 210 P. 536, and Spring Street Co. v. Los Angeles, 170 Cal. 24, 148 P. 217, L. R. A. 1918E, 197. In the Thompson Case it is held that work of an entirely different and independent character from that specified in the act could not be justified by virtue of a blanket provision in the Vrooman Act (St. 1885, p. 147, as amended by St. 1911, p. 626), corresponding to subdivision (j) of section 2 of the Improvement Act of 1911, and the Federal Construction Company and Spring Street Cases hold that under our system of government no assessment can be made upon any land on any principle other than that of special benefits actually or presumptively received.

The manifest intention of the Improvement Act and of the language used with relation to appurtenances and auxiliary work make it apparent that the Legislature, not only intended to provide for the installing of wells and pumps, conduits and pipes, but whatever may be reasonably necessary for supplying and distributing the water to its consumers. The act itself characterizes the general power, and then uses this language:

> All "other appurtenances for supplying or distributing a domestic water supply;" and further on, "All other work auxiliary to any of the above, which may be required to carry out the same."

The Legislature certainly did not intend that wells might be drilled and pumps installed, but that they must be left in the broad outdoors unprotected from the elements. To adopt the interpretation urged by appellants would be to create a system which would be useless until some foreign or intervening agency intervened to convey the water into the lines and to the pipes of the consumers and to the fire hydrants. We think the Legislature meant to create a water supply, distributing, and development system. It could not be expected to specify in the act all of the details of appurtenances and auxiliaries necessary to a perfect system.

[2] Under specification (b), that because of defects in the resolution of intention the board never acquired jurisdiction to order the improvement, appellants claim that the resolution of intention does not briefly describe the work, in that it does not define and locate the right of way for the discharge pipe from the pumping station. The language used in the resolution in this respect is:

"And such water well and pumping plant construction work shall include the construction of a wrought steel discharge pipe from said pumping station and on a straight line, across an alley, over certain property belonging to said city and along a right of way therefor, across Langstaff street to a point adjacent to the east line of lot 23, block 87, of said tract."

The language immediately preceding had dealt with and defined the location of the pumping plant, namely, upon lot 13, block 80, Heald's Subdivision of Elsinore, and the entire resolution of intention is tied up to the plans and specifications. The location of the pumping plant having been specified, and the resolution of intention stating that this pipe line runs in a straight line from this pumping plant across the alley and across Langstaff street to a point adjacent to the east line of lot 87, furnishes a brief description of the work, and the plans referred to, indicating exactly where the pipe line is to be laid, sufficiently complies with the law. Richmond v. Growney, 29 Cal. App. 427, 155 P. 1008. From the plans it appears that the line in question runs straight from the lot on which the pumping plant is located, which is lot 13, block 86, to a point on the east line of lot 23, block 87. The exact point on the east line of lot 23, block 87, is not shown upon the plans by the number of feet at that particular point, but it does appear that the pipe line intersects a point on the north line of lot 13, block 87, 50 feet from the northeast corner of such lot, and also intersects the east line of lot 23, block 87, a 60-foot lot; hence the exact location is easily ascertained.

Again, it appears that the pipe line continues in a straight line to the center of the pumphouse located on lot 13, block 86, which point is 44 feet from the east line of such lot and 12 feet from the north line thereof. Therefore, if a line as shown on the drawings starts from a point on the lot mentioned, which point is 44 feet west of the east line and 12 feet south of the north line of such lot, and then reaches a point on the north line of such lot, which is 50 feet west of the northeast corner, as shown by the drawings, and the line running in a "straight line," as defined in the resolution of intention, it could only intersect lot 23, block 87, at one definite point.

Referring to appellants' further objection under this heading that the extent of the right of way, its termini, width, etc., is not sufficiently located, it may be said that plan No. 117 (Defendants' Exhibit No. 14–D) shows the notation with respect to this line as follows: "Trench one foot west of west line of lot 12 of block 5." The clause "over a certain right of way belonging to the city adjacent to the westerly lines" of certain lots, taken in connection with this plan, sufficiently locates the right of way, as it adjoins the west line of certain given numbered lots, at the most farthest in one direction and ends at the end of the lot most farthest in the other direction, which sufficiently fixes the termini of the right of way. The same objection is made with relation to the reservoir. The resolution of intention states upon what particular lots of a given tract of land the reservoir is to be located and refers to the plans for further particulars.

The plans show that the reservoir is located upon a parcel of land, one corner of which is the north corner of lot 25, block 14, Country Club Heights unit No. 3; another corner of which is the east corner of lot 25, block 14, of the same tract; the third corner is the southerly corner of lot 39, block 14, of the same tract; and the fourth corner is the westerly corner of lot 39, block 14, Country Club Heights unit No. 3; that the reservoir extends to within five feet of the outside property lines of this parcel of land. On the bottom of Exhibit 14–N appears the cross-sections of the reservoir given in each direction, and on the plan also appears the lot numbers. It is true that in the specifications there is an error, in that one of the lots upon which the reservoir is to be located has been omitted. This lot, however, which is lot 33, would fall in the center of the parcel of land, and the error, therefore, would mislead no one. Furthermore, paragraph 52 of the specifications provides:

> "Any work, material, or apparatus appurtenant to the work of making a complete job, which shall be specified in these specifications and omitted from plans, or which is shown on plans or drawings and omitted from the specifications, shall be considered as both part of plans and specifications, and the contractor shall furnish said work, material, or apparatus."

Appellants urge, under assignment (c), "that variances and ambiguities invalidate the proceedings and the contract," that where, as here, the description of the work is partly in the plans and partly in the specifications, a variance or conflict in the description with respect to the extent of the improvements, materials to be used, etc., constitutes a fatal defect and invalidates the proceedings; that the resolution of intention provides for the improvement of Poe street, where no pipe line is to be laid, and therefore that this constitutes a conflict; but an inspection of plan No. 115 (Defendants' Exhibit 14–B) shows that at this particular block Poe street is "vacated" and is so marked, and therefore it is not Poe street at all. The same applies to the objection as to two pipe lines on Graham avenue, where the discrepancy exists as to whether there is to be one or two pipe lines.

The next objection which the appellants present relates to the fittings indicated in part by plan No. 117 (Defendants' Exhibit 14–D), particularly referring to intersections designated as intersections 1 and 6, and they urge that by reference to plan No. 114 (Defendants' Exhibit 14–A), which is connected up with plan No. 117, it appears that intersections Nos. 1 and 6 are outside the city. Appellants, however, overlook the notation of explanation appearing on plan No. 114 and also on plan No. 117, reading as follows:

> "The profiles referred to are often more extensive than the plans and are to be disregarded except in so far as they relate to the lines indicated on plans and mentioned in resolution of intention."

This makes it clear that, where an intersection is shown extending beyond the lines indicated in the resolution of intention and shown upon the major plans, it has no reference to the work to be done. Plan No. 114 (Exhibit 14–A) is one of the major plans. In the southwesterly corner of this plan is a rectangular portion, wherein the city limits line is indicated by a dotted line, and wherein is noted on each pipe line indicated that it "is not a portion of the improvement." The figures 1 and 6 referred to by appellants, and which figures appear in circles, relate to a detail plan of the intersection. On this major plan No. 114 (Exhibit 14–A) appears also the explanation: "Figures in circles correspond to enlarged detail." With this explanation that appears upon these two plans, we cannot see how any person could understand that it was his duty to construct fittings on a pipe line not to be laid, not described in the resolution of intention, which lies outside the city limits, and which is especially excluded by appropriate notations made upon the major plans.

Again, appellants complain that there is a discrepancy between plan 116 (Defendants' Exhibit 14–C) and plan 123 (Defendants' Exhibit 14–J) in that the latter shows an 8-inch pipe line, both north and south of the intersection with Flint street, while the former shows the 8-inch pipe line on Main street to extend from a point 15 feet from the north line of Flint street, in a southerly line to the north line of Mountain View avenue, and a 6-inch pipe line to extend from the last-named point in the intersection of Flint street northerly to Minthorn street. Plans 115 and 116 (Defendants' Exhibits 14–B and 14–C) are major plans, as distinguished from special detail plans of appurtenances and accessories. Plan 123 (Defendants' Exhibit 14–J) is one of the detail plans. We do not understand that there is any conflict here. The intersection on the last plan, shown as F–1, may well be reasonably construed to indicate only the 8-inch pipe in the immediate vicinity of the fire hydrant. This latter plan is not a plan of the pipe lines, but is a plan of the fire hydrant details. The following notation and instruction appears on plan No. 116 (Defendants' Exhibit 14–C):

> "For detail of pipe fittings at intersections, see plan No. 118. Figures in circles correspond to enlarged detail. For fire hydrant details, see plan No. 123. Profiles referred to are often more extensive than the plans, and are to be disregarded, except in so far as they relate to the lines indicated on the plans and mentioned in the resolution of intention."

It would not be expected, therefore, that reference be had to plan No. 123, except for information respecting the fire hydrants and their appurtenant details. Therefore there is no necessity or purpose of showing the size of the pipe lines except in the immediate vicinity of the fire hydrant connection. This fire hydrant connection is indicated by letter "T" placed horizontally, and appears upon plan No. 123 (detail F–1) to be upon the pipe line situated on Main street at a point 5 feet south of the south line of Flint street. Since it is an 8-inch pipe at that place, and continues to be an 8-inch pipe until it reaches a point within 15 feet of the north line of Flint street, there is no conflict. The entire purpose of these drawings in plan No. 123 being to show the hydrant details, they are made so as to embrace only the points of intersection where the fire hydrant is to be placed; it is a reasonable interpretation to say that the size of the pipe as placed upon these intersection drawings has particular reference only to the point of juncture of the pipe line with the fire hydrant and its fittings. Furthermore, the lines showing the pipe lines, as appears upon these detail drawings, indicate definitely no point of beginning and no point of ending. The drawing does, however, definitely indicate the fire hydrant, its location and appurtenances, and that, as a matter of fact, as otherwise affirmatively appears from the quotation we have just made, and which is noted on the other plan, is all the information that this plan No. 123 was ever intended to convey.

Again, complaint is made that plan No. 118 provides for the construction of certain fittings at intersections Nos. 30 and 35, but that plan No. 116 recites that intersections 30 and 35 are not part of the drawings. This is the same character of objection we have already considered as to the work noted on major plan No. 114, as being outside of the city limits and which work is to be omitted. Major plan 116 shows that the pipe line situated at the southerly end of block 504, and lying between Granite street and East Hill street, bears the notation, "Not a part of proceedings." Also on the same map, and immediately south of the line just above noted, and situated at the northerly termination of Dutton street, shows another line extending eastward to East Hill street, which bears a similar designation. On this same plan and appearing in circles are the figures "30" and "35" and written in between these circles is the notation, "Not a portion of proceedings." There is also an explanation on this plan reading as follows:

> "For detail of pipe fitting at intersections, see plan No. 118. Figures in circle correspond to

enlarged detail. For fire hydrant details, see plan No. 123. The profiles referred to are often more extensive than the plans, and are to be disregarded, except in so far as they relate to the lines indicated on the plans and mentioned in the resolution of intention."

Plan No. 116 being a major plan, and plan No. 118 being a detail plan of pipe fitting, no one, with these explanations appearing on the major plan, would conclude that the pipe fittings at intersections 30 and 35 were to be constructed under these proceedings. To adopt such a construction would be to disregard the notations and explanations appearing upon the major plans, and to ignore the descriptions set forth in the resolution of intention, which specifically omit these particular pipe lines, and to adopt a conclusion that pipe fittings are to be established at points and in places where there is no pipe line whatever to be constructed.

The next point made is that plan No. 120 (Defendants' Exhibit 14–C) with respect to one of the vertical motors provides that it shall have 20 horse power and that the specifications provide that the motors "shall be of ample H. P. to satisfactorily carry the maximum load under which they will be required to operate without overheating." If there were no further explanations appearing in the proceedings, such a point would not be of any particular merit, unless in conjunction therewith it is shown that 20 horse power was either not ample to carry the load or was in excess of that needed. It must be remembered that this provision of the specifications does not have reference in particular to any one motor shown upon the plans, but was a general specification with relation to a number of different motors.

There is another explanation to be adopted, and that is that these motors are for the purpose of operating the pumps. The specifications provide, with respect to the different pumps, that they shall be of a certain design or equivalent. In this particular instance the Kimball type pump is designated on the plan. The specifications for the different pumps provide the capacity each pump must deliver; that is, speaking of pump at station No. 1, "the pump shall have a capacity of between 260 and 280 gallons per minute operating against a head of 125 feet." If the construction be adopted that the contractor was at liberty to furnish an equivalent type of pump, and that an equivalent pump would require a motor of horse power exceeding twenty horse power, then, it would be his duty to supply the type of motor demanding a greater horse power.

There is no merit in the objection that plan No. 120 provides that the pump at station No. 2 is of a 450-gallon per minute capacity, while the specifications relating to the capacity of the pump say that it shall be "between 440 and 460 gallons per M. operating against a head of 125 feet." The notation appearing upon the plan is necessarily the "rated" capacity of the pump. In actual working conditions, pumps of a given definite capacity will perform differently, according to whether they lift in hot or cold water, or are operating at different elevations above sea level. The proper explanation of the plans and specifications is that they are to supply a pump of theoretical rated capacity of "450 G P M" (which is a technical pumping engineering term), capable, at the conditions existing in the city of Elsinore, of delivering between 440 and 460 gallons per minute, operating against a head of 125 feet. In actual practice, even a layman knows that a pump of rated capacity frequently varies somewhat in its actual performance under varying conditions.

[3] The next objection made is that plan No. 120 provides for "overload relay," and that the resolution of intention provides, in general terms, for "overload relays," without definitely specifying that there are more or less than one. It is a rule of construction that the plural may mean a singular, or a singular may mean a plural, wherever from the context the definite meaning is clearly ascertainable. The "overload relay" is composed of a magnetic control coil on each of two of the leads leading from the source of power to the motor. Each one of these coils is an "overload relay" in itself, but in construction two of them exist, and are also considered as a unit by itself, and therefore, in engineering terms, may be variously referred to as "overload relay" or "the overload relays." The same sort of an objection is made with regard to the resolution of intention, where, after providing for the construction of the pump, it says, "together with the necessary steel suction pipe, strainers," etc. The plan indicates only one strainer is necessary. An error of this kind, in using the singular instead of the plural, taken in connection with the context, becomes immaterial.

[4] Again, appellants complain that the specifications with relation to the pump at station No. 3 provide that it shall be of the underground discharge type. That merely means that it is so constructed that with its appurtenances and connections water can be conveyed directly from the immediate vicinity of the pump to the underground line. The pump could still be of the underground discharge type. If we take plan No. 121 (Defendants' Exhibit 14–H), of which they complain, and compare it with plan No. 117 (Exhibit 14–D), we will see that 15 feet from the center of the well and immediately to the south of it is located the concrete receiving tank; again, if we refer to plan No. 119 (Defendants' Exhibit 14–F), we will perceive that the discharge pipe from the pump to this receiving tank, which is 15 feet distant therefrom, enters the receiving tank at a point 1 foot and 10 inches below the ground line. For practical purposes, therefore, it sufficiently appears that the discharge would be elbow-

ed down to meet the underground pipe coming from the receiving tank, and this would be a sufficient compliance to cover the use of the term "underground discharge." Moreover, appellants have not shown that there is any radical difference of construction or of cost between this type of discharge pipe and some other method, or that it would tend in any wise to increase or lower the cost, or to have any effect whatever on the efficiency of the pumping plant.

[5] Again, appellants complain that plan No. 124 (Defendants' Exhibit 14–K) provides for the construction of two switchboards at station No. 3, while plan No. 117 calls for the construction of only one switchboard. This is not a conflict. Where intricate construction work is indicated, the plans must all be considered together, to determine what the work to be done consists of. Plan No. 117 is intended to show the general location of the pumping station with relation to the lot and street lines. In a plan of this kind, manifestly not all details could be shown on a single plan. It would be highly impractical to do so; many of the details would have to be drawn in such fine scale that they could not be seen with the naked eye. A switchboard is more or less of a generic term in electrical engineering and may consist of one, two, or more panels. When we refer to plan No. 124, we have disclosed to us the system of wiring which could not be possibly indicated on the plan, which was only intended to show the general outline.

[6, 7] Again, appellants complain that the resolution of intention provides that the pipe to be laid "shall be wrought steel screw pipe," and that the specifications provide that "all pipe is to be wrought steel welded pipe." This in itself is not a conflict. "A screw pipe" means that on the ends of each pipe threads are placed to permit it to be screwed to the next connecting pipe to be laid. A "welded pipe" does not have the significance that it is to be welded to the next connecting pipe, but merely means that in the manufacture of the pipe the longitudinal break, which is formed in the center of the pipe in the rolling of the steel plate which forms the pipe, is welded, instead of being joined in some other manner.

The next objection made is the claim that the proceedings are invalid, because on plan No. 117 there is a notation of two pieces of pipe, totaling 32 feet in length, extending from the pumping station to the concrete receiving tank, that bears the mark "W I" pipe and that the resolution of intention and specifications call for "wrought steel" pipe. There is no explanation of what the lettering "W I" means in any of the proceedings, but there are abundant notations on the plan and specific requirements in the specifications and the resolution of intention to the effect that the pipe to be laid shall be "wrought steel" pipe.

With respect to objections of this character as occurring on plan No. 123, it may be said that plan No. 123 is not intended to be a plan of the pipe lines, but is intended to show the fittings and fire hydrants at the intersections. The same observation applies with reference to the discharge pipe from the well as shown on plan No. 119.

The next objection is to the manner of describing the pumps, motors, and appurtenances. Objections are separately taken up as to each pump, but, inasmuch as the objections made are for the most part merely repetitions of objections made to each pump, we will consider the objection only as to one of the three different pumps.

[8] The description of the pumps and appurtenances at station No. 1 is set forth in the resolution of intention in subdivision D. The specifications provide, further, with reference to the pumps to be installed at that station, as is shown under the heading "Pumps," station No. 1. In general, the pump is to be the Kimball type, auger pump, or equivalent. Its capacity is to be between 260 and 280 gallons per minute operating against a head of 125 feet. The word "equivalent," in mechanical matters, has a distinctive meaning in the trade, which is a combination of the ordinary use of the word and the meaning of the word as used in the patent law, and indicates a device of practical equivalence in value and effect and of substantially the same design, performing the same functions in practically the same manner.

Water pumps of this character are now practically standard. It is necessary only to tie up the resolution of intention and plans to make a size and type of pump, and the plans be sufficient to indicate a particular design or number, and give a general outline such as will indicate the kind, size, and character of the pump wanted. If the plans, specifications, and resolution of intention are sufficient with respect to this particular pump to indicate the adoption of a certain Kimball type auger pump, as manufactured by the Frank J. Kimball Company, or equivalent, it is not then necessary to show cross-sections and specifications of foundry make, manufacturers' details, and patterns, because a particular thing has been identified and is a standard article, that can be supplied in the general market.

In order that these plans should receive the interpretation of the court as such interpretation would be given by a contractor familiar with the business, or by an engineer or manufacturer engaged in this line of duty, Mr. J. B. Griffin, an expert water and pump engineer, was called as a witness. From his testimony it seems that any person qualified to bid upon the work, or any person sufficiently familiar with plans of this character to draw the reasonable and ordinary conclusions therefrom, would understand the work required to be done, and that there are no serious uncertainties in the descriptions, and that the cost of the works was definitely ascertainable.

[9] This brings us to appellants' objection "that unlawful discretion and power is delegated to the superintendent of streets and the city engineer," and they urge that the law requiring certainty and definiteness in special assessment proceedings prohibits the delegation of any discretionary power by which the materials or extent or cost of improvement may be varied, and that the rule which requires that specifications must definitely and with certainty describe the extent of the work to be done, is subject only to an exception in cases where the details of the construction do not permit it, citing authorities in support of such contention. We are in accord with the law as stated, disagreeing with appellants only with relation to its application to the situation presented here.

[10] Appellants have set forth in their brief a number of paragraphs from the specifications. Among those having to do with the delegation of discretionary power to the officers named is the following:

> "The nature of the work will necessitate leaving open considerable length of trenches, and the contractor shall have facilities for rapid back-filling, when so instructed by the engineer. If so directed by the superintendent of streets, the filling shall be settled with water at not more than two intermediate depths, to be determined by the street superintendent before it is brought to one foot from the surface. No excavating material shall be removed from the street until back-filling is completed, but as soon as the trenches are refilled, in a manner satisfactory to the engineer."

The remaining paragraphs reproduced by appellants in their brief have been sufficiently discussed. These objections, while being merely trivial, appear also to concern things which could not with reasonable diligence and cost be ascertained in advance, and which would be disclosed only in the doing of the work (City Street Imp. Co. v. Kroh, 158 Cal. 308, 110 P. 933), as for instance, whether the filling of the trench should be settled with water at one or two depths, or settled at all with water, would depend on the condition of the weather as well as the soil.

[11, 12] This brings us to appellants' final objection that no special or compensating benefit can arise from the construction of a municipal water system where only a portion of the city is assessed therefor. The test of the right to create a public improvement by special assessment does not resolve itself upon the point as to whether there exists some general public benefit, because every assessment proceeding contains an element of public benefit. The test is: Does there exist with relation to the work a special and peculiar benefit to the property to be assessed? In the present case, while not all the city is involved in the assessment district, there is no evidence showing that any part of the city could be benefited by the construction of any of the work, save that part which is included within the district. It would therefore be unreasonable to require the payment to be made from general funds, or by a bond issue over the whole city which is not benefited by the improvement. Furthermore, as is said in Kane v. Wedell, 54 Cal. App. 516, 521, 202 P. 340, 342:

> "The statute undoubtedly was intended to authorize the city council to make whatever special improvement might be deemed necessary for the welfare of the city, or any part thereof, * * * a power to include the whole city in one district if necessary for an improvement which affected the whole, or to divide the city into smaller districts for other special improvements, which might affect only the particular sections so included."

[13] As the variances and discrepancies complained of are on the whole slight, and as it does not appear that the cost of the work, because of such variances or the discretion vested in the engineer, materially increased or decreased the cost of the work, they do not vitiate the proceedings. Mill Valley v. Bonding Co., 68 Cal. App. 372, 229 P. 891.

[14] The purpose of the resolution of intention and the plans and specifications, is for the benefit of the property owners and contractors who are to bid on the work. If they are sufficiently certain and definite, upon all the details of the work which materially affect its cost, to apprise bidders of all the essential and substantial parts of the work and enable them to know with reasonable accuracy the outlay they will have to make in performing the work to be contracted for, they are sufficient. City Imp. Co. v. Kroh, supra.

We think the proceedings sufficiently comply with the statute, and that the record contains no error calling for a reversal.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

93 Cal. App. 455

JEDLICKA et ux. v. ATWELL LAND CO. et al. (Civ. 5820.)

District Court of Appeal, Second District, Division 1, California. Sept. 5, 1928.

Vendor and purchaser 🔑308(1)—Imperfection of vendor's title does not destroy validity of contract as respects vendor's right to compel payment of intermediate installments.

Where vendee contracts with one having none or an imperfect title, he contracts with hope or expectation that vendor may be able to perfect title, and in absence of fraud or misrepresentation, such imperfection of title does not destroy validity of contract as respects vendor's right to compel payment of intermediate installments of purchase price, though vendor must be prepared to convey good title when time arrives for making final payment.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

On petition for rehearing. Petition denied. For former opinion, see 269 P. 665.

Miller & Casady, of Los Angeles, for appellants.

Robert Brennan, of Los Angeles, for respondents.

PER CURIAM. On petition for rehearing. Petitioners are in error in their suggestion that this court held that at the date of the contract of August 16, 1921, R. M. Martin was not the owner of any stock in defendant corporation. Implicitly it was admitted by the pleadings that Martin remained the owner of one share; in other words, Martin had owned 9,998 shares and had reserved one share from his pledge to Childress. The testimony of Martin confirms this fact.

The fact that the vendors at the time of making their contract with defendant corporation did not own the land, but had only those rights referred to in the decision herein, has not that supreme importance which has been insisted upon by appellants. Where a vendee contracts with one having none or an imperfect title, he contracts in the hope or expectation that the vendor may be able to perfect the title. Brimmer v. Salisbury, 167 Cal. 522, 531, 140 P. 30; Kerr v. Reed, 39 Cal. App. 11, 16, 179 P. 399. In the absence of fraud or misrepresentation of any kind, such imperfection of title does not destroy the validity of the contract. Of course, it is true that on an installment contract, when the time arrives for making the final payment of consideration, the vendor must be prepared to convey a sufficient title. But under such a contract the vendor's right to compel payment of intermediate installments of the purchase price does not depend upon the present existence of a complete title in the vendor.

While the assignments of error made by appellant in relation to instructions to the jury were not discussed in the opinion of the court, the court did not fail to give to them what we deemed to be sufficient consideration. If there were any errors in said instructions, we are of the opinion that such errors were of minor importance in relation to the case and did not probably affect the verdict.

The petition for rehearing is denied.

YORK, J., absent.

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93 Cal. App. 717

KELLOGG v. SNELL. (Civ. 3535.)

District Court of Appeal, Third District, California. Aug. 30, 1928.

1. Appeal and error 🔑1011(1)—Judgment will not be reversed for merely conflicting evidence.

Judgment appealed from will not be reversed for a mere conflict in evidence.

2. Evidence 🔑441(6)—Parol evidence of contemporaneous oral agreement respecting plaintiff's employment as bank official at $250 per month, where written contract specified he would accept position under conditions otherwise agreed on, held competent.

Where written contract contained provision that plaintiff would accept position with bank under conditions otherwise agreed on, parol evidence of oral agreement contemporaneous with written contract, respecting employment of plaintiff as cashier and manager of bank at salary of $250 per month, *held* not incompetent, as varying or conflicting with specific provisions of the written instrument, which showed a contemporaneous agreement was contemplated.

3. Estoppel 🔑71—Defendant, having waived requirement that plaintiff stay in bank 60 days after resignation, was estopped to assert failure to remain as defense to later action.

In action for bank officer's breach of contract to repurchase bank stock sold plaintiff and procure his employment in bank as cashier and manager, defendant, having consented to plaintiff's resignation as teller, thereby waiving his right to require plaintiff to remain with bank for 60 days thereafter, as provided by terms of contract, *held* estopped to take advantage of plaintiff's failure to so remain, or to urge lack of consideration for waiver.

4. Appeal and error 🔑766—Judgment should be affirmed, where defendant's briefs on appeal failed to set out evidence in support of contention relied on for reversal (Code Civ. Proc. § 953a).

In action for breach of contract, where defendant's briefs on appeal did not include any evidence in support of contention that evidence in trial court proceeding did not support defendant's verbal promise to procure employment for plaintiff in bank as cashier and manager at $250 per month, and that it failed to support damages of $1,250 for breach thereof, such being relied on for reversal, and plaintiff's briefs on appeal setting out substantial evidence to support judgment and findings of lower court, *held*, that judgment should be affirmed, without resorting to examination of typewritten record, prepared in accordance with Code Civ. Proc. § 953a, to ascertain merit of plaintiff's contention.

Appeal from Superior Court, Los Angeles County; Wm. C. Doran, Judge.

Action by G. B. Kellogg against Thomas T. Snell. Judgment for plaintiff, and defendant appeals. Affirmed.

Person & Rodgers, of Los Angeles, for appellant.

Clyde C. Shoemaker, of Los Angeles, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment for damages for failure to repurchase 50 shares of bank stock pursuant to contract. The appeal was perfected under the provisions of section 953a, Code of Civil Procedure, on the ground that the findings are not supported by the evidence. No evidence or proceedings are printed in appellant's brief.

Upon trial the court found the following facts: That the appellant was president of the board of directors of the Hollywood State Bank, at Los Angeles, and that he owned 50 shares of the capital stock of said bank of the book value of $112.50 per share. August 21, 1924, appellant sold his entire block of stock to respondent for $200 per share, with an agreement in consideration thereof that respondent was to be immediately employed by said bank as cashier and manager at a salary of $250 per month. The written agreement of the parties, which accompanied this sale of stock, included the following provisions:

> "* * * It is * * * agreed by the parties hereto that the second party [respondent] is to accept a position with said bank *under conditions otherwise agreed upon* and that this contract of purchase is made with the express understanding that, in the event either party is dissatisfied, or for any reason is desirous of severing the connection of the second party with the bank, he may, prior to March 1, 1925, by written notice, demand the repurchase and delivery of said 50 shares of stock at the price now being paid, namely, $10,000, and both parties hereby agree that, upon such demand by either party, payment for the stock and delivery will be made forthwith, provided however that if the demand is made by the second party, the first party may have sixty days in which to complete the purchase, during which time the second party will remain with the bank."

Pursuant to the provisions of said contract to the effect that respondent would accept a position in said bank "under conditions otherwise agreed upon," it was orally stipulated that respondent was to be immediately employed by said bank as cashier and manager at a salary of $250 per month. Immediately upon consummation of this sale, appellant resigned as director and president of said corporation bank, and severed his connections therewith. After the stock had been purchased and paid for by respondent, the bank declined to employ him as cashier or manager, but passed a resolution hiring him as a teller only at a salary of but $150 per month. Respondent protested against this action, but appellant persuaded him to accept the position as teller temporarily, promising to promptly secure his appointment as cashier and manager, and to have his salary increased to $250 per month, or himself pay the difference between this sum and the salary actually allowed. With this promise the respondent performed the duties of teller for the period of about a month, frequently interviewing the appellant and demanding that he fulfill his contract.

Becoming hopeless of securing the salary or position promised, the respondent told appellant that he intended to resign, and thereupon demanded the repurchase of the 50 shares of bank stock pursuant to contract. The appellant then agreed to immediately arrange to repurchase the stock and expressly waived the covenant on the part of respondent to remain with the bank for the period of 60 days. The respondent resigned his position as teller on October 15, 1924, and five days later served appellant with written notice to fulfill his contract and repurchase the stock, which he failed and refused to do. After due notice respondent sold said bank stock at public auction pursuant to sections 3049 and 3311, Civil Code, on December 31, 1924, for the net sum of $5,750, leaving a balance of $4,250 loss incurred by respondent on the purchase price of said stock. The court found that respondent had sustained damages in said sum of $4,250 on account of appellant's breach of contract, together with the further sum of $1,250 damages proximately caused by his failure to procure respondent's employment in the bank as cashier and manager at a salary of $250 per month, and rendered judgment accordingly.

The appellant contends that (1) the evidence fails to support the judgment; that (2) the written contract is presumed to have included all the conditions of the transaction, and that the verbal agreement to secure respondent's employment in the bank as cashier and manager at a salary of $250 per month was without consideration and void; and that (3) there is no evidence to support the judgment for the sum of $1,250 damages in addition to the loss sustained by respondent upon the public resale of the bank stock.

[1] While there is a conflict of evidence, particularly with respect to the alleged oral agreement to procure the employment of respondent in the bank as cashier and manager at a salary of $250 per month, there appears

to be ample testimony to support the judgment in every particular. Appellant's contention that the findings and judgment are not supported by the evidence is without merit. No rule on appeal is better established than that a judgment will not be reversed for a mere conflict of evidence. 2 Cal. Jur. 921, § 543.

[2] Evidence of the oral agreement contemporaneous with the written contract respecting the employment of respondent as a cashier and manager of the bank at a salary of $250 per month was competent. The written contract itself specifically contemplates an agreement for this employment upon terms not included within this written document, for it is therein specified that respondent would "accept a position with said bank under conditions otherwise agreed upon." Parol evidence of terms or conditions is competent, which does not vary or conflict with the specific provisions of a written instrument, particularly when it is evident from the language of the written document that a distinct contemporaneous agreement is relied upon by the parties. Jones on Evidence (3d Ed.) 668, §§ 439, 440; Greathouse v. Daleno, 57 Cal. App. 187, 206 P. 1019; Wolters v. King, 119 Cal. 172, 51 P. 35; Whittier v. Home Savings Bank, 161 Cal. 311, 317, 119 P. 92.

[3] The appellant expressly waived his right to require the respondent to remain in the employment of the bank for 60 days as provided by the written contract. The conditions of a written contract may be orally waived by the party in whose behalf they were adopted. 6 Cal. Jur. 402, § 239; Cal. Raisin Growers v. Abbott, 160 Cal. 601, 117 P. 767; Hulen v. Stuart, 191 Cal. 562, 569, 217 P. 750; Walker v. Harbor Business Blocks Co., 181 Cal. 773, 780, 186 P. 356. Having advised or consented to respondent's resignation as teller of the bank, the appellant may not take advantage of respondent's failure to comply with the written contract to remain with the bank for a period of 60 days. The appellant is estopped by his conduct. Bidegaray v. Ormaca, 48 Cal. App. 665, 192 P. 176; Hulen v. Stuart, 191 Cal. 562, 217 P. 750. Nor may the appellant urge a lack of consideration for his waiver of the written requirement to remain with the bank for the period of 60 days, under such circumstances. Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 73 P. 740.

[4] The record on appeal in the present case is unique in this regard, that while appellant relies almost exclusively upon a conflict of evidence to secure a reversal, he has scarcely quoted a sentence of the testimony in his brief, nor has he cited a single authority. The burden of his brief is confined to an argument to show that the weight of evidence was favorable to his defense. It is chiefly claimed that the evidence does not support a finding to the effect that appellant verbally promised to procure employment in the bank for respondent as cashier and manager at $250 per month, and that the evidence fails to support the item for damages amounting to $1,250 for failure to comply with said agreement. The appeal was perfected pursuant to section 953a, Code of Civil Procedure. The transcript consists of over 200 typewritten pages, yet no portion of the evidence or proceedings are printed in appellant's brief. The appellate court has been left to wrestle with the record to determine whether there is substantial evidence to support the judgment. In Eddy v. Stowe, 43 Cal. App. 789, 792, 185 P. 1024, 1025, it is said:

> "It is not a compliance with the procedure governing appeals, under the so-called alternative method, for an appellant to print in his opening brief, or in the supplement thereto, only the testimony in the case favorable to his contentions. All the evidence, material to the point made on appeal, should be presented in order that the court may consider its weight and sufficiency, and any conflict presented therein. Unless the record is thus prepared, the court cannot intelligently pass upon the appeal on its merits without imposing on counsel a further presentation of the record, or assuming the vexatious burden of an examination of the typewritten transcript." 2 Cal. Jur. 645; Scott v. Hollywood Park Co., 176 Cal. 680, 169 P. 379; McLaren v. Hards, 39 Cal. App. 104, 178 P. 332; Jones v. Express Publishing Co. (Cal. App.) 262 P. 78.

Where the brief of appellant utterly fails to print any evidence in support of the points relied upon for a reversal, and the respondent's brief sets out substantial evidence to support the judgment and findings, the judgment will be affirmed without resorting to the arduous task of examining the typewritten record to ascertain whether appellant's contentions are founded upon merit.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

93 Cal. App. 770

GRACCHI et al. v. FRIEDLANDER, State Commissioner of Corporations. (Civ. 6454.)

District Court of Appeal, First District, Division 2, California. Sept. 7, 1928.

1. Contracts 🔑164—All documents, signed and executed at same time and relating to same matter, are to be taken together (Civ. Code, § 1642).

Under Civ. Code, § 1642, all documents comprising contracts relating to orders for rabbits, note, and agency assignments, signed and executed at same time, and relating to same matter, are to be taken together.

2. Sales 🔑3—Contract consisting of orders for rabbits, and for sharing profits, without providing for separation or identification of rabbits, held not "sale."

Contract consisting of orders for certain number of rabbits and hutches, authorizing vendors to sell any rabbit and to replace it, and for division of profits between parties, without providing for the separation or identification of any specific rabbit or hutch, *held* not to constitute a "sale," until holder elected to give required 90-day notice, entitling him to receive three rabbits and their increase, and as many hutches as he shall have paid for.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sale.]

3. Licenses 🔑18½—Contracts entitling holder to share in profits on basis of number of rabbits and hutches purchased held subject to Corporate Securities Act (Corporate Securities Act, § 2, subd. 7, par. d).

Contracts consisting of orders for certain number of rabbits and hutches, authorizing vendors to sell any rabbit and to replace it, and for division of profits between parties, without providing for the separation or identification of any specific rabbit or hutch, *held* subject to Corporate Securities Act (St. 1917, p. 673, as amended by St. 1925, p. 962) § 2, subd. 7, par. (d).

Certiorari proceeding by M. J. Gracchi and another, copartners, against J. M. Friedländer, as Commissioner of Corporations of the State of California, to review an order of the Commissioner. Writ denied.

Athearn, Chandler & Farmer, Frank R. Devlin, Karl Brooks, and Philip H. Angell, all of San Francisco, for petitioners.

U. S. Webb, Atty. Gen., Robert W. Harrison, Chief Deputy Atty. Gen., and Donald A. Pearce, Deputy Com'r of Corporations, of San Francisco, for respondent.

STURTEVANT, J. This is an application for a writ of review against the respondent, as commissioner of corporations of the state of California. The petitioners are copartners, and are doing business under two fictitious names: (1) The California Fur Rabbit Association; and (2) the California Fur Rabbit Farms. They are engaged in selling certain contracts. Each contract consists of two pieces of paper. One paper consists of three documents. The first one is an order for merchandise; the second is a promissory note; the third is a receipt for the first payment. The first and second documents are printed to receive the signature of the intending purchaser; the third document has printed thereon "The California Fur Rabbit Association," together with a blank line to be signed by the "sales representative." The second paper is an agency assignment, and is printed to receive the signature of the intending purchaser. The goods ordered in the first document are described as "three (3) pedigreed (Blue Ribbon strain) white giant does; two (2) compartment breeding hutches." The same description is repeated in the agency appointment. The order recites: "The title thereto shall remain with you." The receipt contains a covenant authorizing the vendors to sell any rabbit and to replace it. The agency appointment provides that the vendors shall have the control and possession, and shall care for, supervise, inspect, and market, said rabbits. It uses the expressions "deliver" and "redeliver," but no delivery or change of delivery is provided for, except in one paragraph:

> "I reserve the right to cancel this agency at any time upon ninety (90) days' written notice to said Farms, and in the event of such cancellation I shall be entitled to redelivery, at the expiration of said ninety (90) days, of all my then existing rabbits and their increase and to hutches belonging to me, upon my payment to said Farms of any sums owing by me to them."

The same document provides: "Said rabbits shall be labeled and tattooed." However, no one of the documents contains a blank describing any rabbit by label or tattoo, or otherwise than we have noted above. The petition recites that the petitioners have 10 acres and are engaged in breeding and raising rabbits.

[1] The manner of transacting business was that all of said documents were signed and executed at the same time. As all relate to the same matter, they are to be taken together. Civ. Code, § 1642; Flinn & Treacy v. Mowry, 131 Cal. 481, 63 P. 724, 1006; Cobb v. Doggett, 142 Cal. 142, 75 P. 785; McAuliff v. McFadden, 42 Cal. App. 505, 183 P. 870.

[2] The facts stated in the petition and in the exhibits attached thereto show that, when a contract was sold, there was no indentification of any certain rabbit or of any certain hutch. Under these circumstances, the transaction did not constitute a sale. The documents, taken all together, are not ambiguous as to when the title should pass. They show on their face that the title did not pass. Considered as a present sale, many documents

containing language more favorable to the vendors have been held wanting as constituting a present sale. In the case of McLaughlin v. Piatti, 27 Cal. 451, it was held that the document did not show a present sale of cattle, but that the transaction was executory. At page 463 the court said:

> "It is a fundamental principle, pervading everywhere the doctrine of the sales of chattels, that if goods be sold (while mingled with others) by number, weight, or measure, the sale is incomplete, and the title continues with the seller until the bargained property is separated and identified. The reason is that the sale cannot apply to any article until it is clearly designated and its identity ascertained. In the case under consideration, it could not be said with certainty that any particular 500 head of cattle belonged to Baker, or the plaintiff as his assignee, until a severance of that number from the herd from which they were to be taken. If a part of that herd had died, 500 head surviving, the loss would neither in whole nor in part have fallen upon Baker."

That rule has since been followed. Caruthers v. McGarvey, 41 Cal. 15; Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 P. 248, 9 Am. St. Rep. 199; Walti v. Gaba, 160 Cal. 324, 116 P. 963; Wanee v. Thomas, 75 Cal. App. 231, 242 P. 509. The rule is not altered by the fact that a contract holder may elect to give a 90-day notice, and then he will be, under the terms of the contract, entitled to receive three rabbits and their increase and as many hutches as he shall have paid for. Having duly exercised that right what was theretofore an agreement to buy and sell might then become a sale, but not until then. In the meantime the ownership in and to all properties remained vested in the petitioners.

[3] Counsel speak of three does and two hutches as constituting a unit. Looking at the papers before us, it is apparent that the business of the petitioners consisted of operating a plant harboring all of the units covered by each of the outstanding contracts and the units, or fractions of units, on hand and in excess of the calls of such outstanding contracts. There was no division or segregation of the property in any manner whatever. A most cursory reading of the contract shows that the petitioners are engaged in business for profit, and that each contract is bought and sold in expectation of gain to each party. The sales moneys received by the petitioners constitute the gross earnings of the petitioners from the business. The contract makes no provision for the division of those proceeds into two or more funds. Therefore, out of said gross earnings, $4 per head for breeding does at first breeding age, and 5 cents per pound live weight for all other rabbits, is the measure, and only the measure, of payments by the petitioners to the contract holders. The residue of the earnings is payable to and may be retained by the petitioners.

Of the earnings going to the contract holders, it is clear that a portion arises from the increase of the rabbits, a portion from the use of the hutches, and a portion from the use of every other part of the plant, real or personal. The respondent contends that the contract sold by the petitioners falls within the provisions of the Corporate Securities Act (St. 1917, p. 673, as amended by St. 1925, p. 962), and he cites and relies on section 2, subdivision 7, paragraph (d), which, so far as pertinent, provides as follows:

> "Any instrument offered for sale, * * * to the public by any company, evidencing or representing any right to participate or share in the profits, earnings or income, gross or net, derived from the assets, or any thereof, of any business carried on for profit or in the distribution of such assets. * * *"

We think he is clearly correct in this contention. The facts in the instant case are quite different from the facts in such cases as People v. Pace, 73 Cal. App. 548, 238 P. 1089; Creasy Corporation v. Enz Bros. Co., 177 Wis. 49, 187 N. W. 666; Lewis v. Creasey Corporation, 198 Ky. 409, 248 S. W. 1046. The case of People v. McCalla, 63 Cal. App. 783, 220 P. 436, is more nearly in point.

The writ is denied.

We concur: WARNE, Acting Presiding Justice pro tem.; NOURSE, J.

93 Cal. App. 711

PEOPLE v. MADSEN et al. (Cr. 1446.)

District Court of Appeal, First District, Division 2, California. Aug. 29, 1928.

1. Homicide 🔑234(10)—Defendants' confessions supplied gap in evidence of identification in murder prosecution, where corpus delicti was shown by competent testimony.

Where corpus delicti was shown by competent testimony in prosecution for murder, confessions of defendants supplied gap in evidence as to their identification.

2. Criminal law 🔑566—Defendant need not be identified positively by any number of witnesses.

Identification of defendant need not be made positively by any number of witnesses.

3. Criminal law 🔑741(2)—Issue of defendants' identification is for jury to determine on all evidence in case.

In prosecution for murder, issue of identification of defendants is for jury to determine on all evidence in case.

4. Criminal law 🔑739(2)—Issue of alibi held for jury, under evidence indicating defendant must have been elsewhere at time of assault, but not showing defendant was at any other place.

Where testimony was offered showing defendant could not have been telling the truth when confessing to alleged murder, but must have been elsewhere at time of assault, but no attempt was made to show that defendant was at any other place, issue of alibi was for jury.

5. Criminal law 🔑532(2)—Under conflicting evidence whether confessions were obtained by force, question whether confessions were freely and voluntarily given was for trial court.

Where evidence that confessions were obtained by force and violence by police officers was categorically denied by officers, question whether confessions were freely and voluntarily given was one for trial court to determine.

6. Criminal law 🔑532(2), 1153(6)—Trial court has wide discretion in determining whether confession was freely given, and ruling will not be disturbed in absence of abuse.

Trial court, in passing on question whether confession was freely or voluntarily given, is vested with wide discretion, and this rule will not be disturbed on appeal unless abuse is shown.

7. Criminal law 🔑531(3)—Confession held not necessarily shown untrue and involuntary because defendant's account of participation in crime before grand jury varied from story of eyewitnesses.

Where defendant, in making confession, gave detailed account of participation in crime before grand jury, which differed from story of eyewitnesses and alibi witnesses, confession was not thereby shown to be untrue and involuntary.

8. Homicide 🔑286(1)—Requested instruction on abandonment of criminal design by one defendant held properly refused, under evidence merely showing flight from scene of crime.

In prosecution for murder, requested instruction relative to abandonment of criminal design by one party was properly refused, where there was no evidence of abandonment by either defendant, and only testimony thereof was confession by one defendant that, after receiving blow, he retreated, since evidence of flight from scene of crime does not require instruction on abandonment of criminal design.

9. Criminal law 🔑814(16)—Requested instruction to consider deception or fraud in procuring confession in determining whether it was voluntary held properly refused, in absence of evidence of fraud.

Requested instruction in prosecution for murder that, if jury found from evidence, or had reasonable doubt of matter, that deception or fraud was used in procuring confessions, they were to take such facts into consideration in determining whether such confessions were freely given, was properly refused, in absence of evidence to prove either deception or fraud.

10. Criminal law 🔑523—Deception or fraud does not exclude confession, unless used to procure untrue statement, and requested instruction to consider fraud in procuring confession on question whether it was voluntary was properly refused.

Requested instruction in prosecution for murder that jury could consider that deception or fraud was used in procuring confessions, in determining whether confessions were freely given, if they so found from evidence or had reasonable doubt thereon, was properly refused, since neither deception nor fraud excludes confession, unless they have been employed to procure untrue statement.

11. Criminal law 🔑775(3)—Instruction on alibi defense held not error because using term "alibi."

Instruction covering defense of alibi and defining word "alibi" *held* not error because using term "alibi."

12. Criminal law 🔑782(15)—Instruction on alibi defense, requiring consideration of all other evidence, held not error because not limiting jury to evidence concerning alibi.

Instruction on alibi defense, requiring jury to consider evidence on alibi, together with all other evidence, was not error because not limiting jury's consideration to evidence of alibi, since jury is required to consider all evidence.

13. Criminal law 🔑549—Issues in criminal case are to be determined, not on testimony offered on issues only, but on all evidence relevant thereto.

Issues generally in criminal prosecution are to be determined, not on testimony offered on particular issues alone, but on all evidence and inferences relevant and pertinent to such issues.

Appeal from Superior Court, City and County of San Francisco, James G. Conlon, Judge.

Gus C. Madsen and another were convicted of manslaughter, and they appeal. Affirmed.

Nathan C. Coghlan and A. L. O'Grady, both of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Waldemar Augustine, Deputy Atty. Gen., for the People.

NOURSE, J. The defendants were tried together on an indictment charging them, jointly with others, of the crime of murder. These two defendants were found guilty of manslaughter, and have both appealed from the judgment following the verdict and from the order denying their motions for a new trial. The appeal is presented on a typewritten record.

The assault which resulted in the death of one Campbell occurred on October 21, 1926, at a place in Eureka street, between Twenty-Second and Twenty-Third streets in the city and county of San Francisco. The deceased and his associate, Coyle, who were "American plan" carpenters, were attacked while at work some time between 1:30 and 2 o'clock p. m. by a gang of men claimed to have been in the service of the carpenters' unions which were then on strike. The two appellants were admittedly union carpenters. The stories of the eyewitnesses differed as to the number of men engaged in the mêlée and the manner in which the assault was actually committed, but it seems to be agreed that these men drove to the place in two automobiles, and, in groups of two, attacked their victims with heavy clubs, or similar weapons, and then ran to their automobiles and were driven out of sight. The appellants were arrested a few days later, and both made complete confessions of their participation in the crime when interrogated by police officers and also when appearing before the grand jury.

[1-3] On this appeal they argue that the state failed to identify them as participants in the crime. The testimony of the eyewitnesses was not convincing, due, no doubt to the suddenness with which the assault was committed and the number of men involved, and due also to the reluctance of these witnesses to testify. The "corpus delicti" having been shown by competent testimony, the confessions of the appellants supplied the gap in the evidence as to their identification. It is not necessary that the identification of a defendant be made positively by any number of witnesses. This issue is one for the jury to determine upon all the evidence in the case. 8 Cor. Jur. p. 169. The record discloses that the jury made no mistake here.

[4] The second point argued seems to be that there was some testimony tending to prove the alibi of appellant Madsen. Testimony was offered to show that Madsen called upon a physician at about 2:30 p. m. of the day of the assault and was treated for a scalp wound, which the physician testified was more than an hour old; that two witnesses testified that Madsen was injured earlier in the day in a scuffle at union headquarters, and that when, after his arrest, Madsen confessed that he was injured in the assault on Eureka street and went to the physician for treatment thereafter, he could not have been telling the truth, but must have been some place else at the time of the assault. No attempt was made to show that either of the appellants were at any other place at the time of the assault, but, from the testimony recited, it is argued that the jury should have sustained the alibi defense. It is sufficient to say that this was a question of fact which the jury had to determine.

[5, 6] Appellants insist that their confessions should not have been received in evidence because they were obtained through force and violence on the part of the police officers. It would serve no purpose to cite the evidence on this issue. It is widely conflicting—all charges of the appellants being categorically denied by the police officers. In such a case the question whether the confessions were freely and voluntarily given was one for the trial court to determine. In passing upon this question, the trial court is vested with a wide discretion, and its ruling will not be disturbed unless an abuse is shown. People v. Perry, 195 Cal. 623, 636, 234 P. 890. This was the fourth trial these appellants had had on this indictment, and the ruling of the trial judge admitting the confessions was made only after a thorough and painstaking inquiry had been made of the circumstances under which the confessions were given. There was no error in the ruling.

[7] After these confessions were given to the police officers, the appellants voluntarily appeared before the grand jury and gave detailed accounts of their participation in the crime. In some respects these accounts differed from the story given by some of the eyewitnesses, and they were also at variance with appellants' alibi witnesses, in that Madsen stated that he received at that time the wound on the head for which he was treated by the physician later in the day. From this appellants argue that the confessions were untrue and hence must be held involuntary. No authority is cited for the proposition. This court has held to the contrary. People v. Costello (Cal. App.) 262 P. 75.

[8] Criticism is made of the refusal of the trial judge to give an instruction proposed by appellants relative to the abandonment of the criminal design by one of two parties

setting out on a joint design to commit a criminal act. The instruction had no part in the case. There was no evidence of abandonment by either appellant. The only testimony approaching the subject was the confession of Madsen, in which he stated that, after he had received the blow on the head, he retreated to the automobile. Flight from the scene of a crime and abandonment of the criminal design before a crime is committed are not the same, and evidence of the former does not call for an instruction covering the latter.

[9, 10] Appellants proposed an instruction advising the jury that, if they found from the evidence, "or if they have a reasonable doubt upon the matter," that deception or fraud was used in procuring the confessions, they were to take those facts into consideration in ascertaining whether the confessions were freely and voluntarily given. There was no evidence tending to prove either deception or fraud. But in any event the proposed instruction did not state the law, because neither deception nor fraud excludes a confession unless they have been employed to procure an untrue statement. People v. Castello, 194 Cal. 595, 602, 229 P. 855; People v. Connelly, 195 Cal. 584, 597, 234 P. 374. Here the trial judge fully instructed the jury on the question of the admissibility of the confessions, and appellants were not injured by the refusal to give the one proposed.

[11-13] The appellants tendered an instruction covering their alibi defense without using that term. The trial judge substituted his own instruction defining "alibi," and advising that:

> "It is sufficient to justify an acquittal if the evidence on that point (alibi), considered with all the other evidence, raises a reasonable doubt," etc.

Appellants complain that the court should not have used the odious term "alibi," and that it should have limited the jury's consideration to the evidence on that point alone. The word "alibi" is in common use, and we can see no harm in talking to the jurymen in language they can understand. As to the latter point, the jury must, of course, take into consideration all the evidence and not that offered in support of the alibi defense alone. This is true of issues generally. They are to be determined, not upon the testimony offered upon them alone, but upon all the evidence, and the inferences, relevant and pertinent to such issues.

Appellants' briefs contain many proposed instructions refused by the trial judge and which they now state should have been given. No authorities are cited in support of their contentions, and no effort is made to disclose what instructions were actually given by the trial judge in lieu of those refused. We have, however, examined the record with care, and are satisfied that the issues were all submitted to the jury through instructions which were clear, impartial, and comprehensive, and which were free from error.

The judgment and order are affirmed.

We concur: BUCK, Presiding Justice pro tem; STURTEVANT, J.

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93 Cal. App. 685

MASTER BUILDERS' CO. v. CLINTON CONST. CO. OF CALIFORNIA.★

(Civ. 6263.)

District Court of Appeal, First District, Division 1, California. Aug. 29, 1928.

Rehearing Denied Sept. 27, 1928. Hearing Denied by Supreme Court Oct. 25, 1928.

1. Sales ⚷52(5)—Facts held to show meeting of minds of parties when buyer accepted price in telegram from seller to its agent.

Facts *held* to show meeting of minds between parties to oral contract for sale of Colormix when buyer accepted price contained in telegram from seller to its agent.

2. Frauds, statute of ⚷89(3)—Buyer's acceptance of part of Colormix ordered held sufficient to take oral sales agreement out of statute of frauds (Civ. Code, § 1739).

Where buyer orally agreed to buy 18,000 pounds of red Colormix and 3,500 pounds of gray Colormix, buyer's acceptance and use of gray Colormix was sufficient, under Civ. Code, § 1739, to take oral agreement out of statute of frauds.

3. Sales ⚷181(11)—In action for breach of sales contract, facts held not to show that seller did not perform, nor offer to perform.

In action by seller for breach of contract to purchase Colormix, facts *held* not to show that seller did not perform, nor offer to perform, alleged contract.

4. Corporations ⚷410—Vice president and manager of corporation could bind corporation on oral contract to purchase.

Vice president and manager of corporation had authority to bind corporation by oral contract to purchase Colormix.

5. Sales ⚷377—In action for breach of contract to purchase Colormix, allegation on which damages were based held sufficient.

In action for breach of contract to purchase Colormix, allegation that defendant had failed and refused to take balance of Colormix, and that plaintiff had incurred liability for commissions on sale of same, and had lost profits arising from sale, and had thereby been damaged in sum of $3,060, on which damages were based, *held* sufficient.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action for damages for breach of contract brought by the Master Builders' Company against the Clinton Construction Company of

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★Rehearing denied. Hearing denied by Supreme Court.

California. From a judgment for plaintiff, defendant appeals. Affirmed.

Superseding on rehearing 268 P. 443.

Ernest K. Little, of San Francisco, for appellant.

Willard P. Smith, of San Francisco (Walton C. Webb, of San Francisco, of counsel), for respondent.

CAMPBELL, Justice pro tem. This is an appeal from the judgment awarding plaintiff $3,060 upon a contract found by the court to have been entered into between plaintiff, an Ohio corporation, and defendant, a California corporation, whereby plaintiff agreed to manufacture for and deliver to defendant 21,500 pounds of Colormix at 22 cents per pound, to be delivered f. o. b. Cleveland, Ohio, between January 21 and May 1, 1925, upon which contract plaintiff manufactured and delivered between January 21 and April 13, 1925, 3,550 pounds of the Colormix and was at all times ready and willing to deliver the balance, but that defendant refused to accept the same, and finding that, by reason of defendant refusing to accept the balance of the Colormix called for in the contract, plaintiff was damaged in the sum of $3,060, for which judgment was entered, and from such judgment defendant has instituted this appeal.

Appellant urges under general headings the following points on which he relies for a reversal of the judgment: (1) There was no meeting of the minds of the parties; (2) an oral order would have been within the statute of frauds; (3) plaintiff did not perform nor offer to perform the alleged contract on its part; (4) the vice president of defendant corporation had no authority to bind the corporation by an oral order; (5) the complaint does not set forth facts sufficient to constitute a cause of action.

Under the first general heading appellant asserts:

> "(a) Plaintiff communicated its acceptance of a written proposition, bearing the false signature of defendant and its vice president, but which was never submitted to defendant; (b) there was no acceptance by either party; (c) there was no acceptance communicated until February 3, 1925, while Mr. Rodgers admits that he knew, as early as January 30, 1925, that Mr. Huber desired to withhold the alleged order for redtile Colormix; and (d) the letter of January 21, 1925, from Mr. Rodgers was not a proposition from plaintiff, it was merely a suggestion from Mr. Rodgers as to the proposition which defendant should make to plaintiff."

These four contentions may be considered together.

[1] The record contains the following evidence relative to the transaction between the parties. In January, 1925, Joseph E. Rodgers, local agent of plaintiff, called upon A. Huber, vice president of defendant corporation, at defendant's place of business, and discussed the placing by defendant of the order for Colormix. Mr. Rodgers testified, "We figured up the quantity of material that would be required from the plans and specifications of the San Francisco Relief Home," and Mr. Huber then placed the order at 27 cents per pound. Mr. Huber stated that, "for the quantity involved, the price was, in his judgment, a little bit high," and, in an effort to secure a price that might be a little more favorable to defendant, he (Rodgers) wired to Cleveland and received a reply to his telegram by wire, which he showed Huber:

> "Best price on eighteen thousand pounds Red Colormix twenty two cents per pound f. o. b. Cleveland."

Mr. Rodgers further testified as follows:

> "Mr. Huber then told me to go ahead and write up the order on the basis of 18,000 pounds of one color and 3,500 pounds of another color, which I did. He requested if I could not make that price which was mentioned in the telegram the guaranty delivery price at San Francisco, and I said that that would be impossible, because it would—as the material was then requested for delivery later in the year, I didn't know definitely whether a carload of material would be coming forward at that time, in which this could be included, or whether it would have to come by itself, and, of course, it would take different rates of freight both ways. I then phoned in Mr. Huber's—I phoned the railroad—and told him the difference in the rates between the two materials and why it was impossible for me to give a guaranty delivery price at San Francisco. I told Mr. Huber then, if a full car was coming forward at the time when he would require his material, that the company would give him the benefit of the carload rate rather than L. C. L. (less carload lots) rate, but that I wanted it understood that, if we did not have a car coming forward, that he would have to pay the 22-cent price f. o. b. Cleveland plus whatever freight was involved."

Mr. Rodgers wrote and mailed a letter, which bears date January 21, 1925, to defendant, containing the following:

> "Confirming our verbal agreement of to-day, we are entering your order for 18,000 lbs. Master Builders' tile red Colormix and 3,500 lbs. battleship gray Colormix, at the agreed price of 22c per pound, f. o. b. Cleveland, Ohio—same price both colors."

Mr. Rodgers received no reply to this letter. Prior to February 5, 1925, Rodgers received a phone message from Mr. Huber requesting that the red part of the order be held up, and Rodgers informed him that it would be impossible to hold up any part of the order originally given because the matter was entirely in the hands of the Master Builders' Company, and they would be the ones to come to any decision regarding the matter. On January 23, 1925, Rodgers filled out an order blank and forwarded it to plaintiff calling for 18,000 pounds of red Colormix and 3,500 pounds of battleship gray, and at the bottom wrote in the name under the signature of purchaser, "Clinton Const. Co., A. Huber." On February 5, 1925, defendant wrote J. E. Rodgers & Co.:

> "Kindly enter our order for approximately 3,500 lbs. battleship gray Colormix. Price: 22 cents per pound, f. o. b. Cleveland, Ohio. Deliveries: 700 lbs. immediately. Balance April 1, 1925. Confirming our telephonic conversation of recent date, we wish to inform you that we have not made a decision on the type of red color hardner we intend to use. We will mail you a written order should we decide to use Master Builders' red tile Colormix."

Plaintiff wired to defendant February 5, 1925, as follows:

> "Our representative Rodgers advises substitution for Colormix order being attempted Stop Be advised that order accepted manufactured for you and partly shipped Stop Can accept no change or cancellation See order signed by your Mr. Huber."

Sylvester W. Flesheim, president of plaintiff corporation, testified that J. E. Rodgers & Co. of San Francisco acts as their sales agent in California; that J. E. Rodgers & Co. is authorized to solicit orders subject to their approval; that every order J. E. Rodgers & Co. receives must be sent to plaintiff at Cleveland for acceptance; that, when plaintiff received the telegram from Rodgers containing the order for 18,000 pounds of red Colormix and 3,500 pounds of gray Colormix, the order was immediately accepted and defendant notified accordingly; that tile red Colormix is not a product that has a ready market, and little is carried in stock; that 18,000 pounds is a very large order; and that, when the order was accepted, instructions were immediately given to the factory to manufacture the material.

There was clearly a meeting of minds when defendant accepted the price of 22 cents contained in the telegram from plaintiff and confirmed in Rodgers' telegram to plaintiff. The fact that plaintiff, in its telegram to defendant of February 5, 1924, stating that it would accept no cancellation or modification of the order, referred to the order signed by Huber, does not alter the situation, as the written order to which Rodgers attached Huber's name was merely an order reciting the terms of the verbal contract before entered into. If this were a case where it was agreed that the terms of the verbal contract were subsequently to be reduced to writing, there would be merit in defendant's contention (Las Palmas, etc., Distillery v. Garrett & Co., 167 Cal. 399, 139 P. 1077), but such is not the case here.

The conclusion reached in the present case is not, as claimed by appellant, in conflict with the rule announced in Harvey v. Duffey, 99 Cal. 401, 33 P. 897. In the Harvey Case, the defendants had in their possession a catalogue of the Griffing Iron Company in which was listed the goods in question (radiators), and upon the fly leaf thereof was the following statement:

> "To enable us to fill our orders promptly, we carry at all times an enormous stock, comprising at all times every style as shown in our list."

On April 3, 1890, the defendants, acting upon the statement in the catalogue, sent to the Griffing Iron Company a telegram asking for the lowest price on radiators. The company did not reply to this telegram, but wired plaintiff to call upon defendants and quote the price. On receipt of the wire, Harvey called upon defendants and obtained the following order:

> "A. A. Griffing Iron Co.: Please ship to us at San Francisco the following Bundy hot water standard radiators, 39 in. high: 145, 1x4; 16, 1x10; 1, 1x20. [Signed] Duffey Bros. A."

This order was delivered to Harvey and by him mailed to the A. A. Griffing Iron Company. Defendant Duffey testified that nothing was said to him about the necessity of manufacturing the radiators; that he did not know that they would have to be manufactured; they were catalogued, and he had the catalogue and acted accordingly; and that, when he revoked the order, he did not know that the company was manufacturing the goods for him. On April 18, 1890, the defendants, having received no reply whatever to the order sent through Harvey and being in entire ignorance as to whether it had been received, or if received whether it would be accepted, sent a telegram to the company countermanding the order. This telegram was received before the manufacture of the goods was completed, but notwithstanding that the company proceeded to complete the manufacture of them. The court held:

> "That the minds of the parties never met on a contract to manufacture, for 'it is essential to the validity of a contract that the parties should have consented to the same subject-matter in the same sense.' Breckinridge v. Crocker, 78 Cal. 529 [21 P. 179]. * * * But assuming that he [Harvey] was authorized to sell, he certainly, so far as the record shows, never exercised any such authority, but simply contented himself with receiving the order and transmitting it to the company, by whom it was never accepted, nor was anything said or done by it from which an acceptance could be inferred. In fact, neither the defendants, nor any one for them, ever received any reply or notice whatever of the receipt or acceptance of the order either from the company or Harvey, or anyone else, until after they had revoked it. As the order was merely an offer or proposal to buy, it was revocable by the defendants at any time before acceptance."

The facts in the case quoted from and in the present case are not analogous. Here Rodgers called upon Huber, the vice president and manager of defendant corporation, who placed the order with him for the Colormix at 27 cents per pound, but, as Huber thought a better price could be made for such a quantity of the material, Rodgers telegraphed plaintiff in an effort to secure for defendant a better price, and received a wire in reply, making the price 22 cents. Rodgers then, at the direction of defendant, wrote up the order. Flesheim, the president of plaintiff corporation, testified that, when he received the telegram from the agent Rodgers containing the order for 18,000 pounds of red Colormix and 3,500 pounds of battleship gray Colormix, he took the matter up with Mr. Bertsch and Mr. Krause of the Master Builders' immediately, and the order was then accepted and Mr. Krause instructed to write the Clinton Construction Company accordingly. On January 21, 1925, Rodgers wrote defendant confirming the verbal agreement of that date and notifying defendant that he was entering the order for 18,000 pounds of red Colormix and 3,500 pounds of battleship gray Colormix at the agreed price of 22 cents per pound, f. o. b. Cleveland, Ohio, and telegraphed the order to the plaintiff company on January 24th. While it is true that Rodgers in his letter advised defendant that it incorporate in its confirming order the request "if it is possible at the time of actual shipping date—approximately June 1st—this material will come forward in carload lots so that we can enjoy carload rate rather than L. C. L. rate," and concluded the letter by thanking defendant for "this very splendid business," this did not alter or affect the contract but merely the freight rate which defendant was obliged to pay.

It will be noted that in Harvey v. Duffey the defendants advertised in their catalogue that they had the radiators listed therein in stock for immediate delivery and therefore the manufacture thereof would not be necessary, and the court held there was no meeting of minds on a contract to manufacture, which fact was not an element here. It further appears in that case that the defendants never "received any reply or notice whatever of the receipt or acceptance of the order from the company or Harvey or any one else" before it was rescinded, while here the defendant was notified by Rodgers on January 21, 1925, of the fact that the order was entered and a portion of the material ordered was delivered to and accepted by defendant before the red Colormix portion of the order was attempted to be canceled or ordered held in abeyance by Huber's telephone of January 30th to Rodgers and his letter of February 5th.

[2] As to appellant's second point that the oral agreement is within the statute of frauds in that "(a) there is no evidence to sustain the finding of the court that there was a contract to manufacture, and (b) the gray Colormix was not accepted as and for a part performance of the alleged oral order," it may be said Mr. Huber in his testimony admitted that a part of the Colormix was received and used in the building for which it was ordered:

> "Q. Is it not a fact that the gray Colormix was used on this job and part of the red? A. Yes. Q. Where was it used, on the sidewalks? A. No; on the floor. Q. But the gray was used first? A. Yes. Q. Is it not a fact that you got some shipment in January? A. Of the gray. Q. Of the gray? A. We might have; I think we did probably."

This is sufficient under section 1739 of the Civil Code to take the oral agreement out of the statute of frauds. The fact that the gray Colormix "and part of the red" was used on the job is sufficient to sustain the finding that the gray Colormix was accepted as a part performance of the oral contract.

[3] From the foregoing it is apparent that there is no merit in appellant's third contention "that plaintiff did not perform nor offer to perform the alleged contract on its part," nor that defendant, in accepting the offer of plaintiff, added a new stipulation to the acceptance and the acceptance was not therefore "absolute and unqualified" and that the stipulation in regard to freight rate constituted a new proposal. As has already been said, Rodgers' statement to Huber that, if a full car was coming forward at the time when he would require his material, the company would give him the benefit of the carload rate, but that he wanted it understood that if they did not have a car coming forward he would have to pay the 22 cents f. o. b. Cleveland, plus whatever freight was involved, did not alter the contract, but was merely an offer on the part of Rodgers to save defendant money on freight, if he could do so.

[4] It may likewise be said that appellant's fourth and fifth contentions, viz. that the vice president of defendant corporation had no authority to bind the corporation by an oral order, and that the complaint does not state a cause of action, are likewise without merit. It is true that Mr. Huber testified that he never did give any orders unless they were in writing, as it is against the rules of the company. He further stated that, as vice president of the company, he had charge of buying the materials for jobs. It appears that Mr. Huber was vice president and manager of the corporation, and therefore, as such, could bind the corporation. Eells v. Gray Bros., etc., Co., 13 Cal. App. 33, 108 P. 735; Fowler Gas Co. v. First Nat. Bank, 180 Cal. 471, 181 P. 663; Davis v. Pacific Studios Corp. (Cal. App.) 258 P. 440. The court, having determined that Mr. Huber did enter into the oral agreement here, evidently did not place credence in his statement that he never gave verbal orders.

[5] The objection to the complaint is that the allegation on which damages are based is insufficient. The paragraph objected to is:

"That defendant has wholly failed and refused to take the balance of said Colormix, and that plaintiff had incurred liability for commissions on the sale of the same, and has lost the profits arising from said sale, and has thereby been damaged in the premises in the sum of $3,060."

This allegation is sufficient. Ahlers v. Smiley, 163 Cal. 200, 124 P. 827; Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242, 41 P. 1020.

We have examined the authorities cited by appellant, and do not question the principles they announce, but merely their application to the facts in the present case.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

93 Cal. App. 658

GRIMMESEY et al. v. KIRTLAN et al.

(Civ. 6282.)

District Court of Appeal, First District, Division 1, California. Aug. 27, 1928.

1. **Easements ⚷37—Existence of roadway over vendor's remaining parcel, creating easement appurtenant to parcel conveyed, held, under evidence, question for trial court (Civ. Code, § 1104).**

Whether there was a roadway passing from parcel sold across vendor's remaining parcel at time of sale, so as to give purchaser an easement appurtenant, under Civ. Code, § 1104, *held*, under the evidence, question of fact for trial court.

2. **Easements ⚷17(1)—Roadway for benefit of parcel sold must be shown to have existed at time of sale, and be necessary, to create easement appurtenant (Civ. Code, § 1104).**

To create right of way easement appurtenant, passing with conveyance of property, under Civ. Code, § 1104, it must be shown that roadway was in existence and used for benefit of parcel sold, and that easement in vendor's remaining parcel is necessary for reasonable enjoyment of parcel sold, in form which it assumed at time of transfer.

3. **Easements ⚷36(3)—Finding that right of way easement was not acquired by prescription held warranted by evidence.**

Evidence *held* to warrant finding that right of way easement was not acquired by prescription, resulting from five years' open, notorious, and adverse user prior to commencement of action.

4. **Easements ⚷8(1)—To establish prescriptive right of way over another's land, adverse claim must be communicated to owner or be open and notorious.**

User alone is not sufficient to establish a prescriptive right of way over lands of another, but such user must be accompanied by a claim of right, communicated to the owner of the land, or it must be shown that the user was so continuous, and so openly and notoriously adverse to the owner, as to create a presumptive knowledge in the owner that person using land was doing so under claim of right.

Appeal from Superior Court, Los Angeles County; Frank H. Dunne, Judge.

Action by Agnes R. Grimmesey and another, as executors of the estate of L. J. Grimmesey, deceased, against Edward Elmore Kirtlan and others. From an adverse judgment, plaintiffs appeal. Affirmed.

Hardy, Elliott & Aberle and H. W. Elliott, all of Los Angeles, for appellants.

Bordwell, Mathews & Wadsworth and Ray W. Bruce, all of Los Angeles, for respondents.

CAMPBELL, Justice pro tem. This is an action to establish a right of way over certain property described in the complaint, belonging to defendants. The cause is pleaded in three counts. The first sets up a right of way acquired by grant, pursuant to section 1104 of the Civil Code; the second, a right of way by prescription, arising from adverse use for more than five years; and the third is a quiet title count to the easement claimed.

The complaint alleges that the defendants owned a parcel of land, comprising approximately 41 acres, situated in the northwest corner of the intersection of Ruddock avenue, running east and west, and Glendora avenue, running north and south, in the eastern part of Los Angeles county, and that defendants, on April 10, 1918, sold and conveyed to plaintiffs' decedent the westerly portion of the land, comprising approximately 15 acres, and retained the easterly portion, containing 26 acres. The portion conveyed to plaintiffs' decedent is for brevity referred to in the record as parcel No. 1, and the portion retained by defendants is designated as parcel No. 2. Parcel No. 1 is in form a parallelogram, running north and south, having a frontage on the south on Ruddock avenue of 558.05 feet. Parcel No. 2 likewise runs north and south, and has a frontage of 728.23 feet on Ruddock avenue, and is bounded on its entire length on the east by Glendora avenue.

Plaintiffs claim that, at the time their decedent purchased parcel No. 1, there was created in favor of the decedent an easement or right of way, approximately 12 feet in width, commencing at a point on the westerly side of Glendora avenue, about 650 feet north of the intersection of Glendora avenue and Ruddock avenue, running thence in a westerly direction from Glendora avenue across parcel No 2 to the easterly boundary of parcel No. 1, and that the right of way was in use as a roadway and means of access from Glendora avenue, over parcel No. 2, to parcel No. 1, for vehicles, tractors, wagons, farm implements, automobiles, and other modes of travel, and had for a long time prior to April 10, 1918, been so used. Plaintiffs further allege that since April 10, 1918, the decedent, his family, agents, and employees, used the right of way with horses, wagons, tractors, automobiles, and other vehicles, and have enjoyed such private right of way as an easement appurtenant to plaintiffs' decedent's land. Plaintiffs further assert that shortly prior to the commencement of this action (August 21, 1924) the defendants plowed up, obstructed, and rendered the roadway impassable, and denied decedent's right to use the roadway or to enjoy the use of the easement.

It is the claim of plaintiffs that, at the time decedent acquired parcel No. 1 from defendants, there existed, and for a long time prior thereto had existed, a well-defined roadway, which had been used as a means of ingress and egress to and from parcel No. 1, and was thereafter so used by plaintiffs' decedent, for more than five years prior to the commencement of the action, and that by reason thereof an easement over parcel No. 2 has been acquired by prescription. There is no claim made to a right of way arising by deed or instrument purporting to convey a right of way separately, nor is there any claim to a right of way by necessity; plaintiffs' claim being that the easement was attached to parcel No. 1 when purchased from defendants, and also that such right of way has been acquired by prescription.

Since the commencement of the action, and prior to the trial thereof, L. J. Grimmesey, the original plaintiff, died, and by appropriate amendment Agnes R. Grimmesey and A. L. Bagnall, the duly appointed, qualified, and acting executors of the estate of L. J. Grimmesey, deceased, were substituted as plaintiffs in place of L. J. Grimmesey, deceased.

The errors urged by appellants have to do with certain findings of fact and conclusions of law, and the judgment entered thereon as follows: (1) That said findings of fact and conclusions of law, and the judgment thereon, are not supported by the evidence, but are contrary to the evidence; (2) that said judgment is contrary to law; (3) that the court erred in the admission of certain evidence.

The findings which appellants urge as not being supported by the evidence may be summarized as follows: That it is not true that, at the time plaintiff purchased parcel No. 1, nor at any other time, the plaintiff purchased of defendants, or either of them, a private right of way or easement along or over a roadway approximately 12 feet in width, then or at any other time in use over parcel No. 2; that a gravel roadway for ingress and egress to and from the defendants' residence from Glendora avenue westerly along the southerly side of defendants' residence, extends westerly from said residence a distance of 150 feet, thence westerly there is a pathway extending westerly to the westerly line of the defendants' property, and thence westerly to a tenement house located near the westerly side of plaintiff's property, parcel No. 1; that said pathway has heretofore, at times when defendants were the owners of all of said property, and at times after they sold said parcel No. 1 to plaintiff, and while defendants were in charge of the cultivation, irrigation, and otherwise caring for plaintiffs' property, been used by employees of defendants as a passageway from defendants' property to and from said tenement house; that such use by plaintiff and his employees was permissive by the defendants to plaintiff and his employees for a period of two years or less after plaintiff assumed the care of plaintiff's property; that said road was occasionally used as a means of ingress and egress to and from the public highway of Glendora avenue to the house and barns situated upon parcel No. 1; that said roadway over parcel No. 2 is not the only means of access from Glendora avenue; that it is not true that ever since April 10, 1918, the plaintiff and his family, agents, and employees have used said alleged right of way from Glendora avenue as an easement appurtenant to plaintiff's land; that no right of way for plaintiff or any other person exists, or ever did exist, over said parcel No. 2 as a means of ingress or egress to or from Glendora avenue or otherwise to said parcel No. 1; that plaintiff for five years last past prior to the commencement of this action has not continuously, openly, notoriously, and adversely to any claim of right of defendants, or under claim of right in plaintiff, used, occupied, and enjoyed a private right of way of approximately 12 feet in width, or any width, over, upon, or through the land of defendants, but that at all times after defendants ceased to cultivate, irrigate, and care for plaintiff's property, about May 1, 1922, and up to a few months prior to the commencement of this action, defendants permitted plaintiff, his family, servants, and employees, to occasionally pass over said parcel No. 2 to said parcel No. 1 as a mere accommodation.

Appellants concede that, if there is any substantial conflict in the evidence, the findings of the trial court will not be disturbed on appeal, but maintain that there is no substantial evidence upon which the findings and judgment can be supported. Appellants have cited a number of authorities holding that a transfer of property passes all easements attached thereto at the time of the transfer; that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion of it, the purchaser takes the tenement or portion sold with all the benefits and burdens that appear at the time of sale to belong to it; that when the owner of lands divides his property into two parts, granting one of them, he is taken by implication to include all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers it. The authorities supporting this contention are numerous and uniform. In the present case, however, the interpretation of a legal principle is not so much involved as is the determination of a question of fact; that is, whether the evidence supports the findings that no roadway existed over parcel No. 2 as a means of ingress or egress to or from parcel No. 1 at the time of the sale by defendants to plaintiffs' decedent, and that plaintiffs' decedent has not openly, notoriously, and adversely, and adverse to any claim of right of defendants, occupied, used, and enjoyed a private right of way over the land of defendants for five years prior to the commencement of the action, it being conceded that the roadway in dispute is not the only means of access to parcel No. 1.

[1] The facts disclosed by the record are that the entire tract of land was originally owned by respondents. On April 10, 1918, respondent deeded the western 15 acres to L. J. Grimmesey, now deceased, who was an uncle of respondent Edward Elmore Kirtlan; that before the transfer respondent Kirtlan cultivated, irrigated, and cared for the entire tract; that after the sale he continued to cultivate, irrigate, and care for the 15 acres deeded to plaintiffs' decedent until May, 1922, when Mr. Campbell, the husband of respondent Kirtlan's sister, assumed charge for plaintiffs' decedent. According to the testimony of respondent Edward Elmore Kirtlan, at the time of the sale of parcel No. 1 there was a road from Glendora avenue to his barn on parcel No. 2, and from the end of the roadway at his barn there was only a path leading to parcel No. 1. Some of the people who lived in the house on parcel No. 1 had automobiles, but—

> "they didn't get in with their automobiles. They left their automobiles as a rule in my barn. Once in a while they might take them down there; drive out—no way to turn down there—drive right through the field. I objected to it, of course. A great many people went down there, not knowing there was no road there."

It is apparent that none of the witnesses produced by appellants, 10 in number, excepting Agnes R. Grimmesey, had any knowledge of the condition of the road, or whether the road was in existence at the time of the sale of the property. None of the witnesses, Fisher, Hepner, Ames, Welch, Doughty, Bull, or Webb, had seen the property until long after the transfer to appellants' decedent. One of the remaining three, Kellenberger, was on the property from October, 1915, to July, 1916, only, and therefore his testimony does not throw any light on the conditions existing on April 10, 1918, nearly two years later. Berman, one of the two remaining witnesses for appellants, testified that he resided on the ranch adjoining the 41-acre tract from 1915 to 1925, and that when he first came there was a road clear to the boundary line. Agnes R. Grimmesey, the widow of L. J. Grimmesey, deceased, testified that, when she first saw the property early in 1918, about the time they were considering buying it, she walked over the road with Mrs. Kirtlan and Mrs. Grimmesey from the Kirtlan residence, on parcel No. 2, as far westerly as the little house on the western edge of parcel No. 1, and that there was a well-defined road across parcel No. 1. This testimony on the question whether or not there was a roadway leading from parcel No. 1 across parcel No. 2 to Glendora avenue at the time of the sale presents a conflict, the determination of which was for the trial court, and its finding thereon will not be disturbed.

[2] In order to bring the easement claimed within the provisions of section 1104 of the Civil Code, it must be shown that a roadway was in existence and use for the benefit of the parcel of land sold, and that the easement in the remaining parcel is necessary for the reasonable enjoyment of the part sold in the form which it assumed at the time of the transfer. Cave v. Crafts, 53 Cal. 135; Beem v. Reichman, 36 Cal. App. 258, 171 P. 972, The intention, in view of all of the circumstances, is the cardinal subject for inquiry. Cheda v. Bodkin, 173 Cal. 7, 16, 158 P. 1025. Where there is a better and more convenient means of ingress and egress to and from the land conveyed, and the easement is not necessary to the reasonable enjoyment of the part granted, no grant by implication arises.

[3] As to the claim that a right of way was acquired by prescription—that the roadway was openly, notoriously, and adversely for more than five years prior to the commencement of the action on August 21, 1924—it may be said that the testimony of respondent Edward Elmore Kirtlan is that whatever use had been made of his land had been by permission up to within three or four months of the commencement of the action. Prior to that time plaintiffs' decedent had not claimed any right to cross respondents' land as a matter of right. The decedent L. J. Grimmesey, was the uncle of respondent Edward Elmore Kirtlan, and Mr. Campbell, who was in charge of the property for the deceased following respondent Kirtlan, when the latter ceased to manage and care for it in May, 1922, was the husband of respondent Kirtlan's sister. The use of the private roadway into the yard and around respondent's house was permitted, because the parties were so related. Respondent Kirtlan testified:

> "Mr. Grimmesey was my uncle, and I was very fond of him, as much so as I was of my father. There was no reason why he shouldn't come out on my place at any time."

[4] In order to make the use adverse under the circumstances, there must have been a communicated claim of right to the easement. "User alone is not sufficient to establish a prescriptive right of way over the lands of another. Such user must be accompanied by a claim of right communicated to the owner of the land, or it must be shown that the user was so continuous, and so openly and notoriously adverse to the owner, as to create a presumptive knowledge in the owner that the person using the land was so doing under a claim of right." Tarpey v. Veith, 22 Cal. App. 289, 292, 134 P. 367, 369. The following language used by the court in Clarke v. Clarke, 133 Cal. 667, 670, 66 P. 10, 11, is apropos here:

> "The question as to whether or not the use was under a claim of right, or a mere matter of neighborly accommodation, was a question of fact to be determined by the court in the light of the relations of the parties, their conduct, the situation of the property, and all the surrounding circumstances. The court below saw the witnesses, heard them testify, and found the facts against defendant. * * * It is not sufficient that the claim of right exist only in the mind of the person claiming it. It must in some way be asserted in such manner that the owner may know of the claim. The fact that the owner knew of the travel and occasional use of the property does not even raise a presumption that such use was hostile or under claim of right. If any party who is allowed by silent permission to pass over the lands of another, nothing being said as to any right being claimed, after five years, without showing that he ever communicated such claim in any way to the owner, can thus gain title by prescription, it would be a blot upon the law."

Appellants have not directed our attention to any ruling of the court, under their third assignment, that the court erred in certain particulars in the admission of evidence, and we therefore assume that they have abandoned this objection.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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93 Cal. App. 681

KRAUSE v. MARINE TRUST & SAVINGS BANK et al. (Civ. 3537.)

District Court of Appeal, Third District, California. Aug. 27, 1928.

1. Vendor and purchaser 🔑22, 334(1)—Land contract, describing lot by reference to unrecorded map, was void, and payment thereunder was recoverable in action for rescission (St. 1907, p. 290, as amended by St. 1913, p. 568).

Contract to purchase a lot, which described it by reference to an unrecorded map, was void, under St. 1907, p. 290, as amended by St. 1913, p. 568, and purchase price paid pursuant to such void executory contract was therefore without consideration, and was a proper claim for repayment in purchaser's action for rescission.

2. Vendor and purchaser 🔑119—Purchaser held not barred by laches in suing for rescission (Civ. Code, § 1213).

Where contract to purchase lot represented to be 105 feet deep stated that map was then recorded in county recorder's office, and vendors represented that blueprint exhibited to purchaser, showing lot to be 105 feet deep, was true copy of map on file, purchaser had right to rely on such representations, and recording of map subsequent to execution of contract, showing depth of lot to be 90 feet, did not give purchaser constructive notice of its contents, under Civ. Code, § 1213, and he was therefore not guilty of laches in failing to sue for rescission until after acquiring actual notice of change in dimensions of lot.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Chris M. Krause against the Marine Trust & Savings Bank and others. From the judgment, certain defendants appeal. Affirmed.

Swaffield & Swaffield, of Long Beach, and Edward T. Sherer and Welburn Mayock, both of Los Angeles, for appellants.

Norman T. Mason, of Los Angeles, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a decree rescinding a contract to purchase real property, and refunding the purchase price thereof, on the ground of fraud.

June 12, 1923, plaintiff entered into a written contract with the defendants Gilkey and Leeston-Smith to purchase "lot 6, No. A, tract 6743, being a subdivision of the east 19.80 acres of lot 4, range 7, of the Temple & Gibson tract, in the county of Los Angeles, as per map recorded in Book 32, page 64, Miscellaneous Records of said county, in the tract No. 6743 as per map recorded in Book ———, page ———, of Maps in the office of the county recorder of Los Angeles county, California," for the sum of $2,000 to be paid in specified monthly installments. The last installment of the purchase price of this lot was not paid until June 8, 1925. This appeal is on the judgment roll only, and the evidence is not before this court.

The plaintiff alleged, and the trial court found, that in procuring the contract to purchase the lot in question the appellants Gilkey and Leeston-Smith exhibited to respondent what purported to be a blueprint copy of the map of said tract No. 6743, showing the dimensions of said lot, and then represented the fact to be that said lot fronted on Lemon street in Los Angeles and extended along Washington street a distance of 105 feet to an alley at the rear. This map, which was exhibited to respondent, was never filed for record, although the contract of sale stated that it was situated "in tract No. 6743, as per map recorded in Book ———, page ———, of Maps in the office of the county recorder of Los Angeles county." This map, which was exhibited to the respondent, was subsequently changed, so as to indicate that the lot in question was but 90 feet in depth, instead of 105 feet, as represented by the appellants. This map, so changed, was for the first time filed for record July 25, 1923, after the contract for sale of the lot had been executed and delivered. The respondent was not notified of the change. The trial court found that the respondent relied upon the dimensions of the lot as shown by the map which was exhibited to him, and upon the statements made by appellants, and that he had no knowledge of the alterations of the map, or the change in the depth of the lot, until his final payment had been made and the deed was tendered to him July 10, 1925, in which deed the lot was described as 90 feet in depth, instead of 105, according to contract. Acceptance of this deed was refused, and this action for rescission was then promptly commenced on August 6, 1925. A judgment was rendered against appellants, rescinding the contract for fraud, and restoring to respondent the amount of the purchase price which had been paid.

[1] The appellants contend that the filing of the amended map on July 25, 1923, was notice to respondent of the diminished size of the lot in question, and that he is therefore guilty of laches in failing to have promptly commenced his action for rescission after the filing of this map. This contention is without merit. The contract to purchase the lot in question, having described it by reference to an unrecorded map, was void as provided by the Statutes of 1907, p. 290 (as amended by St. 1913, p. 568), which declares:

> "* * * No person shall sell or offer for sale any lot or parcel of land by reference to any map or plat, other than such recorded map or plat [which is provided for by the statute], or true and correct copy thereof. (§ 8) * * * Any map or plat which is not executed and approved as herein required shall be null and void." (§ 9)

The purchase price of the lot, which was paid pursuant to this void executory contract, was therefore without consideration, and hence was a proper claim for repayment in this action for rescission. Smith v. Bach, 54 Cal. App. 236, 238, 201 P. 611; Id., 183 Cal. 259, 191 P. 14.

[2] The filing of the altered map subsequent to the execution and delivery to the respondent of the contract of sale of the lot in question was not notice to him of the change in the depth of the lot. His attention was not called to this change. The contract affirmatively stated that the map, at the time of the execution of the contract, was recorded in the office of the county recorder of Los Angeles county, although the book and page of the purported recordation were left blank. Moreover, the appellants represented to respondent that the blueprint which was exhibited to him was a true copy of the map on file. The respondent had a right to rely upon these affirmative representations as true. He had no occasion to examine the record to prove the truthfulness of these affirmative statements, but, upon the contrary, had a right to rely upon the specific provisions of his written contract. The recording of the map subsequent to the execution of the contract in question did not give constructive notice of its contents. The public record of any instrument which is by law required to be recorded, or which is entitled to be recorded, is constructive notice only as to *subsequent* purchasers or interested parties. A prior purchaser or interested party is not affected thereby. Section 1213, Civ. Code; 22 Cal. Jur. 616, § 29; 23 R. C. L. 211, §§ 71, 72. The appellant was, therefore, not guilty of laches in failing to bring his action for rescission until after actual notice of the change in the dimensions of the lot had been acquired, which first came to his attention upon the tendering of the deed.

The judgment is, therefore, affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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93 Cal. App. 575

Ex parte WESTCOTT. (Cr. 1704.)

District Court of Appeal, Second District, Division 2, California. Aug. 22, 1928.

1. Bail 🔑42—Petitioner, after second murder conviction, granted new trial for insufficiency of evidence, which was affirmed on appeal, held entitled to bail; production of additional evidence not being indicated (Const. art. I, § 6; Pen. Code, § 1270).

Where petitioner for habeas corpus, seeking to be admitted to bail pending new trial after conviction for murder, was twice convicted, and new trial was granted after second conviction for insufficiency of evidence to support verdict, which was affirmed on appeal, and there was nothing to indicate that additional evidence would be produced by the people, petitioner was entitled to release on furnishing bail, under Const. art. 1, § 6, and Pen. Code, § 1270.

2. Insane persons 🔑83—Ample authority exists for apprehension and detention of insane persons, or those whose sanity is in doubt (Pen. Code, §§ 1367, 1374; Pol. Code, §§ 2136 to 2199).

Pen. Code, §§ 1367, 1374, and Pol. Code, §§ 2136–2199, furnish ample authority for apprehension and detention of insane persons, or those whose sanity is in doubt.

3. Bail ⚷42—Accused may have right to bail determined, irrespective of whether he may be subject to restraint as insane (Const. art. I, § 6; Pen. Code, § 1270).

Under Const. art. 1, § 6, and Pen. Code, § 1270, person charged with crime is entitled to have bail fixed, and to be given his liberty pending disposition of charge, except as right is modified in capital offenses, and may have right to bail, so far as criminal charge is concerned, presented and determined, irrespective of whether or not he may be subject to restraint on some other prospective complaint, asserting him to be insane.

Application by Carl Westcott for writ of habeas corpus against the Sheriff of Los Angeles County. Writ granted.

Paul W. Schenck, of Los Angeles, for petitioner.

Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

CRAIG, Acting P. J. Carl Westcott, the petitioner, was indicted for murder. He was tried twice and was twice convicted. The first judgment was reversed upon appeal (260 P. 901), because of the erroneous admission of certain evidence. After the second trial the court granted the defendant's motion for a new trial on the ground that the evidence was insufficient to support the verdict. Upon appeal from that order this court affirmed the same. 269 P. 724. The case is to be tried again, but there is nothing to indicate that additional evidence will be produced by the people. Pending the appeal last mentioned an application was made in the superior court on behalf of petitioner that he be admitted to bail, which application was denied without prejudice, and he now prays by this proceeding in habeas corpus to be admitted to bail pending the determination of the criminal charge above mentioned.

[1] All persons are bailable, except for capital offenses, where the proof is evident or the presumption of guilt is great. Const. art. 1, § 6; Pen. Code, § 1270. We think it evident that, under the above statement of facts and the provisions cited, the petitioner is entitled to have bail fixed, and to be released upon furnishing it as required by law.

It has been suggested by counsel for petitioner that the sanity of the latter is in doubt. This has presented for our consideration the bearing of such a condition on the part of petitioner upon his right to liberation. The prosecution has not contended that Westcott is insane, nor opposed his release upon that ground. On the other hand, the few authorities available indicate that insanity of one charged with crime is not to be considered in passing upon his petition for a writ of habeas corpus, except as having to do with the determination of the constitutional test as to whether or not the proof is evident or the presumption of guilt great. In the case of Zembrod v. State, 25 Tex. 520, upon this consideration, bail was allowed on a showing made of the petitioner's insanity.

[2, 3] Ample authority exists for the apprehension and detention of the insane, or those whose sanity is in doubt. Such provision is to be found in sections 1367 and 1374 of the Penal Code, and also in sections 2136 to 2199 of the Political Code. There appears to be no reason why full recognition cannot be given to the constitutional right of the defendant, and at the same time all regard be accorded to the safety of the public to guard against the danger of an insane person being at liberty. As a rule, one charged with crime is entitled to have bail fixed, and to be given his liberty pending the disposition of the charge. This he has as a matter of constitutional right, except as modified in cases of capital offenses, and surely he is entitled to have his claim to that right, so far as the criminal charge is concerned, presented to and determined by a competent court, irrespective of whether or not he may be subject to restraint upon some other prospective complaint asserting him to be insane.

We see no force to the argument of respondent that to fix bail in this case would, upon the statement of petitioner's counsel, endanger the public; for, particularly under the Code provisions to which we have adverted, its interests are well protected. Officials to whom authority in that behalf has been delegated have undoubted right, and probably the duty, of instituting such a proceeding as may be provided by law to test the petitioner's sanity and to secure the public safety. At least, they are possessed of all information needed to enable them to decide whether or not such action should be taken. As was suggested in Re Henley, 18 Cal. App. 1, 121 P. 933, although for the safety of the individual or protection of society it might in some instances be proper to deny bail, this should not be done without a showing being made of such facts as justify it. Here this has not been done.

It is ordered that petitioner be admitted to bail by giving bond in the sum of $10,000, pending the determination of the criminal charge upon which he is now detained, said bond to be approved by a judge of the superior court of Los Angeles county.

We concur: THOMPSON, J.; HAZLETT, Justice pro tem.

93 Cal. App. 640

BALZANO v. TRAEGER, Sheriff.
(Civ. 6036.)

District Court of Appeal, Second District, Division 2, California. Aug. 24, 1928.

1. Attachment 🔑184—Lien of attachment on real estate merges in judgment lien, except to preserve priority, while lien on personal property continues after judgment.

When attachment is on real property, and judgment lien is established, attachment lien merges in the lien of the judgment, except to preserve the priority thereby acquired, which is continued and enforced under the judgment; but lien of attachment on personal property continues after judgment, to preserve the lien and its priority, and to allow issue and levy of execution under the judgment, which does not become a lien on personal property, even when attached in the action.

2. Attachment 🔑184—Statute held not intended to release lien of attachment on personal property by undertaking on appeal from judgment (Code Civ. Proc. § 674, as amended by St. 1927, p. 830).

Code Civ. Proc. § 674, as amended by St. 1927, p. 830, so as to incorporate into it the substance of section 671, and provide that a judgment shall be a lien on all real property of the judgment debtor, not exempt from execution, from filing of abstract of judgment in office of county recorder, and that such lien continues for five years, unless enforcement of the judgment is stayed on appeal by a sufficient undertaking, in which case the lien of the judgment, and any lien created by virtue of an attachment issued and levied in the action, ceases, *held*, in view of the titles of all the acts in the history of the legislation being limited to judgment liens, not intended to relate to or affect the lien of any attachment on personal property, which lien does not, as does the lien on real estate, merge in the lien of the judgment.

3. Statutes 🔑117(8)—Code Civ. Proc. § 674, as amended by St. 1927, p. 830, as to liens released by undertaking on appeal, construed as relating to lien of attachment, is to that extent violative of Const. art. 4, § 24.

Code Civ. Proc. § 674, as amended by St. 1927, p. 830, so as to incorporate in it the substance of section 671, if construed as providing for release of lien of attachment on personal property by undertaking on appeal from judgment, is to that extent violative of Const. art. 4, § 24, as to subject and title of acts, in view of the subject of the legislation, as limited by the titles of the acts relating thereto, being the lien of judgments.

Original mandamus proceeding by Frank Balzano against William T. Traeger, Sheriff of Los Angeles County. Peremptory writ denied.

Victor H. Koenig, of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, and S. V. O. Prichard, Deputy County Counsel, both of Los Angeles, for respondent.

HAZLETT, Justice pro tem. This is an original proceeding in mandamus to compel respondent to release $500 belonging to petitioner and held under garnishment by respondent in his capacity as sheriff of Los Angeles county, pursuant to a writ of attachment issued in an action in which petitioner was a defendant, then pending in the superior court of Los Angeles county.

In his petition herein petitioner alleges, in addition to the foregoing, that the superior court gave judgment against him in the action for more than $500, from which judgment he perfected an appeal to the Supreme Court and filed an undertaking in double the amount of the judgment, staying execution; that thereafter, contrary to the provisions of section 674, Code of Civil Procedure, the sheriff refused to release the attachment; and that he thereupon made application to the superior court for an order releasing the attachment, which was denied.

An alternative writ was issued by this court upon the petition, and on the return day respondent filed a general demurrer. Petitioner filed his memorandum of points and authorities in support of his application, and respondent filed his brief in support of his demurrer, but petitioner did not reply.

The question presented by the parties herein is whether, under the provisions of section 674, the stay of execution in petitioner's appeal, by the execution of his undertaking, terminated the lien of the attachment upon his personal property. This question involves the proposition whether, in the light of section 24 of article 4 and section 22 of article 1 of the state Constitution, the provisions of the Code section have any application to attachments upon personal property.

Section 24 of article 4 provides that:

> "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title. * * *"

And section 22 of article 1 provides that:

> "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

Section 674, Code of Civil Procedure, as amended in 1927 (Stats. 1927, p. 830), provides that a judgment shall be a lien upon all property of the judgment debtor not exempt from execution, from the filing of an abstract of the judgment in the office of the county recorder, and that:

> "Such lien continues for five years from the date of the entry of the judgment or decree,

unless the enforcement of the judgment or decree is stayed on appeal by the execution of a sufficient undertaking as provided in this Code, * * * in which case the lien of the judgment or decree, and any lien or liability now existing or hereafter created by virtue of an attachment that has been issued and levied in the action * * * ceases, or upon an undertaking on release of attachment, or unless the judgment or decree is previously satisfied, or the lien otherwise discharged. * * *"

Although the body of the amendatory act embraces provisions relating to attachments, its title contains no expression in reference to attachment liens or liabilities, but refers only to judgment liens, and is as follows:

> "An act to amend section six hundred and seventy-four of the Code of Civil Procedure, relating to the recording of copy of judgments, providing for the lien thereof and the extent of such lien."

This act re-enacted from section 671, Code of Civil Procedure, and incorporated into section 674, the substance of section 671 relating to judgment and attachment lien, and section 671 was amended at the same time (Stats. 1927, p. 829), limiting its provisions to govern only the entry of judgments in the docket. As will hereinafter appear, the title of the act adopting section 671, and the titles of all the acts adopted prior to 1927, amending that section, expressed and related only to judgment liens.

[1] The sole purpose of an attachment is to hold the property of the defendant to secure the judgment that may be rendered in the action. When the attachment is upon real property and the judgment lien is established, the attachment lien merges in the lien of the judgment, and thereafter the only effect of the lien of such attachment is to preserve the priority thereby acquired. This priority is continued and enforced under the judgment. The lien of the attachment on real property is not completely extinguished by the judgment, but such lien ceases in all respects, except to maintain the priority created and merges in the lien of the judgment, in the sense and to the extent that there are not then two separate and distinct and subsisting liens against the same property. Bagley v. Ward, 37 Cal. 121, 131, 99 Am. Dec. 256; Brun v. Evans, 197 Cal. 439, 241 P. 86. The lien of the judgment and the lien of the attachment on real property are both terminated by the filing of a supersedeas bond. Brun v. Evans, supra.

The judgment does not become a lien upon personal property, even though the property is held by attachment in the action (Bagley v. Ward, supra); but the lien of the attachment continues after judgment to preserve the lien and its priority and to allow the issue and levy of execution under the judgment (6 Cor. Jur. 271), and the judgment alone can be enforced against the property (section 681, Code Civ. Proc.; Pease v. Frank, 263 Ill. 500, 105 N. E. 299).

[2] Respondent's first contention is that section 674, so far as it relates to any lien of attachment, has application only to the lien of any attachment upon real property which merges into the judgment in the action, and that, if the Legislature, in adopting the legislation, intended to include and cover the lien of any attachment upon personal property, the titles of the acts adopting or amending sections 671 and 674, Code of Civil Procedure, would have been so worded as to embody some reference thereto. Consideration of the history of those sections will be of interest. Section 671, as adopted into the Code of Civil Procedure of 1872 (being a re-enactment of the substance of section 204 of the Practice Act), related only to judgment liens and contained no reference to attachment liens, but embodied the following:

> "* * * From the time the judgment is docketed it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county, owned by him at the time or which he may afterwards acquire, until the lien expires. The lien continues for two years, unless the judgment be previously satisfied."

This section was amended in 1874 (Amendments of 1874 to the Codes, p. 320), by changing the word "expires" to "ceases" and the last sentence to read as follows:

> "The lien continues for two years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking, as provided in this Code, in which case the lien of the judgment ceases."

The title to this amendment is not important, for the reason that the provision of section 25 of article 4 of the Constitution of California of 1849, relating to the titles of legislative enactments, in effect until the adoption of the Constitution of 1879, was held to be directory only, and not binding upon the Legislature or the people. See the decisions hereinafter cited. Section 671 was again amended in 1895. Stats. 1895, p. 36. The title of this amendment is as follows:

> "An act to amend section six hundred and seventy-one of the Code of Civil Procedure, relating to the lien of judgments, their enforcement and revivor."

This amendment re-enacted the section as adopted in 1874, except that the last sentence was changed to read as follows:

> "The lien continues for five years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this Code, in which case the lien of the judgment and any lien by virtue of an attachment that has been issued and levied in the action ceases."

Section 671 was again amended in 1917 (Stats. 1917, p. 141) by an act entitled as follows: "An act to amend section six hundred seventy-one of the Code of Civil Procedure, relating to judgment liens"—and the only change in the section was to require the clerk, in docketing the judgment, to enter the hour and minute of the entry. Section 671 was again amended in 1923 (Stats. 1923, p. 751) by an act entitled:

> "An act to amend section six hundred seventy-one and section six hundred seventy-four of the Code of Civil Procedure, and to repeal section six hundred seventy-one-a of said Code, relating to judgment liens and transcripts of judgments."

No change was made in that part of the body of the section which related to the liens of judgments and attachments in the state courts. The amendments of 1927 to the sections and the title to the amendment of that year to section 674 are hereinbefore referred to at length.

As the expressions contained in the titles above quoted are limited to judgment liens, we should not assume that the Legislature intended to have the provisions of those Code sections regarding attachment liens cover or affect the lien of any attachment which does not merge into the judgment and become a part of the judgment lien. If we should hold that the Legislature intended to provide that the execution of the undertaking on appeal from the judgment should terminate the lien of an attachment upon personal property in the action, we would be holding, in effect, that the Legislature attempted to embody in section 671, and later in section 674, a provision not mentioned in any of the titles of the acts adopting or amending them, and therefore attempted to violate the prohibition of the Constitution. We hold that the sections were not intended to relate to or affect the lien of any attachment on personal property.

[3] Respondent's second contention is that if, in amending section 674, Code of Civil Procedure, in 1927, the Legislature intended the construction of the amended section to be that the stay of execution in an appeal from a judgment should cause the lien of an attachment on personal property in the action to cease, such intention was ineffective, and that the portion of the amended section which relates to such attachment is therefore in violation of the constitutional prohibition and void, for the reason that the amended section embodies a subject not expressed in the title to the amendment or in the title of any prior legislation mentioned in the title to the amendment.

Prior to the adoption of the Constitution of 1879 the constitutional provision regarding title to legislative enactments was as follows:

> "Every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title. * * *" Section 25, art. 4, Const. of 1849.

The construction placed upon that provision by the Supreme Court was that it was merely directory (Washington v. Page, 4 Cal. 388), and could operate only upon the conscience of the lawmakers, for the infraction of which there was no remedy in the courts (Pierpont v. Crouch, 10 Cal. 315). Also that, where the meaning of the body of the act was doubtful, the title could be relied on as an assistance in arriving at a conclusion, but it could not be used to restrain or control any positive provision of the act, and in case of doubt it should be resorted to as a means of ascertaining the intention of the Legislature. Flynn v. Abbott, 16 Cal. 359, 366; Barnes v. Jones, 51 Cal. 303, 306; In Matter of Boston Mining & Milling Co., 51 Cal. 624. Those decisions were handed down before the adoption of the Constitution of 1879. However, in construing section 24 of article 4 of the latter Constitution, in the light of section 22 of article 1 of the same Constitution, announcing the rules for construing its provisions, still in effect, different rules as to the necessity, value, and construction of titles to legislative enactments have been recognized and followed by the courts. The Constitution of 1849 contained no provision relating to the rules for construing its provisions.

It was held in Wood v. Election Commissioners, 58 Cal. 561, 565, decided in 1881, that as to any subject embraced in an act of the Legislature, which was not expressed in its title, the act was in violation of the Constitution and void; and in Abeel v. Clark, 84 Cal. 226, 228, 24 P. 383, the court announced that the main object of the constitutional provision "is to prevent legislators and the public from being entrapped by misleading titles to bills whereby legislation relating to one subject might be obtained under the title of another," and "that it is not necessary that the title of an act should embrace an abstract or catalogue of its contents."

In the leading and often-quoted decision in the case of Ex parte Liddell, 93 Cal. 633, 29 P. 251, in addition to again announcing the above rules, the court said that:

> "At the present time * * * the object of the provision [section 24, art. 4, Const. 1879] is * * * to guard against the passage of bills, the titles of which give no intimation to the members of the legislature or to the people of the matters contained therein. * * * There was a similar provision in the Constitution of 1863 [1849], and it was held here that it was merely directory, and did not nullify laws passed in violation of it, but the provisions of the Constitution of 1879 'are mandatory and prohibitory, unless by express words they are declared to be otherwise.' * * * It certainly was not intended that the title should be a repetition of the provisions found in the body of the bill. * * * If the title contains a reasonable intimation of the matters under legislative consideration, the public cannot complain. It has always been the custom to state the subject of a bill in general terms and with fewest words,

and the framers of the Constitution doubtless intended the Legislature to conform to that custom. * * * It is admitted that the constitutional provision under consideration has always been given a liberal construction; and this must be so, because the Constitution itself does not define the degree of particularity with which a title must specify the subject of a bill. The matter must therefore be left largely to legislative discretion."

It was held in the case of Clark v. City of Los Angeles, 160 Cal. 30, 40, 116 P. 722, 726, that the provision of section 22 of article 1 of the Constitution, "as is well known, was inserted [in the Constitution of 1879] because of certain previous decisions holding that the provisions of the Constitution of 1849 regarding the titles of legislative acts were directory and not mandatory" (citing cases).

It was held in People v. Jordan, 172 Cal. 391, 394, 156 P. 451, 452, that:

> "A liberal rule of construction has been adopted * * * in the interest of protecting meritorious legislation from being declared void through inartificially constructed titles."

To the same effect, see Estate of Wellings, 192 Cal. 506, 519, 221 P. 628; People v. Sterling Refining Co. (Cal. App.) 261 P. 1080; Torson v. Fleming (Cal. App.) 266 P. 845.

It was held in the case of In re Werner, 129 Cal. 567, 570, 62 P. 97, that where the title of an act fairly indicates but one subject, and the body of the act embraced a separate and distinct subject, not expressed in the title, the portion of the act relating to the latter subject was in conflict with the Constitution and void. To the same effect, see, also, Pratt v. Browne, 135 Cal. 649, 67 P. 1082; Estate of Melone, 141 Cal. 331, 333, 74 P. 991; Williams, Superintendent of Banks, v. Carver, 171 Cal. 658, 661, 154 P. 472; Miller & Lux, Inc., v. Drainage District, 182 Cal. 252, 271, 187 P. 1041; People v. Sterling Refining Co., supra; Estate of Phillips (Cal. Sup.) 263 P. 1017; Brunson v. City of Santa Monica, 27 Cal. App. 89, 91, 92, 148 P. 950; Wallace v. Zinman, 200 Cal. 585, 254 P. 946. A full exposition of the subject is found in Cooley's Constitutional Limitations (8th Ed.) §§ 308 to 313, inclusive, having particular reference to the rules of construction herein discussed, the change in the rules recognized by our courts and the reasons for the change.

Our first duty is to maintain the Constitution as it is, and whenever it is encroached upon we must maintain its supremacy. Lewis v. Dunne, 134 Cal. 291, 297, 66 P. 478, 55 L. R. A. 833, 86 Am. St. Rep. 257. If the portion of section 674, Code of Civil Procedure, which attempts to provide a method for releasing personal property from attachment, should be upheld, it would be opening the door to the accomplishment by indirection of an evil which the framers of the Constitution manifestly intended to directly prevent; that is, giving effect to a legislative enactment upon a subject not expressed in its title. Our conclusions cannot be controlled by any matter of convenience to litigants, or because of any consideration of the fact that an appellant's personal property may still be held under attachment in the action, although he has executed a sufficient undertaking in his appeal from the judgment against him, which will amply secure the respondent's rights under a decision that may affirm the judgment. If the procedure provided for in the section results in unnecessary hardships to litigants, that is a matter for the Legislature to remedy, but is no justification for the court to disregard the plain and salutary provisions of the Constitution, made for the protection of all our people, including the lawmakers in enacting our laws. "Ita lex scripta est." Weill v. Kenfield, 54 Cal. 111, 117.

A hasty reading of the opinion in the late case of Los Angeles City School District v. Odell, President of the Board of Education, 200 Cal. 637, 254 P. 570, might give the impression that the Supreme Court had thereby set aside those rules of construction which have been adhered to ever since the adoption of the Constitution of 1879, and had reverted to the rules announced prior thereto under the provisions of the Constitution of 1849. We do not believe that such was the intention of the court. In that case the facts were that the act under consideration was amendatory of a former act adopting section 1617½ of the Political Code, and that the title to the former contained a limitation relating to the subject of the Code section, which limitation was omitted from the body of the amendment, but the title of the amendatory act recites that it is "An act to amend section 1617½ of the Political Code," and repeats the title of the prior act which expressed the limitation. The court held that the general subject of the amendment was expressed in the title, and that the fact that the scope of the body of the amendatory act was enlarged beyond that indicated by the title of the prior act, which title was repeated in the title of the amendatory act, did not make the amendatory act a violation of section 24 of article 4 of the Constitution, for the reason, mainly, that the portion of the title of the amendatory act which reads " 'An act to amend section 1617½ of the Political Code' adequately expresses the intention of the Legislature, which was to supersede the previous legislation *upon the subject*." (Italics ours.)

The *subject* of the legislation under consideration in the case before us, as limited by the titles of the acts relating thereto, is the *liens of judgments*. It follows that section 674, Code of Civil Procedure, so far as it may relate to the lien of any attachment on personal property, is in contravention of section 24 of article 4 of the Constitution, and void.

The peremptory writ is therefore denied, and the proceeding is dismissed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

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93 Cal. App. 677

PEOPLE v. ROLDAN. (Cr. 1697.)

District Court of Appeal, Second District, Division 2, California. Aug. 27, 1928.

1. Burglary 🔑42(3)—Unexplained possession of stolen police badge held corroborated by other evidence inconsistent with defendant's innocence, authorizing conviction for burglary.

In prosecution for burglary, unexplained possession of stolen police badge was corroborated by evidence that defendant was roomer in hotel on date on which badge was stolen therefrom, together with contradictory statements concerning possession by defendant and use to which badge was put by him, inconsistent with defendant's innocence, and was sufficient to justify conviction.

2. Burglary 🔑42(3)—Slight corroborative evidence, in addition to possession of recently stolen property, tending to show guilt, will support conviction for burglary.

Where person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances, tending to show guilt, will support conviction.

3. Burglary 🔑41(3)—Evidence that defendant posed as officer, broke through screen, knocked down inmate, and searched every room in house, held to indicate intent to steal.

In prosecution for burglary, evidence that defendant posed as officer, broke through screen, struck inmate of house with pistol, and searched every room in house, *held* to indicate intent by defendant to steal something; it being immaterial whether it was beer, whisky, or something else, in view of Pen. Code, § 459, making entry with intent to commit grand or petit larceny, or any felony, sufficient.

4. Burglary 🔑3—Requested instruction, requiring finding that defendant entered premises with sole intent to commit felony, to authorize conviction for burglary, held properly refused (Pen. Code. § 459).

In prosecution for burglary, requested instruction, requiring finding that defendant entered premises with sole intent to commit felony before conviction, *held* properly refused, under Pen. Code, § 459.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Manuel Roldan was convicted of burglary, and he appeals. Affirmed.

Marshall A. Stutsman, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

THOMPSON, J. The defendant was charged by an information containing two counts of two offenses of burglary, one of them said to have been committed on October 9, 1927, and the other on April 2, 1928. The jury returned a verdict of guilty on both counts, and this appeal is prosecuted from the judgment and an order denying defendant's motion for a new trial.

The principal contention of the appellant is that the evidence is insufficient to support the verdict, necessitating a review thereof. F. E. Allison, a deputy city prosecutor of Los Angeles, occupied room No. 204 at the Alhambra Apartments during the month of October, 1927. Called as a witness, Mr. Allison testified to this fact, and said that about 5 o'clock a. m. of a Sunday morning (the exact date being unknown) he was awakened by hearing his door leading into the hallway being shut; that his trousers, containing about $70 in money, some keys, and an officer's badge, were stolen at this time; that the badge, which was shown him at the hearing and which, according to other witnesses, had been found in the possession of appellant, was his badge, he being able to identify it by reason of its number and a broken clasp. The owner and manager of the Alhambra Apartments testified that appellant was living in her apartment on October 9, 1927, having registered there on September 11, 1927. Another witness testified that he was a clerk in a cigar store at 100 South Broadway street; that on the night of April 1, 1928. the appellant came to the store and told him that he had been working as an officer in the flood district, and had been given the officer's badge; that the badge was hanging loosely on his vest, and, when asked by the witness why he didn't clip it down, stated that the clip was broken. This witness also stated that the appellant at the time appeared to have been drinking, It will be noted that this explanation by appellant of the possession of the badge is directly contradictory of another, made at the police station on the morning of April 2, 1928, and the one related by him on the witness stand, to the effect that on the evening of April 1st or 2d he purchased a bottle of liquor, and while in a rest room pulling at the cork preparatory to taking a drink the bottle slipped from his fingers; that in picking it up he noticed the badge lying on some places of newspaper.

With respect to the second count, and incidentally related to the first by reason particularly of the use made of the badge by the appellant, one Hernandez, residing on April 2, 1928, at 612½ North Grand avenue, in Los Angeles, testified that between 4 and 5 a. m. appellant knocked at a screen door of his residence demanding admission; that, when the door was not opened, the appellant broke in and began searching the premises. According to this witness, appellant exhibited this same badge, and said that he was an officer, and searched every room in the house, "to see what he could find there," and while knocking at the door had a pistol in his hand, with which he knocked the witness over the head after forcing his entrance.

Another witness testified that appellant entered his room between 4:30 and 5 a. m. at 612½ North Grand avenue on this same morning, exhibiting the badge and carrying a pistol in his belt, and told the witness that he was an officer looking for wine and beer. And Macario Romero, also residing at the same address, testified substantially to the same effect. As heretofore indicated, the appellant took the stand and denied having committed either offense.

[1, 2] Appellant insistently argues that the unexplained possession of the stolen police badge is insufficient, standing alone, to support the conviction. It is obvious that this argument stands upon a false premise, for the reason that there is in this instance corroborating evidence. Not only is there evidence that appellant was a roomer in the hotel on the date on which the badge was stolen, which, of course, is of slight corroborative value, but also there are the contradictory statements concerning its possession by the appellant, and the use to which the badge was put on the morning of April 2d, which latter circumstance is not consistent with its innocent acquirement. We are not unmindful of the fact that the badge might easily pass from hand to hand, nor have we overlooked the lapse of time occurring between the date on which the badge was stolen and the date on which unlawful use was made of its possession. In the absence of any one of the corroborating circumstances already mentioned, we might have grave doubts of the sufficiency of the testimony. As it stands, however, we are of the opinion that the jury was justified in returning the verdict. The firmly established rule of law is that,"when a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction." People v. Cataline, 54 Cal. App. 36, 200 P. 1060. In the case just cited the possession of the stolen property was corroborated by a denial by defendant of his identity, a denial of his ability to run an automobile of the make of the one stolen, although an ignition key fitting the car was found in his possession, and a denial that he had placed the automobile in the garage in which it was found, although he was identified by the night watchman. When analyzed, it is apparent that the corroborating circumstances consisted solely of denials of facts established by other testimony. Yet the court said the verdict was abundantly supported. To the same effect we find People v. Vidal, 121 Cal. 221, 53 P. 558; People v. Luchetti, 119 Cal. 501, 51 P. 707; People v. Gibson, 16 Cal. App. 347, 116 P. 987; People v. Miller, 45 Cal. App. 494, 188 P. 52; People v. Farrell, 67 Cal. App. 128, 227 P. 210; People v. Crotty, 70 Cal. App. 515, 233 P. 395; People v. Brown, 71 Cal. App. 181, 235 P. 72.

[3] With respect to the second count of the indictment, it is urged that it was not proven that appellant entered the residence with intent to commit a felony or to commit larceny. The facts that appellant posed as an officer, broke through the screen, knocked one of the inmates over the head with a pistol, and searched every room in the house, go a long way toward indicating an intent on the part of appellant to steal something; whether it was beer, wine or whisky, as appellant argues, or something else, would make little difference, in view of the provision in section 459 of the Penal Code, stating that entering with "intent to commit grand or petit larceny or any felony" is sufficient.

[4] Counsel complains of two instructions requested by him, which the court refused to give. Suffice it to say that the substance of these instructions was fully covered by the court in other instructions, except in those particulars where appellant requested the court to inform the jury that, before appellant could be convicted of burglary, it was necessary that the prosecution prove that he entered the premises with "the sole intent of committing a felony," and, as just indicated, this is not the statutory definition of burglary, which to all intents and purposes was incorporated in the instructions given.

Other minor points are argued by appellant. We have examined them, and find nothing which merits or justifies further discussion.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; HAZLETT, Justice pro tem.

93 Cal. App. 615

BRYDON v. CITY OF HERMOSA BEACH et al. (Civ. 6111.)★

District Court of Appeal, Second District, Division 2, California. Aug. 23, 1928.

As Modified on Denial of Petition for Rehearing Sept. 22, 1928. Hearing Denied by Supreme Court Oct. 22, 1928.

1. Appeal and error 🔑477—Superior court may grant or refuse injunction staying proceedings pending appeal from judgment (Code Civ. Proc. §§ 525–533, 681; Civ. Code, § 3421; Const. art. 6, § 5).

Under Code Civ. Proc. §§ 525–533, 681, Civ. Code, § 3421, and Const. art. 6, § 5, superior court has power to make order granting or denying injunction to stay all proceedings pending appeal proposed to be taken from judgment when entered.

2. Appeal and error 🔑100(1)—All orders granting or refusing injunctions pending appeal are appealable, whether addressed to trial court's discretion or matter of right (Code Civ. Proc. § 963).

Under Code Civ. Proc. § 963, all orders granting or refusing injunctions, whether temporary, permanent, or provisional, pending appeal, are appealable, whether granting of order by trial court is addressed solely to its discretion, or is matter of right vested in litigant.

3. Appeal and error 🔑122—Appeal may be taken from whole or any portion of appealable order (Code Civ. Proc. § 940).

Under Code Civ. Proc. § 940, appeal may be taken from whole or from any portion of any appealable order.

4. Municipal corporations 🔑323(1)—Assessed property owners, failing to protest to council within time fixed, cannot enjoin council from proceeding with improvement, in absence of fraud, want of power, or notice (St. 1911, p. 730, §§ 6, 7, 82).

Under St. 1911, p. 730, §§ 6, 7, 82, providing that decision of council shall be final on objections to proposed assessment district after hearing, failure of owners of property proposed to be assessed for street improvement to protest to council within time fixed therefor is fatal to action by owners to enjoin council from ordering improvement or entering into contract therefor, unless council has no power to do proposed work, or there is fraud or collusion in proceedings, or council has been guilty of abuse of discretion equivalent to fraud, or failed to give required notice of improvement.

5. Municipal corporations 🔑321(2)—Assessed property owners, not protesting, are deemed to submit to jurisdiction of council in determining necessity for improvement, in absence of fraud, want of power, or notice (St. 1911, p. 730, §§ 6, 7, 82).

Under St. 1911, p. 730, §§ 6, 7, 82, making decision of council final after protest by owners to assessment, owners of property proposed to be assessed, failing to protest within time fixed, are deemed to have submitted themselves to jurisdiction of council in determination of necessity of improvements, unless council has no power to do proposed work, or there is fraud or collusion in proceedings, or council has been guilty of abuse of discretion equivalent to fraud, or failed to give required notice.

6. Municipal corporations 🔑323(3)—Claim that council acted fraudulently in not specifying lighting posts were designed as trolley poles held not sustained by evidence, in action to enjoin improvement proceeding (St. 1911, p. 730, §§ 6, 7).

In action to enjoin city council from proceeding with street improvement, claim that council was guilty of acts amounting to fraud on owners of lots in assessment district by failure to specify that nearly all lighting trolley poles were in fact designed to be used as posts for benefit of railway company *held* not supported by evidence showing all posts would be suitable for carrying lighting equipment, and that council declared they were to be installed for that purpose; their decision being final, under St. 1911, p. 730, §§ 6, 7.

7. Municipal corporations 🔑321(2)—City council has exclusive power to determine whether improvement is adaptable for purpose made, and decision is final, in absence of protest (St. 1911, p. 730, §§ 6, 7).

Under St. 1911, p. 730, §§ 6, 7, it is the exclusive province of the city council to determine whether improvement is of character adaptable or needed for purpose for which it is made, and its determination within its discretion is final, in absence of protest on part of property owners.

8. Municipal corporations 🔑272—That poles on improved street might be larger than necessary for lighting purposes and suitable as trolley poles, incidentally benefiting railway company, could not invalidate improvement proceedings.

In suit to restrain city council from proceeding with street improvement on ground of fraud, in failing to designate that lighting posts were in fact designed to be used also for trolley poles for benefit of railway company, fact that posts might be larger than necessary for lighting purposes, or suitable for trolley poles, or may incidentally benefit railway company, cannot invalidate improvement proceedings, or deprive council of authority to proceed with work.

9. Municipal corporations 🔑323(1)—Improvement proceeding could not be restrained, because funds used in condemning railway right of way were received from county from automobile licenses (Vehicle Act).

In action to enjoin city council from proceeding with street improvement, amended allegations of complaint, alleging condemnation of portions of right of way of railway company along improved street, and that deposit of money to pay for property taken was made from moneys deposited with city by county, out of funds derived by county from automobile licenses and other moneys received under Vehicle Act (St. 1923, p. 517, as amended by St. 1925, p. 398), *held* properly stricken, since, if fund could not be so used, city would be required to pay value of land condemned out of other funds.

★Petition for rehearing denied. Hearing denied by Supreme Court.

10. Municipal corporations ⚷323(3)—Evidence of negotiations between city and railway company not ripening into contract held properly excluded, in suit to enjoin improvement because of secret agreement with railroad company.

In suit to restrain city council from proceeding with proposed street improvement, because of secret agreement between council and railway company for erection of lighting posts to be used as trolley poles, evidence of resolutions by county directing negotiations with railway company, and instructing city attorney to accept terms of letter from company and file same with city engineer, was properly excluded, since showing negotiations did not ripen into contract.

11. Municipal corporations ⚷323(3)—Evidence of discussions by city council to combine lighting and trolley poles, not showing agreement with railway, held properly excluded in suit to restrain council proceeding with improvement for fraud.

In suit to restrain city council from proceeding with street improvement on ground of fraud by council in failing to specify that lighting posts were designed to be used also as trolley poles for benefit of railway company, proposed evidence by member of city council regarding alleged plan to install combination lighting and trolley poles, and in relation to contract between council and company, was properly excluded, in absence of showing that conversations ripened into formal action or into any agreement with railway company.

12. Municipal corporations ⚷330(4)—Specification of patented devices on file for reference held not to invalidate improvement proceedings.

Proceedings for street improvement *held* not invalid because certain patented devices were specified to be used in installing lighting equipment and patented materials were specified for use in doing paving, where agreements for use of same and prices thereof were on file in office of city clerk, for reference by property owners and bidders for work, in making bids.

13. Municipal corporations ⚷321(3)—Trial court's determination of substantial compliance with statute in improvement proceeding is controlling, in absence of abuse of discretion.

If improvement proceeding is one where requirement of statute has not been entirely disregarded, trial court's determination on question of substantial compliance with statute is controlling, in absence of abuse of discretion.

14. Municipal corporations ⚷323(3)—Denial of temporary injunction pending appeal from judgment refusing to restrain improvement proceeding held not abuse of discretion under evidence (St. 1911, p. 730, §§ 6, 7, 82).

In suit to restrain city council from receiving bids or making contracts for construction of street improvement, trial court did not abuse discretion in denying temporary injunction pending appeal from judgment for city, under evidence showing resolution for improvement, notice of adoption of resolution, failure by property owners to appeal or object within time limited, approval by council of equipment to be used, and failure to show fraud in erecting lighting poles, to be used also as trolley poles, under St. 1911, p. 730, §§ 6, 7, 82.

Appeal from Superior Court, Los Angeles County; Clair S. Tappan, Judge.

Action by Robert W. Brydon and others against the City of Hermosa Beach and others. Judgment for defendants, and plaintiff Brydon alone appeals. Affirmed.

Robert Young, of Los Angeles, for appellant.

T. W. Marchant, City Atty., of Hermosa Beach (Kimball Fletcher, of Los Angeles, of counsel), for respondents.

O'Melveny, Tuller & Myers, H. R. Snyder, Arthur M. Ellis, and Paul S. Honberger, all of Los Angeles, amici curiæ.

HAZLETT, Justice pro tem. This is an action for an injunction against the city of Hermosa Beach, the mayor, the members of the city council, and superintendent of streets of the city, to enjoin them from receiving any bids or making any contracts for the construction of certain street improvements upon certain public streets in the city, and from levying any assessment or taking other proceedings in the matter, and to enjoin a certain other action predicated in eminent domain, and for general relief.

Plaintiff Brydon and other parties plaintiff brought this action as owners in the district of lands to be assessed for the improvement, and they allege that they sue for themselves and for all other property owners similarly situated. The proceedings for the improvement are under the "Improvement Act of 1911." St. 1911, p. 730. Plaintiffs introduced their evidence, and defendants, being content therewith, introduced none, but rested, and judgment was given for defendants, from which judgment plaintiff Brydon alone appeals.

Between the time when the court announced its decision and the entry of the judgment, plaintiffs moved the court for an injunction to stay all proceedings in the matter of the improvement pending an appeal, which they proposed to take from the judgment when entered, which motion was heard and denied before the judgment was entered, and plaintiff Brydon alone appeals from the order denying the injunction pending appeal.

Respondents contend that the decision of the trial court denying an injunction pending the appeal from the judgment is final, and that no appeal lies therefrom. They cite in support of this contention Richards v. McMillan, 6 Cal. 422, 65 Am. Dec. 521; Porter v. Jennings, 89 Cal. 440, 26 P. 965, City of Pasadena v. Superior Court, 157 Cal. 781, 109 P. 620, and certain decisions of the Supreme Court of New York and of the United States Supreme Court. It was held in the Richards Case that "an appeal does not lie from an order refusing an injunction." This opinion

was handed down in 1856, and is not authority now, for the reason that the first legislative enactment providing for appeal from such an order was adopted in 1866. Stats. 1865–66, p. 707. In the Porter Case the court announced that:

> "An order granting or dissolving an injunction is a matter of discretion with the lower court which this court will not review except where an abuse of that discretion is urged."

This case recognizes the rule that an appeal may lie from an order granting or dissolving an injunction.

The City of Pasadena Case was an original application for a writ of prohibition to prevent the superior court from maintaining and enforcing an injunction granted to preserve the status quo of the parties pending appeal from a judgment denying a permanent injunction. The question involved was whether the trial court had the right to grant the injunction to preserve the fruits of a possibly successful litigation to the appellants from an adverse judgment against them. The Supreme Court held that the trial court had the right to grant the injunction and denied the writ. In discussing the law bearing upon the question, reference was made to the Slaughterhouse Cases, 10 Wall. 273, 19 L. Ed. 915, wherein the power of the chancery courts of England to maintain the status quo of the subject-matter of litigation pending appeal was discussed. The holding referred to was that such power existed in the trial courts, "and should always be exercised, when any irremediable injury may result from the effect of the decree as rendered, but it is a discretionary power, *and its exercise or nonexercise is not an appealable matter*." (Italics ours.) This clause, which we have italicized, quoted from the Slaughterhouse Cases, is obiter dictum as related to the matter under consideration in the Pasadena Case, and is not controlling.

The opinions of the New York Supreme Court and of the Supreme Court of the United States, cited by respondents, are to the effect that, where the matter of granting, continuing, dissolving, or refusing an injunction pendente lite is addressed to the discretion of the trial court, its holding will not be disturbed on appeal. Strasser v. Moonelis, 108 N. Y. 611, 15 N. E. 730; Pfohl v. Sampson, 59 N. Y. 174; Brown v. Cheese Ass'n, 59 N. Y. 242; Schneider v. City of Rochester, 155 N. Y. 619, 50 N. E. 291; Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381. And the same rule is announced in relation to an order granting an injunction to maintain the status quo pending appeal. Hovey v. McDonald, 109 U. S. 150, 3 S. Ct. 136, 27 L. Ed. 888; Virginian R. Co. v. United States, 272 U. S. 658, 47 S. Ct. 222, 71 L. Ed. 463. These decisions, however, are not authority in California, for the reasons hereinafter stated.

[1] Such an order may properly be made under section 681, Code of Civil Procedure (Pierce v. City of Los Angeles, 159 Cal. 516, 114 P. 818), and, where not prohibited by statute, the superior court, under section 5 of article 6 of the Constitution, has power to make it (Tulare Irr. Dist. v. Superior Court, 197 Cal. 649, 660, 242 P. 725). See, also, Pasadena v. Superior Court, supra; Mulvey v. Superior Court, 22 Cal. App. 514, 135 P. 53; Porter v. Superior Court, 78 Cal. App. 790, 248 P. 1077; Wheeler v. Superior Court (Cal. App.) 255 P. 275; United Railroads v. Superior Court, 170 Cal. 755, 758, 151 P. 129, Ann. Cas. 1916E, 199; American Trading Co. v. Superior Court, 192 Cal. 770, 222 P. 142. The power exists under section 3421, Civil Code, relating to provisional injunctions, and under sections 525 to and including 533, Code of Civil Procedure, relating to provisional remedies in civil actions. United Railroads v. Superior Court, supra; American Trading Co. v. Superior Court, supra.

[2, 3] Our statute permitting appeals from the superior court (section 963, Code Civ. Proc.) provides that:

> "An appeal may be taken from a superior court in the following cases: * * * from an order * * * granting or dissolving an injunction, or refusing to grant or dissolve an injunction. * * *"

And our courts have held that under that section an appeal lies from an order granting an injunction pendente lite, and, so far as mandatory in character, its enforcement may be stayed pending appeal. Doudell v. Shoo, 159 Cal. 448, 455, 114 P. 579; United Railroads v. Superior Court, supra; American Trading Co. v. Superior Court, supra. In this regard, it matters not whether the granting of the order by the trial court is addressed solely to the discretion of that court or is a matter of right vested in the litigant. It is clear that the intent of the statute is that all orders granting or refusing injunctions, whether temporary or permanent, or provisional pending appeal, shall be appealable, and this construction finds support in the cases of United Railroads v. Superior Court and American Trading Co. v. Superior Court, supra. In the United Railroads Case the Supreme Court held that where, upon notice, an order is made granting or dissolving a temporary or provisional injunction, to continue during the pendency and until final determination of the action, the remedy is by appeal. In the American Trading Co. Case it was held that an order granting an injunction pending appeal, after having refused an injunction pendente lite, can be sustained only on the theory that the order "is a portion of the order denying the injunction pendente lite, for, where the court has refused an injunction, it could not subsequently grant the injunction, because the order refusing the injunction is an appealable order." It is well settled that an appeal may be taken from the whole *or from any portion* of an appealable order. (Italics ours.) Section 940, Code Civ. Proc.; Donnelly v. Gray Bros., 3 Cal. App. 59, 84 P. 451.

An inspection of the record in this appeal from the order of the trial court denying an injunction to plaintiffs pending appeal from the judgment, discloses that it will be necessary to examine the whole case in order to determine whether the trial court erred in refusing the injunction. Therefore the appeal from the order will be considered in connection with the appeal from the judgment.

The improvement proposed, as described in the resolution of intention, was to be done upon Hermosa avenue and certain adjacent streets in the city. Hermosa avenue is the principal throughfare of the city, extending entirely through it, along the Pacific Ocean, a distance of about two miles, and is a double roadway, with the right of way of the Pacific Electric Railway dividing it. This right of way is, and for some time has been, used by the company as an electrically equipped double-tracked interurban railway, passing through the city and connecting it with other cities and territory of Los Angeles county. The equipment includes trolley poles, located about the center of the right of way, supporting overhead wires. In general, the improvement so proposed was to consist of grading, paving, construction of curbs, sidewalks, gutters, culverts, sewer connections, and lighting posts and standards, together with certain conduits, cables, wires, lights, and appurtenances, the details and more particular locations of which are shown upon the plans, specifications, and profiles for the same then on file in the office of the city clerk of the city, and referred to in the resolution for a further and more particular description of the work and improvement. The resolution also provides that the work and improvement shall be chargeable upon a district described therein.

In his brief, appellant admits that the proceedings are within the law, so far as the form and letter are concerned, but he asserts that they are not within the spirit of the law. His main contention is that the greater number of the lighting posts were designed for and to be used by the Pacific Electric Railway Company as trolley poles, under some agreement or understanding with the company, and that the city council did not so state in the resolution of intention, but intentionally omitted to so state, for the reasons that the members of the council knew that such statement would be unlawful and would defeat the improvement. In this connection, he also contends that the greater number of posts were made heavier, longer, and more expensive than necessary for lighting purposes, in order that the company might use them for trolley poles, thus increasing the amount of the assessment in the district. For these reasons he asserts that the injunction should have been granted.

The portion of the resolution relating to the lighting system complained of, proposed to be installed, is as follows:

> "That Hermosa avenue, and certain property for the widening of Hermosa avenue (between designated points), * * * be improved * * * by the installation of certain steel lighting posts, known as 'King ferronite standards,' and certain wood lighting posts, together with certain conduits, cables, wires, lights, and other appurtenances."

The plans, specifications, and profiles referred to show the character, sizes, and locations of the lighting posts, the height of the lighting centers thereon, that 194 of such posts were to be installed in the avenue outside, but adjacent to, the right of way of the company, that lighting equipment was to be installed upon 133 of them, and that the remaining 61 were to be installed without such equipment, that 181 were to be 34 feet or more in height above the grade of the street, while the lighting centers were to be at the height of 22 feet, and that 7 of the posts were to be 22½ feet high. The testimony showed that all the posts would be suitable to be used for ornamental lighting purposes, that the lighting center could well be at the height of 18 or 19 feet to properly light the avenue, that 181 of the posts would be suitable to be used as trolley poles, as well as for lighting purposes, that the posts suitable to be used for both purposes cost more than posts for lighting equipment alone, but there is no competent evidence as to the amount of such excess cost. However, the descriptions and specifications of the posts and equipment, contained in the resolution of intention and in the plans, specifications, and profiles, are so full and complete that there is no ambiguity or uncertainty as to their dimensions or appliances, or their use for lighting purposes, immediate or prospective. Therefore the rule relied on by appellant, announced in Southwest Paving Company v. Wilson, 57 Cal. App. 251, 255, 206 Pac. 776, to the effect that, where a material variance exists between the description of the work as set out in the resolution of intention and in the plans and specifications, the proceedings are thereby invalidated, does not apply in this case. The court found upon the evidence that the improvement provided for in the resolution will cost approximately $300,000, the lighting system portion thereof approximately $85,000, and that all of the posts are suitable, useful, and proposed to be used by the city as a part of the ornamental lighting system, and most of them susceptible for use in supporting trolley wires.

Notice of the adoption of the resolution and of the hour and place where objections to the proposed work might be made was given and published in compliance with the act, but none of the plaintiffs appeared or objected within the time limited or at all. Objections and protests were made by the owners of about 16 per cent. of the lands in the proposed assessment district, and after a hearing by the council the protests were overruled, and the council adopted a resolution ordering the work. The act of 1911 provides in section 6 that under such circumstances the decision of the council "shall be final and conclusive," and in section 7 that "immediately thereupon [upon overruling the protests] the city council shall be deemed to have acquired jurisdiction to order the proposed improvements." Section 82 of the act provides that the "act shall be liberally construed, to the end that its purposes may be effective. * * * The exclusive remedy of any person affected or aggrieved thereby [by any error, irregularity or informality or neglect or omission in any procedure under the act of any officer of the city] shall be by appeal to the city council as herein provided."

[4, 5] Under the act, the failure of owners of property proposed to be assessed to protest to the council within the time fixed therefor is fatal to an action by them to enjoin the council from ordering the improvement or entering into a contract therefor. They cannot raise an objection to the improvement, in the action, which was not previously made by them to the council. Blake v. City of Eureka, 201 Cal. 643, 258 P. 945, and cases therein cited; Noyes, III, v. Chambers (Cal. Sup.) 261 P. 1006. By their failure to protest they are deemed to have submitted themselves to the jurisdiction of the council in the determination of the necessity for the improvements. Swall v. County of Los Angeles, 42 Cal. App. 758, 765, 184 P. 406; Duncan v. Ramish, 142 Cal. 686, 691, 76 P. 661. These rules are subject to the following exceptions: Where the council has no power to do the work proposed (Harney v. Benson, 113 Cal. 314, 317, 45 P. 687); where there is fraud or collusion entering into the proceedings (People v. City of Los Angeles, 62 Cal. App. 781, 218 P. 63); and where the council was guilty of an abuse of discretion equivalent to fraud or failed to give the required notice of the improvement (Hanson v. Board of Trustees, 74 Cal. App. 588, 590, 241 P. 572.) Unless plaintiffs have shown that this case comes under one or more of the exceptions, their action is not well founded.

Appellant contends that the council was guilty of acts amounting to a fraud upon the owners of the lands in the assessment district, by their failure to specify that nearly all of the posts designated as posts for lighting purposes were in fact designed to be used also as trolley poles for the benefit of the Pacific Electric Railway Company, and some of them exclusively for the latter use.

[6-8] The evidence does not support this contention. It shows, in fact, that all the posts would be suitable for carrying the lighting equipment, and the council, as it had the right to do, declared that they were to be installed for that purpose, and their decision in the matter was final. Blake v. City of Eureka, supra. It is the exclusive province of the council to determine whether the improvement is of the character adaptable or needed for the purposes for which it is to be made. Harney v. Benson, Duncan v. Ramish, and Swall v. County of Los Angeles, supra. The fact that the posts may be taller and larger than necessary for lighting purposes, or may be suitable for and may be used as trolley poles by the company, or may incidentally benefit the company, cannot invalidate the proceedings, and the council is not deprived of its authority to proceed with the work by reason of any such condition or result. See Brown v. Board of Supervisors, 124 Cal. 274, 282, 57 P. 82.

If the trial court had held that the posts were somewhat taller and heavier than necessary for lighting purposes, the determination of the council as to the character of posts adopted, being within the discretion of the council, is final, in the absence of protest on the part of plaintiffs. It was held in Harney v. Benson, supra, that, where the board of supervisors of San Francisco adopted a resolution of intention for the construction of a sewer, it appeared that a small part of the work as designed had no outlet and at the time would be useless. The court said that it was the province of the board "to determine whether sewers are needed, and what districts will be benefited thereby. Upon these points their judgment is ordinarily final. And there may have been, in the judgment of the board, other reasons why this sewer should be thus constructed, although it would not be at once utilized. * * * The work was within the general power of the board, though to construct this sewer may have been an improvident use of the power." Also, our Supreme Court, in the case of Noyes, III, v. Chambers, supra, held that, even though some portion of the improvements appeared to be wholly useless, if proper notice was given under the act, and the property owners failed to object, they could not collaterally attack the proceedings.

Should the question of the use of the posts as trolley poles by the company arise in the future, the right to permit such use may be tested then. See Clark v. Los Angeles, 160 Cal. 30, 37, 116 P. 722. In fact, it has been held that, although an improvement may be used by a privately owned utility, it may be constructed under public improvement proceedings, and the use permitted upon proper terms and for proper compensation. Larsen v. San Francisco, 182 Cal. 1, 186 P. 757; Milheim v. Moffat Tunnel District, 262 U. S. 710, 43 S. Ct. 694, 67 L. Ed. 1194; County of Los Angeles v. Hunt, 198 Cal. 753, 247 P. 897.

In the Larsen Case it appeared that the board of supervisors of San Francisco adopted a resolution for the construction of a tunnel known as the "Twin Peaks tunnel," "*for public uses*," but did not specify the particular public uses to which it was to be devoted. In fact, it was constructed to be used by street car companies, or by the city and a street car company, by installing and operating street car lines through it for passenger service. The Supreme Court held that the uses were public uses, that the construction of the tunnel would be a benefit to the lands assessed, that the resolution was sufficient, and that the proceedings were valid.

In the Milheim Case it appeared that the Legislature of Colorado adopted an act to provide for the construction of the Moffat Tunnel through the Continental Divide, and for the creation of an improvement district to be assessed to pay its cost. The act declared that the tunnel should be constructed to provide an avenue of communication by transportation through the Continental Divide between the eastern and western portions of the state, and would promote the health, comfort, safety, convenience, and welfare of the people of the state. The contesting landowners claimed that the purposes of the act were not public, but were private, because the tunnel was to be so located as to be practically a part of the Moffat road, a privately owned common carrier railroad, to save the railroad from bankruptcy, and for the people of the state. The court announced that subway tunnels may be constructed by municipalities for lease to street railway and rapid transit lines for use as common carriers, and that for the construction of which the power of taxation may be exercised, and held that the proposed use by the railroad company was a public use, that the act was not in contravention of private rights, and, even if the act had specifically provided that the tunnel was designed to be leased to the company, a carrier of passengers and freights, it would be a public improvement for public use.

In this appeal the question whether the city may permit the company to make joint use of the poles is not before us. However, it fairly appears that, in proposing to install the larger posts, the council had in mind the elimination of the trolley poles now in use by the company, thus benefiting the district by preventing an unsightly duplication of poles on a beautiful avenue; but the main and primary use, as determined by the council and as found by the court, was for the lighting purposes.

[9] Appellant calls attention to the allegations of the amended complaint which were stricken out on motion of defendants, wherein plaintiffs alleged that on the day the resolution of intention was adopted the city commenced in the superior court an action against the Pacific Electric Railway Company and others to condemn two portions of the right of way of the company, and make the portions parts of and to widen Hermosa avenue, to be improved in connection with the avenue as it existed prior thereto; that there was filed with the complainant in that action the affidavit of the mayor of the city to the effect that those portions of the right of way were of the value of $49,100; that the court then made its order for the deposit of that sum in court, which was then done, and that an order was made for the immediate possession by the city of portions to be condemned; also that said deposit was made from moneys deposited with the city by the county of Los Angeles, out of funds derived by the county from automobile licenses, and other moneys received by virtue of the California Vehicle Act (St. 1923, p. 517, as amended by St. 1925, p. 398).

Appellant contends that the allegations were material and competent and asserts that the city is without authority to use such funds for paying for property condemned in such action. The order of the court striking out the allegations was proper, for the reason, among others, that, if the fund may not be so used, the city will be required to pay the value of the lands to be condemned out of other funds which may be legally expended for that purpose. Assuming, without holding, that the merits of that action might properly be determined in this suit, the contention does not go to the merits of that action.

[10] Appellant contends that there was a secret agreement between the council and the company for the erection of the posts for use as trolley poles, and in support of this contention refers to the fact that plaintiffs offered in evidence a resolution of the council, adopted before the resolution of intention was adopted, directing the city attorney to negotiate with the company to secure the needed portions of the company's right of way for widening Hermosa avenue, and, if not successful, to bring condemnation proceedings for acquiring the land; that they also offered in evidence another resolution of the council, adopted prior to the adoption of the resolution of intention, but after the adoption of resolution of instructions to the city attorney, reciting that the terms of a certain letter from the general manager of the company "be accepted, and the letter filed for the use of the city engineer and the city attorney in the condemnation proceedings now being started by the city"; and that plaintiffs offered in evidence the letter referred to, which letter mentions the proposed widening and improving of the two roadways of Hermosa avenue, and states that a member of the council and the city engineer requested for comparative purposes an estimate of costs involved if the width of the right of way is reduced, paving done for four blocks on the right of way, and easement given over same and over two additional crossings, paving done on ten crossings where easements exist, and laying girder rails on certain crossings, and specifying the net cost of the same at $49,010, after deducting certain credits, including $4,100 as contribution towards poles and $8,840 estimated cost of filling the right

of way with crushed rock; also proposing that, in return for the easements, the city and property owners are to protect the company from any assessment for the street improvement or street widening, except a nominal one of $1 for each parcel of right of way involved, the proposition to be subject to the approval of the board of directors of the company.

Defendants objected to the introduction of each of the resolutions and the letter, respectively, upon grounds that they were incompetent, irrelevant, and immaterial, were negotiations only, which did not ripen into a contract, related to the taking of the portions of the right of way of the company later involved in the action in condemnation, and were nothing upon which any right of action could be based. These objections were sustained, and appellant assigns the rulings as error. The rulings were correct. It is not shown that any contract of any sort, secret or open, was made between the council and the company. While the letter relates to matters in addition to the taking of portions of the right of way for street purposes, the resolutions adopted by the council relate only to acquiring the strips from the right of way, and the council, while resolving "that the terms of the letter be accepted" limited its action thereon to filing it "for use of the city engineer and city attorney in the condemnation proceedings now being started." Had any such contract been made as claimed by appellant, the "right of way deeds" referred to in the prior resolution should have been obtained as a result thereof, and the action in condemnation would have been a useless thing and an unnecessary expense. It is apparent that the council and the company failed to agree, and therefore the action in condemnation was commenced.

[11] One A. R. Holston, a member of the city council, was called as a witness by plaintiffs, and it was sought to interrogate him in relation to discussions between the members of the council prior to and about the time of the adoption of the resolution of intention, regarding an alleged plan to install combination lighting and trolley posts and in relation to an alleged form of contract between the council and the company. Counsel for plaintiffs stated to the court that plaintiffs proposed to show by the witness that the plan was to install posts that would serve as trolley poles, that the cost thereof should be assessed upon the district, that the majority of the council stated that, unless the contract was made with the company, the proceedings for the improvement would not go through, that he believed the witness would testify that the contract was signed by the company and delivered to the council for approval, and that the proposed contract provided that the company should be relieved from all assessment in the matter of the improvement, except a nominal assessment of $4.

By his questions asked the witness, counsel for plaintiffs indicated that he understood and expected the witness to testify that the proposed contract was not approved by the council but was referred to the city attorney. Plaintiffs' counsel produced what he stated was a copy of the proposed contract and had it marked for identification, but the copy is not shown in the record in this appeal. Defendants objected to each of the questions asked the witness in regard to the said matters sought to be shown by plaintiffs, on the grounds that they were incompetent, irrelevant, and immaterial, which objections were sustained; the court stating that there was no showing that any such conversations ripened into formal action by the council, or into any agreement or understanding whatever, but all that had been shown and was then being attempted to be shown was informal discussions and tentative propositions. Assuming, but not holding, that under the plea of fraud or concealment, made in the amended complaint, the trial court should have permitted the questions to be answered in order to give the fullest latitude to plaintiffs, there is no clear inference that the offered evidence, if admitted, would show any agreement, secret or open, made by the council with the company. In fact, as hereinbefore stated, the record induces the conclusion that no such agreement, or any agreement, with the company was made; the only facts attempted to be shown, which might tend to raise a suspicion that there was some understanding between the council and the company being that, in the action for condemnation, the affidavit of the mayor states, as the value of the two strips of right of way to be taken an amount the same as the letter of the manager of the company states is the net costs to the company occasioned by the improvement, when considered with the evidence that the lighting posts were to be suitable for trolley poles for use by the company. These matters are wholly insufficient to show any agreement in regard to the character of the posts or their joint use. Appellant's contentions above stated are without merit.

[12] Appellant also contends that the proceedings were invalid because of the facts that certain patented devices were specified to be used in installing the lighting equipment, and also patented materials were specified for use in doing the paving. It appears that the agreements for the use of the same and the prices thereof were on file in the office of the city clerk, for reference by the property owners and the bidders for the work in making their bids. In the case of Gualco v. City of Bakersfield (Cal. App.) 260 P. 308, and in the cases therein cited it was held that under such circumstances, where the right to require competitive bidding is preserved, such materials may properly be specified and used. See, also, Braun v. McGuire, 201 Cal. 134, 255 P. 808. We can see no rea-

son why patented devices for use in the lighting system may not likewise be specified and used.

[13, 14] Finally, after full presentation of plaintiffs' case, the trial court, upon the evidence adduced, found against plaintiffs' contentions upon every question raised, holding that the act of 1911 was substantially complied with by the council, and that the council did not exceed its powers. The judgment of the trial court of what is a substantial compliance with the statute in a street improvement proceeding is to be exercised in the first instance by the trial court. "If the case is one where a requirement of the statute has not been entirely disregarded, its determination of the question of substantial compliance ought to be controlling, in the absence of an abuse of discretion." Beck v. Ransome-Crummey Co., 42 Cal. App. 674, 682, 184 P. 431, 434; Standard Oil Co. v. United States, 222 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. The ruling of a trial court upon a motion for an injunction pending appeal in the action rests in the sound discretion of that court, and the ruling must be sustained on appeal from it, unless abuse of discretion is shown. We find no abuse of discretion on the part of the trial court.

The other points presented by appellant, which are not herein mentioned, are collateral to and connected with the questions herein decided, and we do not deem it necessary to give them further consideration.

The order denying plaintiff's motion for an injunction pending appeal and the judgment are affirmed.

We concur: CRAIG, Acting P. J.; THOMPSON, J.

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93 Cal. App. 725

ANDERSON et al. v. RINDGE CO. et al. (Civ. 6330.)

District Court of Appeal, First District, Division 2, California. Aug. 30, 1928.

1. Evidence 🔑213(2)—Statement in letter held mere recital of unsuccessful offer of compromise, and so inadmissible as admission against interest of value of services.

Statement of plaintiff's letter to person principally interested in defendant corporation, urging payment of fees for certain services, and reminding her of concessions made in other matters, in the hope of settlement, and in this connection saying, "We also offered to leave the matter of * * * claim (reduced by us to ——— in the hope of a satisfactory adjustment) till you could confer with us in that matter," *held* a mere recital of unsuccessful offer of compromise, and so inadmissible as admission against interest in action on the latter claim.

2. Attorney and client 🔑166(3)—Evidence 🔑553(3)—Amount received in settlement by client, under negotiations successfully concluded with attorneys' aid, held proper for jury's and expert's consideration on value of services.

The amount received in settlement by attorneys' client, under negotiations previously commenced and dropped before they were retained, but reopened and successfully concluded with their aid after they had moved to dismiss the proceeding to condemn client's property, is a proper matter for consideration of the jury in finding the value of their services and for an expert in giving his judgment of their value.

3. Attorney and client 🔑145—That part of work in preparing motion was done in another's office held not shown to be breach of attorneys' contract of employment.

Breach of contract of employment of plaintiff attorneys, suing for their fees, not claimed to have failed in attaining the ends for which they were employed, is not shown by fact that part of the work in preparation for their motion to dismiss proceeding for condemnation of their client's property was done by employees in the office of another attorney; the character of such employees' labors not appearing, and it being presumed that plaintiffs performed their contract.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by J. A. Anderson and another, partners as Anderson & Anderson, against the Rindge Company and another. From a judgment for plaintiffs against the named defendant, it appeals. Affirmed.

M. F. Mitchell, Richard Hartley, and W. J. Clark, all of Los Angeles, for appellant.

Anderson & Anderson, Edward F. Wehrle, Victor T. Watkins, and Nathan Newby, all of Los Angeles, for respondents.

STROTHER, Justice pro tem. This action was brought by plaintiffs, a firm of lawyers, to recover an attorney's fee alleged to be due for services rendered the defendant Rindge Company. The other defendant, Newby, also a lawyer, was so joined because he had an interest in the fee and refused to become a party plaintiff. The action was tried before a jury, which brought in a verdict for the amount of the demand.

The complaint is in two counts, one declaring upon a book account, the other upon a quantum meruit for the value of the services alleged to have been rendered at the instance of defendant. The answer of the Rindge Company is a specific denial of the allegations of the complaint. The answer of the defendant Newby admitted the allegations of the complaint. The defendant Rindge Company appeals from the judgment, and the record is brought before us in a bill of exceptions.

The evidence on behalf of plaintiffs gave a circumstantial account of the employment of the attorneys in certain litigation in which the Rindge Company was a party, and of the services rendered by them to that defendant.

The evidence on behalf of that defendant did not deny the fact of the employment or of the performance of any of the services claimed to have been rendered.

[1] A number of exceptions were taken by defendants to the rulings of the court on admissions of evidence. Only three points, however, are urged in support of the appeal. The defendant offered in evidence a letter written by plaintiffs to Mrs. May K. Rindge, who seems to be the party principally interested in the Rindge Company, urging payment of fees for services in matters wholly unconnected with the claim in suit here, but reminding her of concessions made in other matters, in the hope of settlement. The letter contains this clause in relation to the matter in issue here:

> "And we also offered to leave the matter of the Broadway opening claim (reduced by us to $1,500.00 in the hope of a satisfactory adjustment) until you could confer with us in that matter."

To this offer plaintiffs objected, and the court sustained the objection. The argument of appellant is that it was competent evidence as an admission against interest as to the value of the services. The statement in the letter was so patently a mere recital of an unsuccessful offer of compromise that it does not require argument, and it was clearly inadmissible in evidence.

[2] A part of the services rendered by the attorneys consisted in the preparation for making a motion in a suit brought by the city of Los Angeles against the Rindge Company and others to condemn a right of way for a street, and giving notice of the motion to dismiss the suit for condemnation on the ground that the damages awarded for the taking of the right of way had not been paid, though a year had elapsed after the award. The pressing of the motion to hearing was deferred by stipulation between the parties to that action, pending negotiations for a settlement which was concluded, whereby the Rindge Company received $50,000, in addition to the damages awarded. F. B. Scotton, office manager of the defendant company, called as a witness for defendant, testified that, "in commencing those negotiations, I was guided by Anderson & Anderson and Mr. Newby as one would be."

In the trial of this action, two attorneys were examined by plaintiffs, as experts, as to the value of the services performed. The action of the court complained of was permitting the inclusion in the hypothetical question asked these witnesses of a recital of the receipt of $50,000 as a result of their labors.

It appeared from evidence on both sides of the case that there had been negotiations for settlement between the parties to the condemnation suit which had been dropped before these plaintiffs were retained, and that the negotiations were reopened after the notice of motion by them, and successfully concluded with their aid. It follows that those facts were proper matters for the consideration of the jury in finding the value of the services, and of an expert in giving his judgment of their value.

[3] The last contention of appellant is almost too absurd for comment. The defendant Newby testified on cross-examination that part of the work done in preparation for the motion for dismissal was done by employees in his office, and it is claimed that this was a breach of the contract between plaintiffs and defendant which called for the personal knowledge and skill of plaintiffs. The character of the labors of the employees does not appear, and of course it will be presumed that the plaintiffs performed their contract. It is not suggested that they did not attain the ends for which they were employed.

For the reasons stated, the judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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93 Cal. App. 666

BRIGGS et al. v. JESS MEAD, Inc., et al.★
(Civ. 6264.)

District Court of Appeal, First District, Division 1, California. Aug. 27, 1928.

Rehearing Denied Sept. 26, 1928. Hearing Denied by Supreme Court Oct. 25, 1928.

1. Automobiles ⟹245(6, 72)—Automobile driver's negligence, in crossing sidewalk from street, and deceased pedestrian's contributory negligence, held, under evidence, questions for jury.

In action for death of pedestrian, struck by automobile which was being driven across sidewalk from street into open gateway at corner of lot, evidence of automobile driver's negligence and decedent's contributory negligence *held*, under evidence, questions of fact for jury.

2. Appeal and error ⟹989—Appellate court's review of jury's determination of fact questions is limited to ascertaining legal sufficiency of evidence to support determination.

In reviewing jury's determination of questions of fact, authority of appellate court is limited to ascertaining whether the evidence is legally sufficient to support such determination.

3. Automobiles ⟹244(1)—Finding that automobile dealer was jointly liable with its salesman for death of pedestrian, struck by automobile driven by prospective buyer, held warranted.

Where finance company, to which conditional sales contract was assigned, as legal owner seized automobile on conditional buyer's default, and turned it over to corporate conditional sell-

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★Rehearing denied. Hearing denied by Supreme Court.

er, which placed it in its used car lot for sale, and thereafter automobile, while being negligently operated by prospective buyer during demonstration by salesman, caused death of pedestrian, *held*, finding that conditional seller was jointly liable for accident with its salesman was warranted; salesman not being independent contractor.

4. Appeal and error 🔑1052(2)—Any error in permitting witnesses to testify that they were employed by defendant held harmless, where they testified to facts showing employment.

Even if preliminary statements made by automobile dealer's salesman in his testimony that he was "working for" dealer, and by manager of dealer's used car lot that he was "handling" a certain car for dealer, were erroneously admitted as stating conclusions of witnesses, such errors were not reversible, where statements were followed by testimony showing facts establishing such employment.

5. Trial 🔑296(3)—Any error in using article "the," instead of article "a," before words "proximate cause" in instruction, held harmless, in view of other instructions.

Any error in using article "the," instead of article "a," before the words "proximate cause" in instructions on contributory negligence in action for death of pedestrian, struck by automobile, *held* not prejudicial, where elsewhere in court's charge jury was fully and correctly instructed on doctrine of proximate cause in connection with contributory negligence.

6. Trial 🔑296(3)—Omitting element of proximate cause from instructions on contributory negligence held not reversible error, where other instructions covered matter.

Failure of certain instructions on contributory negligence to contain the element of proximate cause *held* not reversible error, where jury was elsewhere fully and fairly instructed on that branch of the case, since instructions must be read as a whole.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Action by Herbert F. Briggs and others against Jess Mead, Incorporated, Joseph T. Dendinger, and others. Judgment for plaintiffs, and the named defendants appeal. Affirmed.

Cooley & Gallagher, of San Francisco, for appellants.

W. E. Simpson and Walter Sorensen, both of Fresno, for respondents.

KNIGHT, J. On December 31, 1925, shortly after the noon hour, Mrs. Edna W. Briggs was walking along the sidewalk in front of a lot situate on the corner of Inyo and Fulton streets, Fresno, which was being operated as a sales place for used automobiles, when the defendant Lani, accompanied by the defendant Dendinger, attempted to drive an automobile across the sidewalk from the street into an open gateway at the corner of said lot, and in doing so struck Mrs. Briggs, inflicting injuries of an internal character, from which she died the same day. This action was subsequently commenced by her surviving husband and three children to recover damages resulting from her death. Upon trial a jury awarded a verdict in their favor, and from the judgment entered thereon the defendants Jess Mead, Incorporated, and Dendinger have appealed, urging as grounds for reversal that the evidence is insufficient to sustain the verdict, and that the trial court erred in ruling upon the admissibility of evidence and in instructing the jury.

[1] The first point made against the sufficiency of the evidence relates to the issues of the negligent operation of the automobile and the contributory negligence of the deceased. The circumstances attending the accident, briefly stated, were as follows: The lot where the accident occurred is situate on the southwest corner of the said streets, and was inclosed by chains; the gateway thereto being located directly across the corner thereof and being marked by posts on each side which stood 13 feet apart. Dendinger was a salesman connected with said lot, and had taken Lani, a prospective buyer, out in the automobile in question, a Maxwell touring car, for a demonstration, and before returning to the lot requested Lani to drive, which the latter was doing when the accident occurred. As they approached the lot they drove up the easterly side of Fulton street in a northerly direction, beyond the center of its intersection with Inyo street, which runs nearly at right angles with Fulton, and then made a left half circle turn in Fulton street, and proceeded southerly in the opposite direction down the westerly side of Fulton street, across the intersection, until they reached the corner of the sidewalk, and then they turned slightly to the right to enter the gateway. Mrs. Briggs was walking southerly down Fulton street on the same side as said lot. She had crossed the intersection of Inyo street, and had reached a point about opposite the southerly gatepost on Fulton street, when Lani approached from the rear and sounded his horn. At that time the automobile was in the street, at the corner opposite the gateway, about 3 or 4 feet from the street curb, and was headed diagonally into the lot. It was also 25 feet distant from Mrs. Briggs, and traveling between 2 and 3 miles an hour. Upon hearing the horn, Mrs. Briggs turned around suddenly and, evidently believing that the automobile was coming down the sidewalk toward her, screamed and ran around the post into the gateway of the lot. Lani saw that she was confused, and the evidence shows beyond question that at that time he could have easily applied the brakes and stopped the car; but either because of excitement and lack of control of the car, or believing that Mrs. Briggs would get out of the way, or that he would be able to steer the car so as to avoid striking her, he took no measures to stop the car. Instead he continued to drive forward at the same rate of speed, with the

result that she tried to dodge the automobile, and in doing so was struck and thrown against the post, causing the injuries from which she died.

[2] In view of the situation above described, a question of pure fact was presented for the jury to decide as to whether Mrs. Briggs' death, if resulting from negligence, was proximately caused by the negligent operation of the automobile, or a failure on her part to exercise ordinary care for her own safety, and, both of these issues having been determined against appellants' contention, our authority on appeal is limited to an ascertainment of whether the evidence is legally sufficient to support such determination. We are of the opinion that it is. As said in Raymond v. Hill, 168 Cal. 473, 143 P. 743:

> "* * * No person who has ever ridden in or driven an automobile can be unaware of one fact, and that is that pedestrians, and women particularly, are liable to sudden panic upon the unexpected approach of this terrifying machine. In the exercise of 'every reasonable precaution' which the law enjoins, it is well within the spirit of the law to say that the driver of an automobile, approaching pedestrians, and particularly women, must have his car under such control as that it may be promptly stopped. The sounding of the horn and the noise occasioned by the muffler cut-out are each and both well enough in their way, but they do not embrace and conclude all of the duties of the driver of the automobile."

In the present case the evidence is without conflict that Mrs. Briggs was proceeding along the sidewalk, in which position she had the right to believe she would be safe from the approach of automobiles, and that when she heard the horn and saw the automobile apparently coming toward her she became terrified and confused, and sought safety in the gateway of the lot. Lani, while testifying, admitted that he saw that she was confused, and it is manifest that he could have easily avoided any further danger by simply applying his brakes and stopping the car, because at that time he was 20 or more feet distant from her and was traveling less than 3 miles an hour. Therefore the fact that he did not stop justifies the conclusion reached by the jury that he did not exercise ordinary care. The facts of the present case differ materially from those of Depons v. Ariss, 182 Cal. 485, 188 P. 797, which has been cited by appellant, for in the latter case the deceased was in the street and negligently exposed himself to danger by stepping suddenly into the pathway of the approaching truck; and, unlike the present case, the driver there immediately upon seeing the danger shut off his engine, applied the brakes, and, as the opinion therein states, "used every proper care and precaution to avoid injuring" the deceased. The other case appellant cites (Wall v. Merkert, 166 App. Div. 608, 152 N. Y. S. 293) is no closer to the point at issue than is Depons v. Ariss, supra, for the reason that there, too, the injured party was in the street and stepped suddenly in front of the automobile, giving the driver thereof not the slightest opportunity to stop his machine or otherwise avert the collision.

[3] The second point urged as to the insufficiency of the evidence relates to the question of the legal liability of appellants Jess Mead, Incorporated, and Dendinger; it being contended that neither was sufficiently connected with the ownership of the automobile, or its operation by Lani, to hold either of them responsible for his acts. The evidence bearing upon the question of the ownership of the car was in substance as follows:

Jess Mead, Incorporated, was the sales agent in Fresno for the Chrysler and Maxwell automobiles; and it was also engaged in the business of selling used cars taken in as part payment for new ones. On July 6, 1925, it sold the Maxwell car involved here, under the usual form of a conditional sales contract, to one Wainscoat; title being reserved in Jess Mead, Incorporated, until all deferred payments were made.

Thereupon the sales contract was assigned to the Pacific Finance Corporation, under a form of assignment whereby Jess Mead, Incorporated, guaranteed to its assignee the—

> "fulfillment of said contract [by the purchaser] according to its terms, and the payment of all moneys due and to become due thereunder, and all costs, including reasonable attorney's fees incurred in collecting the money or attempting the collection thereof, or the enforcement of any right, under said contract, or under this guaranty, * * * and further agree that should the assignee take possession of said property, for failure of the purchaser to perform any of the conditions of said contract, to at once pay to the assignee, the balance owing by the purchaser under the terms of said contract, upon the conveyance of said property to ——, or —— agreed that the assignee may sell the said property without notice of any kind, for such price as it can secure for the same, and in the event that said property does not sell for enough to pay any deficiency. * * *"

The certificate issued by the state motor vehicle department designated the Finance Company as the "legal owner" and Wainscoat as "registered owner," and the so-called "pink" certificate issued by said department was delivered to and held by the Finance Company. Some time prior to November, 1925, Wainscoat defaulted in his payments and otherwise violated the conditions of the sales contract, so that early in November, 1925, the Finance Company, exercising its rights under the contract, repossessed the car, which was immediately redelivered, according to the testimony of its manager, to Jess Mead, Incorporated, at its lot on the corner of Inyo and Fulton streets. At the same time the Finance Company notified Jess Mead, Incorporated, in writing, that it had repossessed said car and delivered the same to the lot above mentioned, and that "repossession figures" would be furnished as soon as the same were received from San Francisco, and subsequently two demands in writing were made by the Finance Company upon Jess Mead, Incorporated, for the balance of the purchase price due under the sales contract. The car remained on said lot until the date of the accident, and thereafter until April, 1926, at which time Jess Mead Incorporated, secured a purchaser therefor, who was sent by the latter's office manager to the Finance Company to pay the balance due on the contract and obtain the "pink" certificate properly indorsed.

The evidence further shows that, upon being notified by the Finance Company of the repossession of said car and the delivery of the same to said lot, Jess Mead, Incorporated, in accordance with its usual custom, made out at its head office a "car receipt" record in duplicate, describing the car and setting forth further information with reference thereto, one of which was kept at its head office and the other sent to the office at the lot, and placed in a loose-leaf binder known as the "Used Car Book," by Fred Deutch, the manager of said lot. This book constituted the sole record of used cars placed on said lot by Jess Mead, Incorporated, and it included also the records of other used cars delivered to Deutch by other parties for the purpose of sale. Said book was produced in court by Deutch, but it appears that the record pertaining to the car involved in this accident was missing therefrom. Deutch stated that he had not removed it, nor did he know what had become of it; that he discovered only the day before he testified that it had been extracted from the book. The records mentioned consisted of printed forms, with appropriated spaces for filling in the necessary data, and were entitled, "Car Receipt Records, Jess Mead, Inc., Fresno."

Regarding the legal relationship of the parties charged with responsibility for the accident the evidence was as follows:

Some time in 1924 Dendinger applied to Jess Mead for a position to sell its used cars, and was informed that Jess Mead, Incorporated, maintained no separate used car salesrooms, but Mead told Dendinger he would see what could be done. A few days later Mead phoned Dendinger that he had rented the Black building in Fresno as a salesroom for used cars, and the next day Dendinger was given employment. The keys to the place were delivered to him, and his duties consisted of opening up the place in the morning and locking it up at night, and demonstrating and selling the used cars, and for his services he was paid a commission of 5 per cent. on whatever sales he made.

During this time Fred Deutch was operating the lot in question for the sale of used cars under the name of "C & D Sales Company," a sign bearing this inscription being maintained over the gateway to the lot, and about the 1st of July, 1925, Jess Mead, Incorporated, discontinued its salesrooms in the Black building and made arrangement with Deutch for the sale of its used cars at this lot. In furtherance of this arrangement, Jess Mead, Incorporated, assumed and afterwards paid the rental of the corner lot in question, and paid Deutch a salary of $200 a month and commission to handle the sale of its used cars. It also replaced the "C & D Sales Company" sign over the gateway with one reading: "Jess Mead, Incorporated, Used Car Lot. Fred Deutch, Manager." All expenses for repairs to the cars were paid, and all gasoline and oil consumed in the demonstration thereof were furnished, by Jess Mead, Incorporated. Additional ground space adjacent to the corner lot was rented independently by Deutch and operated by him for the sale of used cars placed with him by other parties, and with which Jess Mead, Incorporated, had nothing to do. When the salesrooms in the Black building were discontinued, Dendinger was informed of the arrangement with Deutch, and was told to apply to Deutch for further employment, which he did, and was hired under the same conditions as prevailed at the Black building. He was given the keys to the lot, and was obliged to close it at night, by placing and locking a chain across the gateway, and open up in the morning. It was his duty, also, to demonstrate and sell the used cars, and in doing so he was permitted and expected to let the prospective buyers drive the cars. For the services thus rendered he was paid the same compensation as before, a commission of 5 per cent. on all sales made by him, and he was allowed, also, to demonstrate and sell other used cars which Deutch handled for other parties.

The effect of the foregoing evidence is that, when Wainscoat violated his contract of purchase, the automobile in question was seized by the Finance Company as legal owner thereof, and that thereupon, exercising its rights under the contract of assignment, it turned the same over to Jess Mead, Incorporated, and served the latter with notice to pay the balance due on the contract. Jess Mead, Incorporated, therefore, to all intents and purposes succeeded to all of the rights and liabilities of Wainscoat as equitable owner of said automobile, and its status remained such until it finally effected a sale of the automobile in April, 1926. In the meantime, being in possession of the automobile, it placed the same on sale at its lot, with its used car sales manager, Deutch, who was given full authority to allow demonstrations to be made thereof for the purposes of sale, and while the automobile was being demonstrated under those conditions it was negligently operated, and became the direct cause of the accident which resulted in the death of Mrs. Briggs. Therefore, under such circumstances, we are of the opinion that the jury was warranted in finding that Jess Mead, Incorporated, was liable jointly for the accident with Dendinger, who was in direct charge of the automobile at the time it was negligently driven. In its facts the present case is almost identical with Wooding v. Thom, 148 App. Div. 21, 132 N. Y. S. 50, which was cited approvingly in Easton v. United Trade School Con. Co., 173 Cal. 201, 159 P. 597, L. R. A. 1917A, 394, and in our opinion is subject to the reasoning set forth therein, and must be controlled by the legal principles there stated.

In support of its contention that Jess Mead, Incorporated, was not liable, appellants rely mainly upon the case of Barton v. Studebaker Corporation, 46 Cal. App. 707, 189 P. 1025; but we think that case is to be differentiated from the one before us upon the following grounds: There a salesman named Owens, whose business was merely that of seeking and finding and procuring purchasers for said corporation, was driving a prospective buyer named Mrs. Barton to the salesrooms of said corporation for the purpose of allowing her to examine the cars on display there, and while on the way there collided with another automobile, and Mrs. Barton was injured. The automobile which Owens was driving at the time was his property, which he maintained and operated at his own expense; and regarding the nature of his employment the evidence shows that he was at liberty to go and come where and when he pleased, and to exercise his own judgment as to the parties with whom he dealt and the manner and means to be employed in the accomplishment of his work. Here Dendinger had the keys to the sales lot and apparently had regular hours of employment, for he was "supposed to" and did open the place of business at 8 o'clock in the morning and closed it at 6 o'clock at night; and it was his duty, also, in addition to that of soliciting business, to demonstrate to prospective buyers the various cars owned by Jess Mead, Incorporated, and at the time the accident occurred he was actually engaged in the pursuit of those duties, and the car of which he then had control belonged to and was being maintained by Jess Mead, Incorporated. Therefore, in our opinion, his status did not fall within the class of an independent contractor (Curran v. Anthony, 77 Cal. App. 462, 247 P. 236).

[4] Appellants assign as error the rulings of the trial court, made over appellants' objection, allowing Dendinger to testify that he was "employed" by Jess Mead, Incorporated, and in permitting Deutch to testify that he was "handling" the Maxwell car in question for Jess Mead, Incorporated, citing Winslow v. Glendale Light & Power Co., 164 Cal. 688, 130 P. 427. The case mentioned holds in effect that, when the question of employment is the issue in the case, a witness should not be permitted to testify to his conclusion that he "was working for" the defendant, but that his testimony should be limited "to a statement of the person by whom he was employed, the nature, terms, and surrounding circumstances of his employment," which was substantially all that Dendinger testified to here, his preliminary answer, to the effect that he was "employed" by Jess Mead, Incorporated, being followed and supported by much more testimony showing the nature, terms and surrounding circumstances of such employment, and as to Deutch's testimony, his preliminary statement that he was "handling" the Maxwell car for Jess Mead, Incorporated, was also followed and supported by much more testimony, showing how, when, where, and under what circumstances said car was delivered to him, and as to the facts surrounding his employment and the nature thereof. Therefore, aside from any conclusions of the witnesses, the evidence in the present case is sufficient to establish the facts that Dendinger was employed by, and that Deutch was handling the automobile for, Jess Mead, Incorporated. That being so, there is no ground for reversal, even though it be assumed that the two preliminary statements of the witnesses to which appellants object were erroneously admitted. Winslow v. Glendale Light & Power Co., supra.

[5, 6] Nor do we find any merit in appellants' objections to the instructions. In two or three of them, wherein the court stated to the jury the affirmative allegations of the answers regarding contributory negligence, the article "the" was used, instead of the article "a," before the words "proximate cause"; but elsewhere in the court's charge the jury was fully and correctly instructed upon the doctrine of proximate cause in connection with contributory negligence, and therefore the error complained of, if any, was not prejudicial. Squier v. Davis Standard Bread Co., 181 Cal. 533, 185 P. 391.

The several instructions bearing upon the matter of fright were doubtless founded upon the law as declared in the case of Raymond v. Hill, supra, and bearing in mind that the negligence here did not consist in sounding the horn, but in negligently operating the automobile after the horn was sounded, we are convinced that the instructions complained of correctly stated the legal principles pertaining to the particular facts of this case. And regarding those instructions which appellants object to upon the ground that they omitted the element of proximate cause, it is sufficient to say that elsewhere the jury was fully and fairly instructed upon that branch of the case, and—

"No citation of authority is needed to the point that these instructions must be read as a whole and that each instruction need not be complete in itself. Thus, where the expression 'through the negligence of the defendants' is used, it is not necessary to repeat in every paragraph of the instructions that such negligence must be 'the proximate cause of the injury sustained.'" Aubel v. Sosso, 72 Cal. App. 57, 236 P. 319.

The remaining assignments of error are not sufficiently important to require discussion.

The judgment is affirmed.

We concur: TYLER, P. J.; CAMPBELL, Justice pro tem.

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93 Cal. App. 728

HANSEN v. CITY OF SANTA ROSA.★
(Civ. 3430.)

District Court of Appeal, Third District, California. Aug. 31, 1928.

Rehearing Denied Sept. 29, 1928. Hearing Denied by Supreme Court Oct. 29, 1928.

1. Municipal corporations ⇐293(2)—Jurisdiction over street improvement proceedings is acquired by resolution of intention, and is limited to improvements described therein.

In all street proceedings under Street Improvement Act, jurisdiction is acquired by resolution of intention and only to make such improvements as are described therein, and other work not described cannot be lawfully performed.

2. Municipal corporations ⇐304(2)—Portions of work already constructed to official line and grade may be excepted from street improvements (Street Improvement Act 1911, § 3; St. 1885, p. 147, § 7, subd. 13).

Under Street Improvement Act 1911, § 3 (St. 1911, p. 730), and St. 1885, p. 147, § 7, subd. 13, exception from all work described in street improvement of such portions as are already constructed to official line and grade may lawfully be made.

3. Municipal corporations ⇐304(4)—Resolution for street improvement covering two blocks, excepting portions already constructed to official line and grade, held not uncertain as to work to be done and excepted.

Resolution of intention to order street improvement, describing property as covering two blocks and excepting from described work all portions already constructed to official line and grade, *held* not uncertain as to work to be done or that to be excepted.

4. Municipal corporations ⇐304(2)—Work to be excepted from street improvement must be of same character as proposed and done to official line and grade.

Before any work can be excepted from street improvement, it must be of same character as that proposed, and must be done to official line and grade.

5. Municipal corporations ⇐303(2)—Resolution stating manner of performing street improvement, if to same effect as ordinance authorizing improvement, is sufficient.

Resolution reciting manner of performing street improvement is sufficient, if to same effect as things stated in ordinance providing for street improvement, though not reciting exact language.

6. Municipal corporations ⇐304(14)—Resolution for street improvement, reciting public interest requires day labor pursuant to ordinance, held sufficient compliance with ordinance reciting work may be more satisfactorily performed by day labor.

Resolution providing manner of performing street improvement, reciting that public interest and convenience requires work described to be done by day labor, and providing that work shall be done pursuant to provisions of ordinance, referred to by number, *held* sufficient compliance with ordinance reciting that work may be more satisfactorily performed by day labor.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Henry D. Hansen against the City of Santa Rosa. Judgment for defendant, and plaintiff appeals. Affirmed.

C. W. Anderson and F. W. McConnell, both of Santa Rosa, for appellant.

J. P. Berry, of Santa Rosa, for respondent.

HUGHES, Justice pro tem. This is an action to quiet title against a street assessment levied by the defendant. Judgment for defendant, and plaintiff appeals.

Appellant's land is situated on Beaver street in the city of Santa Rosa. The street improvement to be made was on Beaver street, from the northerly property line of Howard street to the southerly property line of Spencer avenue. On August 21, 1923, respondent passed its resolution ordering the preparation of plans and specifications for the improvement of Beaver street. Pursuant thereto, specifications and a plan in detail of the work to be done were prepared. The specifications provided that the work to be done was the same as shown on the plan. On September 4, 1923, respondent passed its resolution adopting said plans and specifications, and on September 18, 1923, said respondent passed its resolution of intention. Notices of improvement, incorporating the resolution of intention, were posted, and on October 23, 1923, the respondent passed resolution No. 612, ordering the work described in the resolution, directing the clerk to post notice of said work, directing said clerk to publish a notice inviting sealed proposals or bids, and directing that such bids be delivered to the clerk on or before 8 p. m. on the 6th day of November, 1923. The clerk published said notice inviting sealed proposals, and on the 6th day of November, 1923, the city council of respondent opened and examined said proposals or bids for doing said work. Only one was received, and that was rejected, because it was not accompanied by a check for 10 per cent. of the amount of the bid, as required by

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★Rehearing denied. Hearing denied by Supreme Court.

the notice. Thereupon, on the 6th day of November, 1923, said council passed resolution No. 625, whereby said council rejected all proposals or bids, and further resolved:

> "That the public interest and convenience require the work hereinabove described, and the council of the city of Santa Rosa hereby orders that the work and improvement hereinabove described be done and performed in the name of and by the city of Santa Rosa, pursuant to the provisions of Ordinance No. 395 of the said city of Santa Rosa."

Ordinance No. 395 was passed and adopted by the city council of the city of Santa Rosa on September 4, 1923, and was thereafter duly published. After the adoption of said resolution No. 625, the respondent city paved Beaver street from the southerly property line of Mason street to the southerly property line of Spencer avenue. Upon said work being done, the assessment was levied.

While the resolution of intention called for the improvement of two blocks on Beaver street, as a matter of fact only one block was improved; respondent city contending that the other block had already been improved in all respects under the requirements of said resolution of intention and plans and specifications.

Appellant contends that the judgment should be reversed for the following reasons:

(1) Respondent never acquired jurisdiction to do the work actually done, because the work which was done was less in extent by one full block, and hence substantially different than the improvement described in the plans and specifications, resolution of intention, and notice inviting sealed proposals or bids.

(2) Respondent never acquired jurisdiction to do the work under Ordinance No. 395, because the city council failed to comply with the provisions of section 2 of said ordinance, in the following particulars, to wit: (a) It failed to follow the provisions of the general laws of the state of California in conducting the proceedings up to and including the posting and publication of the notice inviting sealed proposals or bids, as therein provided; and (b) upon rejection of bids, and prior to the doing of the work, it failed to adopt a resolution "that in its opinion the work in question may be more satisfactorily performed by day labor, or the material or supplies purchased at a lower price in the open market."

[1] It is unquestionably the rule that, in all street proceedings under any street improvement act of this state, it is by the resolution of intention that jurisdiction is acquired, and only then to make such improvements as are described therein, and that other work not described therein cannot be lawfully performed. Kutchin v. Engelbret, 129 Cal. 635, 62 P. 214; Partridge v. Lucas, 99 Cal. 519, 33 P. 1082; Piedmont Paving Co. v. Allman, 136 Cal. 88, 68 P. 493; Stockton v. Whitmore, 50 Cal. 554.

The resolution of intention is as follows:

> "Resolved, that it is the intention of the council of the city of Santa Rosa, to order the following work to be done and improvement to be made in said city, to wit:
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> "That the portion of Beaver street from the northerly property line of Howard street continuously to the southerly property line of Spencer avenue be improved as follows, to wit: By grading where necessary, by excavating or filling to the official or established grade, and by paving same with six (6) inches of water-bound macadam, and by constructing concrete curb and gutter combined on each side of street where not now constructed, and where and as specified in the said plan of said work, excepting, however, from all of the above-described work, such portions as are now constructed to the official line and grade. All the aforesaid work and improvement is to be done in accordance with the plans and specifications made therefor by the city engineer of said city of Santa Rosa, and adopted by resolution No. 598, adopting plans and specifications, passed and adopted by the council on the 4th day of September, 1923, which plans and specifications are now on file in the office of the city clerk of the said city of Santa Rosa, and are hereby referred to and made a part hereof.
>
> "And it is further resolved that, where concrete curb and gutter combined has already been constructed on the street hereinabove described, and where such curb and gutter does not conform to the official grade heretofore established, and is shown on the plan for said work as concrete curb and gutter to be removed, same shall be removed and replaced on proper grade at the expense of the city of Santa Rosa; and said council hereby orders that the cost of such removal and replacement of concrete curb and gutter be paid out of the treasury of said city, and the superintendent of streets, in making up the assessment herein provided for the cost and expense of said work, shall first deduct from the whole cost and expense such part thereof as is hereby ordered to be paid out of the municipal treasury as aforesaid. * * * All the above-proposed work shall be done in pursuance of Ordinance 395, entitled: 'An ordinance to provide for work to be done in the city of Santa Rosa upon streets, avenues, lanes, alleys, courts, places and sidewalks within said city, when bids therefor are rejected by the city council, and providing for the apportionment, assessment and collection of the cost of such work.'"

[2] The improvements referred to and described cover two blocks; but it will be observed that there is excepted "from all of the above-described work such portions as are now constructed to the official line and grade." A like exception is set out in the resolution ordering the plans, adopting the same, ordering the work, and inviting sealed proposals. Such exceptions can be lawfully made. The statutes themselves provide for them. The Street Improvement Act of 1911, § 3 (Stats. 1911, p. 730). Likewise, similar pro-

visions are to be found in the Vrooman Act (Stats. 1885, p. 147, § 7, subd. 13).

[3, 4] The resolution is not uncertain as to the work to be done or that to be excepted. Before any work can be excepted, it must, of course, be of the same character as that proposed, and must be "done to the official line and grade"; and such are the facts of this case. Barber Asphalt Paving Co. v. Crist, 21 Cal. App. 1, 130 P. 435.

Assessments for street improvements in which the work has been similarly described have been often sustained by the courts. McDonald v. Conniff, 99 Cal. 386, 34 P. 71; Perine v. Erzgraber, [illegible]2 Cal. 234, 36 P. 585; Williams v. Bergin, 116 Cal. 56, 47 P. 877; Powers v. Holmes, 55 Cal. App. 454, 203 P. 1023.

We therefore conclude that there is no variance between the work done and that described in the plans and specifications, resolution of intention, and notice inviting sealed proposals or bids.

We will next consider appellant's contention that respondent never acquired jurisdiction to do the work under Ordinance 395, because the city council failed to comply with the provisions of section 2 of said ordinance. Section 2 of said ordinance, in so far as it is pertinent to the subject under investigation, reads as follows:

> "All proceedings for the doing of any of the work hereinabove specified in section 1 of this ordinance, up to and including the posting and publication of the notice inviting sealed proposals or bids for doing such work, shall be done under and pursuant to the provisions of the general laws of the state of California. * * * The city council may reject any and all bids presented for the doing of said work, and, after rejecting bids, may declare and determine, by a four-fifths vote of all of its members that, in its opinion, the work in question may be more satisfactorily performed by day labor or the materials or supplies purchased at a lower price in the open market, and after the adoption of a resolution to this effect, the council shall have the right and jurisdiction to have such work done and performed in the name of and by the city, and to pay therefor out of the proper funds of the city, and the city shall have a lien upon all property fronting upon said street or streets, sidewalk or alleys where the said work shall be done, and the same shall be apportioned and assessed as hereinafter provided."

After the rejection of bids, the board passed its resolution No. 625, which, in so far as it is applicable, provides as follows:

> "And it is further resolved that the public interest and convenience require the work hereinabove described, and the council of the city of Santa Rosa hereby orders that the work and improvements herein described be done and performed in the name of and by the city of Santa Rosa, pursuant to the provisions of Ordinance No. 395 of said city of Santa Rosa."

This was done by a four-fifths vote, but exception is taken to the wording of the resolution, because it does not embrace the language used in section 2 of Ordinance 395. It is true that the language is not identical. In the ordinance it is expressed as follows:

> "That in its opinion the work in question may be more satisfactorily performed by day labor or the materials or supplies purchased at a lower price in the open market and after the adoption of a resolution to this effect."

[5] The ordinance does not provide that such a resolution shall recite the exact language used, but it is sufficient if the resolution is to the effect of the things stated in the ordinance.

[6] The resolution states "that the public interest and convenience require the work hereinabove described be done by day labor," and this to our minds is, in substance and effect, the very thing required by the ordinance itself. Any other view, it seems to us, would be hypercritical.

In addition, the resolution is strengthened by reference to Ordinance 395, in that it provides that the work shall be done pursuant to its provisions. The language so used in the resolution, together with its reference to the ordinance, is sufficient.

It seems that there has been a compliance with all the statutory requirements.

The judgment is affirmed.

I concur: PLUMMER, J.

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CITY OF STOCKTON v. FRISBIE & LATTA et al. (Civ. 3496.)★

District Court of Appeal, Third District, California. July 27, 1928.

Hearing Denied by Supreme Court Sept. 24, 1928.

1. Municipal corporations 🔑645—Failure of zoning ordinance to provide penalty for violation does not prevent its enforcement through appropriate civil remedy.

Fact that zoning ordinance does not declare violation of its terms shall constitute a crime, and does not provide any penalty for violation, does not render the ordinance illegal, or prevent its enforcement through an appropriate civil remedy.

2. Evidence 🔑43(1)—Matters outside record are not subject of judicial notice.

Court cannot take notice of any matter outside the record.

3. Injunction 🔑89—Zoning ordinance, which failed to provide penalty for violation, held enforceable by injunction in suit by city against persons violating ordinance (Stockton City Charter, art. 3, § 16; Const. art. 11, § 11).

Zoning ordinance adopted under Stockton City Charter, art. 3, § 16, approved by Leg-

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★Hearing denied by Supreme Court.

islature in St. 1923, p. 1321 et seq., which fails to provide penalty for violation of ordinance, *held* enforceable by injunction, under Const. art. 11, § 11, permitting city to enforce police regulations, in suit by city against persons using building in residence district for undertaking parlors; city having right to interfere in behalf of its citizens, irrespective of claim that it had no pecuniary interest.

4. Municipal corporations ⚷1017—Municipal corporation may in certain instances invoke appropriate civil remedy to coerce obedience to its police regulations (Const. art. 11, § 11).

Municipal corporation, county, or township may in certain instances by direct action on its part invoke appropriate civil remedy to coerce obedience to its ordinances, adopted in exercise of its police power, under Const. art. 11, § 11.

5. Injunction ⚷89—City may enforce police regulations by injunction, where personal welfare and property rights of large number of inhabitants would be detrimentally affected by violation of ordinance (Const. art. 11, § 11).

Where personal welfare and property rights of a large number of the inhabitants of a city or town will be detrimentally affected by violation of police or sanitary regulation, city may have writ of injunction to restrain the violation, or to cause the wrongful effect to be removed, whether ordinance provides other means of enforcement or not, under Const. art. 11, § 11, providing for city's enforcement of police regulations.

6. Municipal corporations ⚷601—Enactment of zoning ordinance is within city's police power.

Cities may, in exercise of police power, adopt and pass ordinances restricting certain districts exclusively to residential uses, and other districts to business and industrial uses.

7. Constitutional law ⚷48—Municipal corporations ⚷120—Statute or ordinance, which, if enforceable, will promote public welfare, should, if possible, be construed in harmony with constitutional requirements.

Where statute or ordinance under attack on constitutional grounds would, if enforceable, promote public welfare, court should interpret it in harmony with constitutional requirements, if possible.

8. Constitutional law ⚷63(2)—Municipal corporations ⚷601 — Provision in zoning ordinance permitting erection of business buildings in residence district, if three-fourths of adjacent landowners consent and council so orders, after public hearing, held not void, as delegating legislative power (Stockton City Charter, art. 3, § 16).

Provision of zoning ordinance adopted under Stockton City Charter, art. 3, § 16, and approved under St. 1923, p. 1321 et seq., permitting issuance of permit for erection of business buildings in residence district, if three-fourths of adjacent landowners consent and city council shall so order, after public hearing, *held* not invalid, as delegating legislative power to property owners within residence district, since ordinance requires that ultimate decision, whether exception to operation of zoning ordinance shall be allowed, rests in council's discretion.

9. Municipal corporations ⚷591—City's reservation of discretionary power in dealing with police regulations does not deprive persons affected of constitutional guaranties.

City's reservation to itself of discretionary power in its governing boards in dealing with police regulations does not have effect of depriving persons affected thereby of guaranties of federal or state Constitution.

10. Municipal corporations ⚷122(2)—There is no presumption that discretion vested in city to make exceptions to operation of police ordinance will be arbitrarily exercised.

There is no presumption that power or discretion vested in board of city to make exceptions to police ordinance will be arbitrarily exercised, but in case such abuse is shown courts will interfere to protect persons discriminated against.

11. Municipal corporations ⚷111(4)—Provision in zoning ordinance, permitting erection of business establishments in residence district with consent of property owners and city council, if invalid, did not render entire ordinance void.

If section of zoning ordinance permitting erection of business buildings in residence district with consent of three-fourths of property owners and permission of city council was invalid, its invalidity did not render ordinance as a whole void, since section was separable and severable from prohibitory provisions of ordinance.

12. Statutes ⚷64(1)—Inclusion of subsidiary unconstitutional provision will not render entire act void, if different parts are severable and legislative purpose can be made effective.

If different parts of act are severable and independent of each other, and manifest purpose of Legislature can be made effective by upholding provisions within its constitutional power, the entire act will not be defeated by the inclusion of a subsidiary unconstitutional provision.

13. Municipal corporations ⚷601—Zoning ordinance, creating separate residence and business districts, held within city's authority under statute (Stockton City Charter, art. 3, § 16; St. 1917, p. 1419).

Ordinance providing for division of city into separate districts for residences and for business and industrial establishments, enacted under Stockton City Charter, art. 3, § 16, approved by Legislature in St. 1923, p. 1321 et seq., *held* not void for failure to conform to provision of St. 1917, p. 1419, authorizing legislative body of any city to divide it into districts, for purpose of regulating uses of real property therein.

14. Injunction ⚷118(1)—City, suing to enjoin violation of zoning ordinance, was not required to plead compliance with jurisdictional prerequisites to adoption thereof, irregularities in passage of measure being matters of defense (Stockton City Charter, art. 3, § 16; St. 1917, p. 1419, § 4; Code Civ. Proc. § 459).

In city's suit to enjoin maintenance of undertaking establishment in residence district in violation of zoning ordinance passed under Stockton City Charter, art. 3, § 16, approved by Legislature in St. 1923, p. 1321 et seq., failure of complaint to affirmatively show that city commission took steps required by St. 1917, p. 1419, § 4, as jurisdictional prerequisites to adoption of zoning ordinance, *held* not to prevent recovery, where complaint stated substance of ordinance, time of its passage, and that it was duly passed, under Code Civ. Proc. § 459; irregularities in passage of ordinance constituting matters of defense.

15. Constitutional law ⚷296(2)—Enforcement of zoning ordinance, creating residence and nonresidence districts, held not to deprive property owners in residence districts of their property without due process (Stockton City Charter, art. 3, § 16).

Enforcement of prohibitory provisions of zoning ordinance, passed under Stockton City Charter, art. 3, § 16, approved by St. 1923, p. 1321 et seq., creating residence and nonresidence districts, does not deprive owners of real property in residence districts of their property without due process.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by the City of Stockton against Frisbie & Latta, a copartnership, and others. From a judgment dismissing the action, after the sustaining of a demurrer to the complaint, plaintiff appeals. Reversed.

See, also, Sapiro v. Frisbie, 270 P. 280.

J. Le Roy Johnson, Nutter, Hancock & Rutherford, and A. P. Hayne, all of Stockton, for appellant.

Lafayette J. Smallpage, Gilbert L. Jones, and Charles H. Epperson, Jr., all of Stockton, for respondents.

HART, Acting P. J. The city council of the city of Stockton, operating as a municipal corporation under and by virtue of the authority of a freeholders' charter, adopted by the electors of said city at a special municipal election held on the 28th day of November, 1922, and approved by the Legislature at its session of 1923 (Stats. 1923, p. 1321 et seq.), "duly adopted and passed," as the complaint alleges, "Ordinance No. 858, which went into full force and effect on December 13, 1923, whereby there was created in said city certain residence and certain nonresidence zones."

Among the specifically enumerated powers vested by said charter in the city of Stockton as a municipal corporation is the authority or power "to zone the city as relates to the *use of property*" (Charter, § 16, art. 3; Stats. 1923, p. 1334), and it was in pursuance of the power so vested in said city that the legislative body thereof passed the ordinance above named. The provisions of said ordinance are as follows:

"Section 1. The city of Stockton is hereby divided into zones or districts to be known respectively as nonresidence districts and residence districts, as follows:

"(A) Nonresidence zones or districts shall comprise:

"(1) All lands which at the time this ordinance goes into effect are used for any business or industry other than farming, truck gardening, growing of trees, shrubs, vines or plants, the raising of animals, professional or other customary home occupations conducted by a family within its residence, and the conduct of a boarding or lodging house not primarily for transient guests; and,

"(2) All lands located and fronting upon any section of any street which lies between the outer lines of two successive intersecting streets whether said streets cross the former street or not, and in which not less than one-half of the ground floor yardage on either side of said street is at said time devoted to business or industry or is manifestly intended to be so used.

"(B) Residence districts shall comprise areas not included in nonresidence districts.

"Section 2. Except as hereinafter provided no parcel of land lying in a residence district and not at said time devoted to any business or industry, other than those specified in section 1, shall hereafter be used therefor, and no permit shall be issued for the erection, alteration or conversion of any building for or to such use upon such parcel.

"Section 3. A permit may be issued for the erection in a residence district of a building for the purposes of any business or industry, or for the alteration or conversion of a building in such district for or to such purposes, provided that there be filed with the application for *such* permit written consents thereto signed and acknowledged by the owners or legal representatives of the owners of not less than three-fourths of all lands used for other than business or industrial purposes, which front on the same side of the street and which lie between the two intersecting streets nearest to and on either side of the land in question or within four hundred feet on either side thereof in case the nearest intersecting street is more than that distance therefrom, and also of all lands fronting upon the other side of the street and directly opposite said land, and of all lands immediately in the rear thereof; and provided further that the city council shall after public hearing so order.

"Section 4. The invalidity of any part of this ordinance shall not invalidate any other part thereof.

"Section 5. That all ordinances and parts of ordinances inconsistent herewith are hereby repealed.

"Section 6. This ordinance shall be in full force and effect thirty (30) days from and after its final passage and approval."

The complaint, among other averments, alleges:

> "The said defendants are the owners of an interest in that certain property known as the 'Kilmer House,' located on lots 1, 3, and 5, block 130, east of Center street in the city of Stockton, county of San Joaquin, state of California. Said property is in a residential zone and has been used exclusively for residential purposes.
>
> "The defendants Frisbie & Latta are now, and for a long time past have been, engaged in the undertaking business, and as an incident thereto have owned and maintained a funeral parlor, as well as hearses, caskets, and other property and apparatus necessary in the conduct of said business.
>
> "Said defendants, without obtaining the permit required by Ordinance No. 858, have commenced and are continuing to convert the use of the building described above as the 'Kilmer House' from a residence to that of a funeral parlor, and in the furtherance of that purpose have moved funeral apparatus into said building, and have placed thereon a sign entitled 'Frisbie & Latta Funeral Home,' and, unless restrained by this court until the requisite permit is obtained, will continue to use said building in the undertaking business.
>
> "Said defendants have never applied for the necessary permit to convert the above described property from a residential to a business use, nor have they obtained the written consents of the owners of not less than three-fourths of all lands used for other than business or industrial purposes, which front on the same side of the street and which lie between the two intersecting streets nearest to and on either side of the land in question, nor of the lands fronting upon the other side of the street directly opposite said land and of all lands immediately in the rear thereof, nor have they obtained from the city council, after a public hearing, a permit so to do.
>
> "The defendants have commenced to maintain, and, unless enjoined by this court, will continue to maintain, the funeral business on the property above described, and in violation of the ordinance hereinabove referred to.
>
> "The maintenance and operation of a business on the property hereinabove described constitutes a conversion of the use of said property from residential to business uses, and constitutes a violation of Ordinance No. 858 of the city of Stockton, since no permit as required by said ordinance has been obtained by the said defendants to so convert the use of said property."

The prayer is for an order temporarily restraining "the defendants, or either of them," from using the property described in the complaint for business purposes, and "after a hearing the said restraining order may be made perpetual," etc.

The ordinance involved herein and annexed to the complaint is thereby expressly made a part thereof. It should here be explained that there is a companion case to this case, entitled "Louis Sapiro and Flora Sapiro v. Frisbie & Latta," etc., 270 P. 280, the defendants being the same as in the present case, and that the complaint in the Sapiro Case contains an averment, which is not in the complaint filed herein by the city, to the effect that, after the passage of Ordinance No. 858 (the ordinance in question), the city council passed an ordinance whereby section 3 of Ordinance No. 858 was amended, so that, in the place of providing, as in its original form it did provide, that "the city council shall, after public hearing, so order," provides "that such proposed erection, alteration, or conversion be approved by the city manager." By a written stipulation between counsel for the respective parties and filed with the records here of the two cases, this court is authorized to consider both cases as one; the points involved in both, with the exception of a few questions rather subsidiary to the principal points, being the same.

The defendants interposed a demurrer to the complaint upon both general and special grounds. Included in the special grounds of demurrer is this: (1) That the complaint fails to show that the plaintiff (city of Stockton) is authorized, in any wise or at all, to commence or maintain this action, and hence is without "legal capacity to sue herein." The demurrer was sustained, without leave to amend. From the judgment dismissing the action, after demurrer sustained, the plaintiff appeals.

The propositions submitted for solution by the present appeal, stating them in the order in which they are presented in the brief of defendants, are: (1) That, assuming that the ordinance in no particular or manner offends either the federal or state Constitution, injunction will not lie to prevent the commission of acts prohibited thereby. (2) That, likewise assuming, the city of Stockton is not entitled to invoke the remedy by injunction against the violation of its provisions. (3) That said ordinance is unconstitutional for these alleged reasons: (a) That the authority sought to be conferred by section 3 thereof upon the city council to issue a permit for the erection of a building within the limits of a residence district for the purposes of any business or industry, etc., upon the conditions specified therein involves the delegation of legislative powers; (b) that the ordinance violates the Fourteenth Amendment of the federal Constitution, "in that there is a taking of private property without due process of law or compensation therefor"; (c) that it involves "an unlawful exercise of the police power." (4) That the ordinance is invalid because it "was improperly passed, in that the council failed to follow the procedural requirements of the Enabling Act of 1917." Stats. 1917, p. 1419.

The briefs of counsel representing the respective parties are quite voluminous, and the points raised and discussed herein are pressed, pro and con, with vigor and obvious earnestness. We shall not attempt to follow strictly the ramifications of the arguments of counsel, but shall content ourselves with a statement of the reasons which have led us to the conclusion that the city of Stockton, as a municipal corporation, is legally authorized to maintain this action, that the ordinance in question in no manner or particular offends any provision either of the state or federal Constitution, and that the city council, in adopting and passing said ordinance, substantially, if not strictly, followed the procedure prescribed by the charter of the city of Stockton for the adoption or passage of city ordinances. Indeed, the reasons for supporting the conclusion herein arrived at upon all the major points presented have been so frequently explained or expounded by the cases that, in showing that neither the legal propriety of the city's position as plaintiff in the action nor the ordinance itself is obnoxious to the objections urged by the respondents against it, it will be sufficient to go no further herein than to refer to and adopt a few excerpts from the opinions in those cases.

It will be convenient to consider these two propositions together, to wit: (1) Whether injunction will lie to prevent the commission of acts in disobedience of the terms of the ordinance; (2) whether the city is legally eligible to maintain this action. The ordinance in controversy represents the exercise by the city of Stockton of the police power. The right to exercise this power by the cities and towns of the state is expressly granted by section 11 of article 11 of the Constitution. That section of our organic law reads:

> "Any county, city, town, or township may make and *enforce*, within its limits, all such local, police, sanitary, and other regulations as are not in conflict with general laws."

[1-3] The ordinance in controversy, as will be observed, itself does not declare that a violation of its terms shall constitute a crime, nor does it provide a penalty for such violation. This, however, does not render the ordinance an illegal enactment or unenforceable through the agency of an appropriate civil remedy. Matter of Ellsworth, 165 Cal. 677, 133 P. 272; see, also, C. & E. I. R. R. Co. v. Hines, 82 Ill. App. 488, and cases therein cited. But counsel for the respondents extrajudicially state in their brief that a building ordinance of the city of Stockton "provides a penalty for occupying, altering or constructing any business building without having first obtained a permit so to do," and that the penalty so prescribed applies to the ordinance in question. The complaint makes no reference to such an ordinance, and, of course, we cannot take notice of any matter dehors the record. We are not reluctant to say, however, that, even if the ordinance itself expressly prescribed a penalty for the violation of its terms, we would still be firmly of the conviction that thus there would not be afforded an adequate remedy at law to prevent the commission of acts prohibited thereby.

The obvious object of the ordinance is to promote and preserve the comforts of home life as against interference by the ceaseless humdrum, confusion, and other discomforting elements essentially characteristic of the business marts, as well as against the invasion of duly established residential districts by industrial enterprises which, although in themselves legitimate and necessary, would, from their very inherent nature, operate as a positive menace to the peace, comfort, and, in some instances, the health, of the inhabitants of such district, and also to the serious detriment of their property rights. It is perfectly clear that any remedy short of one having the force and effect practically of stalling a violation of the ordinance before the infliction of the mischief which it is its paramount purpose to prevent, or of forcing a removal of the cause of the damage after it has been done, would render the measure utterly impotent for the achievement of the ends of its adoption and passage.

To be compelled, in a case such as this, to rely for relief upon the uncertain results of the trial of a criminal case, with the usual delays occasioned by appeals, etc., would not, it is very certain, afford that speedy and adequate remedy which the nature and the object of the ordinance involved herein would, in justness, demand, in the case of a violation of its provisions. Furthermore, the imposition of a penalty upon a violator of an ordinance, even though it be by imprisonment (which could be under a municipal ordinance nothing higher than as for a misdemeanor), would not itself have the effect of removing the prohibited building or necessarily to stop the inhibited business. Village of Ashley v. Ashley Lumber Co., 40 N. D. 515, 169 N. W. 87, 91, 92. But this immediate discussion is academic rather than necessary to the decision of the point in hand, since the ordinance, so far as this record shows, has no provision prescribing a penalty for the violation of its terms. Yet, as has been shown, it is a valid ordinance, and it would certainly come as a shock, even to the commonest understanding, if it were necessary to concede that its purpose is not subject to coercive execution, if its mandates be violated, by or through some means afforded by our system of remedies and remedial rights.

But counsel for the respondents insist that the complaint fails in the statement of a case for the relief thereby demanded, because it contains no allegation that "the proposed business of defendants will be a nuisance, [or] that plaintiff has any property rights or interests which might be prejudiced by acts of the defendants, [or] that the alleged violation of the statute affects either civil rights or property interests of the people of Stockton at large." These propositions are not supported by the authorities. In 5 Pomeroy on Equity Jurisprudence (2d Ed.) § 1894, it is said:

> "While the right of the government to obtain an injunction to restrain criminal acts is not confined strictly to cases of nuisance, it would seem that it should be limited to cases closely analogous. Such relief, if applied to criminal acts in general, would supersede the criminal law and deprive parties of the right to a jury trial. *Where the property rights of many citizens are involved, it is proper for the government, on their behalf, to invoke the powers of equity;* and it would seem that only in such a case should the jurisdiction be assumed."

In the case of In re Debs, 158 U. S. 564, 15 S. Ct. 900, 39 L. Ed. 1092, it is said:

> "Every government, intrusted by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, *and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter.* The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."

Our own Supreme Court, in Miller v. Board of Public Works, 195 Cal. 477, 487, 234 P. 381, 384 (38 A. L. R. 1479), declared:

> "It is conceded, as indeed it must be, by the opponents of the ordinance in controversy here that it is within the police power, by zoning, to banish nuisances and 'near nuisances' from certain districts. It is disputed, however, that the police power may be extended by any zoning ordinance, comprehensive or otherwise, to the regulation and isolation of vocations, business enterprises, and residential uses which are not intrinsically obnoxious. A perusal of the decisions in California, which have upheld the prohibition and segregation of certain businesses by means of zoning, indicates that the court has not limited the power to zone to nuisances per se, and has held that certain business establishments, harmless in themselves, may become 'near nuisances' because of the character of the neighborhood in which they are operating. In Ex parte Quong Wo, 161 Cal. 220 [118 P. 714], the court justified the exclusion of a certain type of laundry from a residential district upon the theory that a laundry is 'of such a nature that it may be confined, in the lawful exercise of the police power within defined limits in a city.' This is tantamount to saying that whenever the recognized purposes for which the police power may be called into play are subserved, either by exclusion or segregation of any business, it may be thus regulated. This is but another way of saying that any zoning regulation is a valid exercise of the police power which is necessary to subserve the ends for which the police power exists, namely, the promotion of the public health, safety, morals, and general welfare. It will thus be seen that the police power as evidenced in zoning ordinances has a much wider scope than the mere suppression of the offensive uses of property (Des Moines v. Manhattan Oil Co., 193 Iowa, 1096, 23 A. L. R. 1322, 184 N. W. 823, 188 N. W. 921), and that it acts not only negatively, but constructively and affirmatively, for the promotion of the public welfare (Bacon v. Walker, 204 U. S. 311, 51 L. Ed. 499, 27 Sup. Ct. Rep. 289). See, also, Rose's U. S. Notes."

In Micks v. Mason, 145 Mich. 212, 108 N. W. 707, 11 L. R. A. (N. S.) 653, 9 Ann. Cas. 291, et seq., the court said:

> "Not in all cases has the right to abate been rested on the ground that a building not constructed in compliance with the ordinance is a nuisance per se, but in some it has been deemed sufficient to say that the building so erected was erected in defiance of law; but, whatever the reasoning adopted, the right has been affirmed."

This language is approved in Detroit v. Kunin, 181 Mich. 604, 148 N. W. 207.

In City of Aurora v. Burns, 319 Ill. 84, 95, 149 N. E. 784, 788, a case, precisely similar to the one before us, in which an injunction, sued for by the city, to prohibit a violation of a zoning ordinance, was sustained, the court said:

> "Zoning necessarily involves a consideration of the community as a whole and a comprehensive view of its needs. An arbitrary creation of districts, without regard to existing conditions or future growth and development, is not a proper exercise of the police power and is not sustainable. No general zoning plan, however, can be inaugurated without incurring complaints of hardship in particular instances. But the individual whose use of his property may be restricted is not the only person to be considered. The great majority, whose enjoyment of their property rights requires the imposition of restrictions upon the uses to which private property may be put, must also be taken into consideration. The exclusion of places of business from residential districts is not a declaration that such places are nuisances, or that they are to be suppressed as such, but it is a part of the general plan by which the city's territory is allotted to different uses in order to prevent, or at least to reduce, the congestion, disorder, and dangers which often inhere in unregulated municipal development."

In addition to the foregoing authorities, attention may be called to the following cases, which discuss the principles involved in the present consideration and support the cases above cited: City Council of Baltimore v. Scott, 131 Md. 228, 101 A. 674; McMillan v. Live Stock Sanitary Board, 119 Miss. 500, 81 So. 169; Inhabitants of Skowhegan v. Heselton, 117 Me. 17, 102 A. 772; Board of Health of City of Grand Rapids v. Vink, 184 Mich. 688, 151 N. W. 672; Story on Equity Juris. §§ 863, 929, 948 and 956b.

[4, 5] By the above authorities it is thoroughly established that a municipal corporation or a county or a township may, in certain instances, by direct action on its part,

invoke an appropriate civil remedy to coerce obedience to the mandates of its ordinances or regulations adopted in the exercise of the police power as expressly granted to it by the Constitution. Article 11, § 11, Const. And, it is worthy of note, that said provision of our organic law does not expressly limit such city, town, etc., to the adoption of any particular mode for enforcing such regulations. The language of the section in that particular is general. It says that any county, city, town or township may make local, police, sanitary and other regulations, and that such *city or town may enforce* the same, how or by what particular means the section does not declare. Thus it would seem that it is left for such corporation or town or county to determine for itself the particular mode for enforcing such regulations within its limits. Of course, the means of enforcement, whatever the nature thereof, must be reasonable, and should be suitable to the nature of the ordinance or the effect of the violation thereof upon the personal and the property rights of the inhabitants of such city or town. But it is too clear, both upon principle and the authorities, of which many are above named, to require further discussion, that where the personal welfare and the property rights of a large number of the inhabitants of a city or town would be detrimentally affected by a violation of a police or sanitary regulation, whether the ordinance provides other means for its enforcement or not, such city or town may itself appeal to a court of equity by means of the forceful and singularly effective writ of injunction (preventive, if the violation is merely threatened or attempted; mandatory, if the violation has already occurred) to restrain such violation or to cause the wrongful effect thereof to be removed.

[6] It cannot for a moment be doubted, in the face of the innumerable authorities, of which a few are above referred to, upholding zoning ordinances dealing with different specific subject-matters as representing the legitimate exercise of the police power of the state, where that attribute of sovereignty has been by the people through their Constitution imparted to cities, towns, and other local political subdivisions of the state, that, as an abstract proposition, such cities, towns, etc., may, by a resort to such power, adopt and pass ordinances restricting certain districts thereof exclusively to residential purposes or uses and other districts thereof to business and industrial uses only. The only valid objection that may be found and urged to such regulations would be as to the manner in which such power has therein been invoked or attempted to be invoked. And it is upon this theory, as is explained above, that the point first made by the defendants here as in impeachment of the constitutional validity of the local measure in question is founded; that is, the contention that by section 3 the city council has delegated, or attempted to delegate, to certain owners of the real property embraced within the residential district involved in this litigation a function purely legislative or which alone is a legislative attribute, in (as counsel assert) that thereby it is left to the discretion of such real property owners to determine definitely whether, in certain instances, exceptions may be recognized and allowed to the operation of the prohibitory terms of the measure, whereby business enterprises may be established and maintained within the limits of said district. It is further contended, as seen, that, if the hypothesis thus advanced be sound, then the whole ordinance, being "tarred with the same stick," is therefore absolutely void. These questions must be determined upon a construction of the language of the ordinance.

The real question thus propounded, stated in general terms, is whether it is within the constitutional competence of a city, through its governing or legislative board, and in the exercise of its police power, to leave to the exclusive determination of certain selected and designated real property owners the authority to compel other property owners in the same city to use their real property in a particular manner or for a particular purpose; or, stating the proposition in another form, whether the city council of a city may by ordinance, in the exercise of its power of police, confer upon certain owners of real property lying in a particular locality or district of the city the legal authority to deny, in effect, to other owners of real property lying in the same locality or district the right to devote such real property to such legitimate purposes or uses as may please them.

Counsel for the defendants cite a large number of cases which hold invalid zoning ordinances purporting to vest in the owners of certain quantities of the lands embraced within the boundaries of the district in the city constituting the zone the right to determine whether the operation of the prohibitory provisions of such ordinances may, in any given case, be suspended and so permit to be done that which is prohibited. The cases so cited are: Eubank v. City of Richmond, 226 U. S. 137, 33 S. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192; Levy v. Mravlag et al., 96 N. J. Law, 367, 115 A. 350; City of Utica v. Hanna, 202 App. Div. 610, 195 N. Y. S. 225; State ex rel. Nehrbass v. Harper, 162 Wis. 589, 156 N. W. 941; Wasilewski v. Biedrzychi, 180 Wis. 633, 192 N. W. 989; Spann v. City of Dallas, 111 Tex. 350, 235 S. W. 513, 19 A. L. R. 1387; In re Quong Woo (C. C.) 13 F. 230; People ex rel. Friend v. Chicago, 261 Ill. 16, 103 N. E. 609, 49 L. R. A. (N. S.) 438, Ann. Cas. 1915A, 292; Willison v. Cooke, 54 Colo. 320, 130 P. 828, 44 L. R. A. (N. S.) 1030; Tighe v. Osborne, 149 Md. 349, 131 A. 801, 43 A. L. R. 819; Wertheimer v. Schwab, 124 Misc. Rep. 822, 210 N. Y. S. 312; Coon v. Board of Public Works, 7 Cal. App. 760, 95 P. 913; Ex parte Sing Lee, 96 Cal. 354, 31 P. 245, 24 L. R. A. 195, 31 Am. St. Rep. 218; Yick Wo v. Hopkins, 118 U. S. 373, 6 S. Ct. 1064, 30 L. Ed. 220.

On the other hand, the following cases sustaining the validity of ordinances whose provisions are substantially the same as those considered in the cases cited by the defendants, of which a few are named above, are cited by the plaintiff: Myers v. Fortunato, 12 Del. Ch. 374, 110 A. 847; City of Spokane v. Camp, 50 Wash. 554, 97 P. 770; City of Chicago v. Stratton, 162 Ill. 494, 44 N. E. 853, 35 L. R. A. 84, 53 Am. St. Rep. 325; U. S. ex rel. Early v. Richards, 35 App. D. C. 540; Building Inspector of Lowell v. Stroklosea, 250 Mass. 52, 145 N. E. 262. Another case upon which the plaintiff relies is Cusack Co. v. City of Chicago, 242 U. S. 526, 37 S. Ct. 190, 61 L. Ed. 473, L. R. A. 1918A, 136, Ann. Cas. 1917C, 594.

[7] It would accomplish no useful purpose to review in detail herein the above cases. It is enough to say generally that many of those cases involve ordinances establishing zoning restrictions or regulations and which provided that their prohibitory provisions could be modified where the mere consents of the owners of designated quantities of the lands situated within the district are obtained. And it may be added that it is held in those cases (cited by the defendants) that the vesting in certain owners of real property embraced within the districts or zones to which the regulations applied the right and the discretion of denying to other owners of like property situated in the same district to use their property for any legitimate purpose which they desired to use it not only involved an unauthorized delegation of legislative power, but that the effect of such discretion, when asserted, would be to deprive the latter of their property or property rights without due process of law. The reasoning in all the cases cited by defendants revolves around various considerations which support the conclusions arrived at. The conclusions arrived at in the cases cited by the plaintiff are directly adverse to those announced in the cases relied upon by the defendants here. The cases cited by the plaintiff hold that where, as in those instances, the operative effect of a law or city ordinance was not made to depend upon the vote or act of the people, and the law or ordinance in and of itself is complete, as it was held to be true in those cases, the fact that such law or ordinance "provides for the removal or modification of its prohibition by the act of those most affected thereby does not make it a delegation of legislative power." Myers v. Fortunato, supra. In that case the ordinance provided that no permit shall be granted for the erection or alteration of any building "intended for use as a public garage in the residential portion of the city of Wilmington, within 40 feet of the building line of any and all adjoining property owners, unless the written consent of all such adjoining owners has been filed with the building inspector."

The ordinance in the present case, however, goes much further than the ordinances considered in the cases cited by the attorneys for the respective parties herein. This statement is not approved by counsel for the defendants, their claim being that, when the written and acknowledged consents of the owners of the requisite amount of real property embraced within the zone have been filed with an application for a permit with the city council, there is then no other alternative left to that body but to grant the permit; that is to say, that, such consents having been duly filed according to the terms of the section, there is then no discretion vested in the city council by said section to reject the application or disallow the permit. Section 3 of the ordinance, it may be conceded, is not, in the respect here being considered, clearly expressed. If it be true that the section in the particular referred to is not free from ambiguity, yet it would not follow that its true meaning and intent may not be ascertained upon a fair consideration thereof by the light of established canons of construction. Where it is obvious from the face of the statute or an ordinance, under attack on constitutional grounds, that it would, if enforceable and when enforced, promote and conserve the welfare of the people, or that portion thereof to be affected thereby, the courts, in construing the same, where construction is necessary to ascertain its designed intent as to a particular vital provision thereof, must give to the language of the measure, if rationally it can be done within the general purport and the spirit thereof, such an interpretation as will make it harmonize with the mandates of our Constitutions and with the fundamental guaranties which those great primary laws of the land vouchsafe to the people. And, in approaching such an investigation, in such a case, the courts must do so in a spirit of friendliness, rather than of antagonism, toward the statute or ordinance, and upon the assumption that the statute or ordinance was enacted or passed in good faith. By the light of these and other principles whereby courts are governed in the construction of statutes, municipal ordinances, or other writings, we will proceed to consider and determine the question whether section 3 of the ordinance is unconstitutional, and, if so, whether the entire ordinance is by reason thereof rendered invalid.

[8-10] It seems plain to us, after a careful examination of the language of section 3 of the measure, that the intention was thereby to vest the council with the power or discretion of determining, upon the application for a

permit, and the written consent of the owners of the indicated quantities of the real property in a residence district, whether such permit shall or shall not be granted or issued. In support of this conclusion, we first emphasize the proposition that the application for the permit must be made to the city council, and by that body the permit must, if at all, be issued. Again, we note the fact that the language of section 3 is that a permit "may" be issued, etc., thus indicating that the intention was to vest in the council a discretion in disposing of the application, exercisable either favorably or unfavorably to the application, according to the course which that body may deem to be the proper one under all the circumstances. That the verb "may," as so employed, was purposely used in its permissive or natural sense, cannot for a moment be doubted, when we keep in mind the grave consequences which might follow the granting of a permit in particular cases, and the further consideration that some of the owners of real property in the district might not themselves reside therein, and who themselves might own sufficient of such real property to lay the foundation for the issuance of a permit, and who might be governed, in consenting to the permit, more by motives of self-aggrandizement than by seeing the district maintained according to the prime purpose of its segregation from those districts allotted by the ordinance to the prosecution of the business and industrial activities of the city. Lastly, as seen, section 3 in effect provides for a public hearing of the application. This can only mean, if an absurd view of that provision is not to be indulged (and, of course, it is not), that the council must conduct a *public hearing*, and that interested parties may thereat appear before that body and advocate or oppose the issuance of the permit. If this be not a correct view of that provision, or not the meaning or intent thereof, then why a public hearing, or any hearing at all? And what is a *hearing*, in a juridical sense, but the taking of testimony, or the reception of other evidence, or the presentation of arguments upon the issue to be decided by the tribunal vested by law with the power or jurisdiction to decide it one way or the other?

We do not think that it would be a far-fetched construction of section 3 to hold that the hearing provided for thereby was not intended to be anything more than merely of an advisory nature. In other words, it would be no overdrawn construction of that section to hold that the city council would not be bound by any showing made at the hearing, but would still have the discretion of determining, upon its own independent judgment, based upon its own knowledge of the general situation, whether the application for the permit should or should not be granted. But, whether the last stated proposition does or does not involve the true construction, it is, at any rate, perfectly clear from the language of section 3 that the intention was that the ultimate decision of the question whether an exception to the operation of the prohibitory provisions of the ordinance should be allowed should rest in the discretion of the council, and that, therefore, said section or the ordinance is not justly subject to the criticism that it involves a delegation of legislative power to the owners of property lying within the residence districts. And it may pertinently be added here that it has been uniformly declared by the cases that the reservation to itself of such discretionary power by the governing boards of municipal corporations in dealing with police regulations of the same general nature as those with which we are here concerned does not have the effect of depriving the persons affected thereby of any of the guaranties either of the federal or state Constitutions. See Ex parte Fiske, 72 Cal. 125, 13 P. 310; Robinson v. Otis, 30 Cal. App. 769, 159 P. 441; Wilson v. Eureka City, 173 U. S. 32, 19 S. Ct. 317, 43 L. Ed. 603; Gorieb v. Fox, 274 U. S. 603, 47 S. Ct. 675, 71 L. Ed. 1228, 53 A. L. R. 1210. Those cases further well say that there is no presumption that the power or discretion vested in a city administrative board to make exceptions to an ordinance such as we have here will be arbitrarily exercised, but if in any case it is so exercised, and it is sufficiently so made to appear, the courts will not hesitate to extend their protective aid to the parties so discriminated against.

[11, 12] But, if it were necessary to concede that the foregoing construction of section 3 is unsound, there is yet another consideration in connection with the present inquiry which would remove the principal ground of objection to the measure. It is this: That section 3 is obviously separable and severable from the prohibitory provisions of the ordinance, and may be taken therefrom without impairing the force of the latter provisions. In other words, the prohibitory provisions of the ordinance are not dependent for their validity on section 3, and that section may therefore be eliminated from the measure entirely and wholly disregarded, without disturbing in the remotest degree or at all the legal integrity of the provisions of the ordinance establishing residence districts and prohibiting the introduction and establishment therein of business or industrial enterprises. The settled rule as to this proposition is stated as follows in 5 California Jurisprudence, at pages 645 and 646, and as so stated is supported by the cases named in the footnotes of the text:

> "The question as to whether portions of a statute which are constitutional may be upheld, while other separable portions are eliminated as unconstitutional, is primarily one of intention, as shown by the general scope and purposes of the law. If the general scope of an act is within the power of the Legislature, the act is not to be declared void by reason of a sub-

sidiary provision which is beyond its power. If the different parts of the statute are severable and independent of each other, and if the manifest purpose of the Legislature can be carried into effect by upholding and enforcing those provisions within its constitutional power, that purpose will not be defeated by the inclusion of an unconstitutional provision subsidiary in its nature. It is likewise settled that, if a provision which is not obnoxious to the Constitution is found even in the same section with another which is repugnant thereto, the one in itself valid and complete must be sustained, unless the two are so united as that it must be presumed that the Legislature would not have adopted the one without the other."

It is plainly manifest that the provisions of section 3 were not the dominating considerations influencing the adoption and passage of the ordinance. The prime and the important purpose of the ordinance was and is to exclude from residence districts business and industrial enterprises and their offensiveness to home life. Thus viewing section 3, the situation would be, if said section were void, as counsel for the defendants contend, that under no circumstances could a business of any kind or character be maintained in residence districts, and hence, borrowing a word or two from Hamlet, the defendants find themselves "hoisted by their own petard."

[13, 14] The objection that the ordinance in question does not conform to the terms or provisions of St. 1917, p. 1419, authorizing the legislative body of any city or town in the state to create or divide such city or town into districts for the purpose of regulating the uses of real property therein, is devoid of merit. Said statute authorizes the city council or town trustees to create such districts by ordinance, and we perceive nothing in the ordinance here which varies from the requirements of the statute. It is true, as one of the grounds of the demurrer asserts, that it is not made affirmatively to appear by the complaint that either the city planning commission, if there be such a body in the city of Stockton, or, if there be no such commission, the city council, took the steps prescribed and required by section 4 of the act of 1917, supra, as a jurisdictional prerequisite to the exercise by said council of the authority to adopt and pass ordinances creating districts in cities or towns as the bases or for the purpose of regulating the use of the real property situated therein. The prerequisites referred to are not prescribed by the charter of the city of Stockton. It was not, however, necessary in any event to plead those matters specially. Code Civ. Proc. § 459. That section provides that, in pleading "an ordinance of a county or municipal corporation, or a *right* derived therefrom, it is sufficient to refer to such * * * ordinance by its title and the day of its passage." The complaint, in general terms, states the substance of the vital provisions of the ordinance, which sufficiently indicate the title, states the time of its passage, and further alleges that the measure was duly passed by the city council. Furthermore, the full text of the ordinance is annexed to the complaint, and, as before stated, by it expressly made a part thereof. Any irregularities in the passage of the measure, sufficient to invalidate it, constitute matters of defense.

[15] The objection that the effect of the enforcement of the prohibitory provisions of the ordinance would be to deprive the owners of real property in the residence districts of their property without due process of law has already virtually been disposed of in contravention of such objection. There is, therefore, no necessity for any further consideration herein of that point.

As will be seen, we have not attempted to review herein many of the cases cited on both sides of the controversy. We have, however, examined all the cases cited by respective counsel. None has led us to the conclusion that any substantial objection to the validity of the ordinance exists.

The judgment is reversed.

We concur: JAMISON, Justice pro tem.; PLUMMER, J.

93 Cal. App. 299

SAPIRO et ux. v. FRISBIE et al.★
(Civ. 3497.)

District Court of Appeal, Third District, California. July 27, 1928.

Hearing Denied by Supreme Court Sept. 24, 1928.

1. Injunction 🔑89—Property owners in residence district held entitled to restrain defendants' maintenance therein of undertaking establishment in violation of zoning ordinance, which failed to provide penalty for violation (Stockton City Charter, art. 3, § 16).

Property owners in residence district *held* entitled to restrain defendants from maintaining funeral and undertaking establishment in district, in violation of zoning ordinance passed under Stockton City Charter, art. 3, § 16, approved by St. 1923, p. 1321 et seq., where no penalty was provided for violation of ordinance.

2. Injunction 🔑89—Injunction against person threatening violation of statute or ordinance runs against commission of acts prohibited by measure, not against mere violation of law.

Where statute or ordinance imposes penalty for violation of its provisions, injunctive relief against persons threatening to violate statute runs against the commission of the acts prohibited, not against the mere violation of the law.

3. Municipal corporations 🔑645—Violation of ordinance giving right to class of persons for their special protection creates liability in their favor, enforceable by civil action against transgressor.

Where right is given by statute or ordinance to particular class of persons for their special protection, and not merely for the protection of the public at large, liability is created in favor of such particular class, as against any person violating such right, which liability may be enforced by means of appropriate civil remedy.

4. Municipal corporations 🔑114—Ordinance stands in original form, where purported amendment thereof is unconstitutional.

If purported amendment to ordinance is void, as constituting attempt to delegate legislative power, provision of ordinance attempted to be amended remains as it was framed in the first instance.

5. Statutes 🔑168—Unconstitutional provision in subsequent statute cannot effect repeal by implication.

Repeal by implication cannot result from provision in subsequent statute, where that provision is itself devoid of constitutional force.

6. Injunction 🔑197—Property owners in residence district held entitled to recover damages in injunction suit against defendants, maintaining undertaking establishment in district in violation of zoning ordinance (Stockton City Charter, art. 3, § 16).

Property owners in residence district *held* entitled to recover damages from persons erecting undertaking establishment in district, in violation of zoning ordinance enacted pursuant to Stockton City Charter, art. 3, § 16, approved by St. 1923, p. 1321 et seq., in connection with relief by injunction, under Civ. Code, § 3523; right of action being based on wrong following from defendant's breach of statutory duty owing to plaintiffs as members of class of persons for whose protection the ordinance was designed.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Louis Sapiro and wife against G. A. Frisbie and E. V. Latta, individually and as partners doing business under the name of Frisbie & Latta. Judgment for defendants, and plaintiffs appeal. Reversed.

J. Le Roy Johnson, Nutter, Hancock & Rutherford, and A. P. Hayne, all of Stockton, for appellants.

Lafayette J. Smallpage, Gilbert L. Jones, and Charles H. Epperson, Jr., all of Stockton, for respondents.

HART, Acting P. J. This is the "companion" case to City of Stockton v. Frisbie & Latta et al. (Civil No. 3496; Sac. No. 4087, 270 P. 270), to which we have so referred in the opinion this day filed in the last-named case, and the appeal is from the judgment dismissing the action after demurrer sustained to the complaint without leave to amend. As stated in the opinion in Civil No. 3496, the two cases were submitted here for decision together, or upon the same arguments and briefs; the legal points raised and urged in both cases, with the exception of one, being the same. The exception referred to involves the question whether the plaintiffs are entitled to claim and obtain damages for the injury which, it is charged, has been caused to their property by reason of the maintenance of the business of the defendants in the residence zone of the city of Stockton, in which zone the said property and the said business are, respectively, situated and maintained. This, therefore, is the only proposition to be considered herein; the questions involving an attack upon the constitutionality of Ordinance No. 858 of the city of Stockton having been considered and disposed of against the contentions of the defendants by the opinion in Civil No. 3496, to which we will hereinafter refer as "the companion case."

The complaint in the present case is in two counts. In the first, Ordinance No. 858 is set out in hæc verba; it being alleged therein that said ordinance was adopted and passed by the city council on the 13th day of November, 1923. The complaint describes the several steps required to be taken by the charter of the city of Stockton to effect legally the passage and adoption of ordinances for said city. The complaint further alleges that, on the 17th day of November, 1924, the city council of said city, after pursuing the preliminary course for adopting and passing ordinances for the city of Stockton, as required by its charter, adopted and passed an ordinance (No.

★Hearing denied by Supreme Court.

914) whereby Ordinance No. 858 was amended, and thereby eliminated from section 3 the part thereof providing for a public hearing before the council on the application for a permit for the erection or alteration or conversion in a residence district of a building for the purposes of any business or industry, and in lieu thereof inserted a provision requiring such "proposed erection, alteration, or conversion be approved by the city manager." The complaint further states that the plaintiffs are the owners of a "residence house" on lot 4, block 135, east of Center street, fronting on Acacia street, in said residence district, and that they are also the owners of another "residence house" on lot 6, block 135, east of Center street, fronting on Acacia street; that they have resided, still do reside, and intend to continue to reside in the residence on said lot 6, block 135; that the "residence house" on lot 4 in said block, and of which they are the owners, they have, at all times mentioned in the complaint, rented to tenants, "who have been, and still are, living there"; that defendants, on or about the 24th day of June, 1927, without first obtaining a permit so to do, as required by the ordinances referred to, "commenced the conducting of an undertaking business on lots 1, 3, and 5, in block 130, east of Center street," and "are now conducting an undertaking business there"; that the lots upon which the defendants are conducting said undertaking business are directly opposite lots 4 and 6 of block 135, upon which the two "residence houses" of the plaintiffs are located and used as above indicated; that the defendants, from the time (1st of April, 1927) they commenced preparations for the conducting of an undertaking business on lots 1, 3 and 5, in block 130, to the time of the commencement of this action, have maintained and "still are" maintaining a large sign on the front of their property, "and fronting on Acacia street, advertising said undertaking business" on said property. The complaint proceeds:

> "That in so conducting said business, said defendants are and will continue to house and embalm cadavers; to hold services over such dead bodies on the premises, attended by mourners for said deceased persons; to accompany such services with doleful music; to carry the coffins containing the bodies of such deceased persons out of the front door to hearses standing in the street, and to permit and cause the forming of funeral processions at their gates in said Acacia street, and that frequent autopsies will be held and performed upon the said dead bodies, and that large numbers of persons will constantly come and go to and from said establishment, for the purpose of viewing said bodies and for the purpose of attending such autopsies and frequent ceremonies; * * * that each and all of said incidents to the conducting of an undertaking business are and will be visible and audible to each and all of the inhabitants, occupants, and residents on both sides of said East Acacia street for a distance of one block both east and west from its intersection with San Joaquin street, including plaintiffs; * * * that, by reason thereof, plaintiffs are and will continue to be, as aforesaid, greatly disturbed and depressed in mind and in spirit, and the value of their said property as a residence will be totally destroyed, and, as a result of the facts herein stated, it will be, if said undertaking establishment continues, impossible for plaintiffs to continue to occupy their said property as a residence, all of which damage will be suffered by plaintiffs in addition to the damage suffered by other residents of the neighborhood and the public in general; * * * that plaintiffs, as aforesaid, are and will be especially and irreparably injured by the continuance of said undertaking establishment; that said undertaking establishment is in a residence district, as defined by the said ordinance of the city of Stockton."

It is further alleged that no application has ever been made by defendants for a permit to conduct said business in said district, and no permit ever granted to defendants by the city council for that purpose. The second count of the complaint by reference incorporates therein all the allegations of the first count, and then alleges that "by reason of the premises plaintiffs have been damaged in the sum of $6,500, by reason of the depreciation in value of their property; that during the pendency of this action, plaintiffs will suffer damage in the further sum of $50 for each month that said undertaking business is conducted as aforesaid." The prayer is for an injunction perpetually restraining defendants from maintaining and conducting any undertaking business on the premises described in the complaint or the premises upon which said business is being conducted, and for damages in the sum stated.

[1] The point first made is that the plaintiffs "are not entitled to the relief of injunction." This point is supported by the same argument as that by which the same point was sought to be sustained in "the companion case," to wit, that an injunction will not lie to restrain the violation of an ordinance or a statute, the infraction of which carries with it penal punishment; that, in such case, the law provides an adequate remedy in the penalty prescribed for the violation of the ordinance or statute. This proposition, as we have stated, was considered and held not to be maintainable, so far as the present case is concerned, by the opinion in "the companion case." A complete answer to the proposition, as it was given in the latter case, is that the ordinance involved in this controversy is not a "criminal" ordinance; that is to say, it contains no penal provision.

The further suggestion, in connection with this point, may be advanced, and that is that, if it is the assumption here that an ordinance or statute prohibiting the doing of certain acts, without prescribing a penalty for the violation of its provisions, unless the acts in and of themselves are criminal, becomes per se a "criminal" ordinance or statute merely because such acts are prohibited, such assumption is fallacious. Crimes are either mala in se or mala prohibita, and, as is obvious, an act, which does not itself involve moral turpitude, or which is not in and of itself criminal, can become a crime—a misdemeanor —only where an ordinance or statute so denounces it. The ordinance in this case, as is pointed out in the opinion in the companion case, neither expressly nor by implication denounces as a crime disobedience to its mandates. But, as also pointed out in the opinion in the companion case, there are exceptional circumstances which may exist, in a case where a penalty is even prescribed for the violation of the provisions of an ordinance or a statute, which would justify the interposition of the remedial power of a court of equity to prevent the commission of the acts thereby prohibited; the ground of such interposition being, of course, that the remedy at law (the mere imposition of a penalty) would be inadequate.

This particular question, though, as we have stated, having been fully considered in the companion case, no further consideration and discussion thereof herein is really required or necessary; yet we may well take occasion to say that the cases cited by defendants upon the proposition are entirely different, so far as is concerned the situation as made by the facts, from the instant case, and are therefore not in point here. Those cases are: Herald v. Glendale Lodge No. 1289, B. P. O. E., 46 Cal. App. 325, 189 P. 329, the opinion therein having been written by former Supreme Court Justice Sloan when that learned jurist was a member of the Court of Appeal of the Second District; Dean v. Powell Undertaking Co., 55 Cal. App. 545, 203 P. 1015, opinion by Mr. Justice Sturtevant. It will be perceived, upon a perusal of those decisions, that neither contains any statement at variance with the conclusion at which we have arrived herein. Indeed, in the case first named, certain cases are approvingly cited which hold that, while a complaint "having for its sole purpose an injunction against crime or misdemeanor will not lie," yet "it is just as well settled that equity will interfere, if the alleged criminal acts go further and operate to the destruction or diminution of the value of property." Manderson v. Commercial Bank, 28 Pa. 379. In the case of Dean v. Powell, etc., supra, the plaintiff sued for an injunction to restrain the establishment in a residential district in the city of Fresno of an undertaking business. There was at the time no ordinance or any regulation in the city of Fresno excluding from such districts therein any business or industrial enterprise. The court, among other things, said:

> "The appellant contends that it should not have been enjoined from conducting upon its own property a business in all respects lawful and in all respects operated with the highest degree of care and under the latest approved methods, solely and entirely because a few people living in the neighborhood believe that such business so conducted will hereafter cause them mental depression. In reply to this contention the respondents have stated they are entitled to the relief awarded and that their position is supported by authorities. They cite cases that arose in those jurisdictions where a statute or ordinance had been passed limiting the locations in which an undertaking establishment might be located. City of St. Paul v. Kessler, 146 Minn. 124, 178 N. W. 171; Meagher v. Kessler, 147 Minn. 182, 179 N. W. 732; Brown v. City of Los Angeles, 183 Cal. 783, 192 P. 716. As Fresno has not adopted an ordinance on that subject, the cases are not helpful."

[2] The judgment in that case granting the injunction was reversed upon the ground that there was no sufficient showing that the plaintiffs or their property would be damaged by reason of the maintenance of an undertaking parlor in the neighborhood where it was proposed to establish it. It must be kept in mind that, in those cases in which a statute or an ordinance makes it penal for any one to violate its provisions, and where injunctive relief is granted as against those who have violated or threaten to violate the statute or ordinance, the injunction runs against the commission of the acts prohibited by the measure and not against the mere violation of the law, although, in point of fact, it must be conceded, such is its effect.

[3] The right of the plaintiffs to claim and recover damages for any injuries which they may have sustained, and may sustain pending the final disposition of this litigation, by reason of any depreciation in the value of their real property caused by the acts with the commission of which the complaint charges the defendants, seems to us to be a proposition which is not subject to serious controversy. It is a well-established and commonly recognized general rule that, where a right is given by statute or municipal ordinance to a particular class of persons and for their special protection, and not merely for the protection of the public at large, a liability is thereby created in favor of any such particular class as against any person who violates such right, and as a result injures the person or property of the former, which liability may be enforced by means of a civil action or civil remedy appropriate to the circumstances peculiar to the particular case. This rule has been announced, approved, and applied in a number of cases. Many of these are listed in the footnotes to the case of Wolf v. Smith, 149 Ala. 457, 42 So. 824, 9 L. R. A. (N. S.) 338, and pages following. Excerpts from a few of those cases will readily suggest, if its mere statement be insufficient for that purpose, the good sense and justness of the rule.

In Tex. & Pac. Ry. Co. (plaintiff in error) v. Rigsby, 241 U. S. 39, 36 S. Ct. 482, 60 L. Ed. 874, in which an award of damages at nisi prius in favor of the latter (an employee of the plaintiff in error) for injuries received as the result of the violation by the railway company of the Federal Safety Appliance Act (45 USCA §§ 1-16; Comp. St. § 8605 et seq.), was sustained, the court, in its opinion, among other things, said:

> "A disregard of the command of the statute is a wrongful act, and, where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Com. Dig. tit. 'Action upon Statute' (F), in these words: 'So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' Per Holt, C. J., Anon., 6 Mod. 26, 27. This is but an application of the maxim, 'Ubi jus ibi remedium.'"

In 1 Corpus Juris, p. 952, it is said, citing in the footnotes a large number of cases:

> "It is a general rule that, wherever a statute imposes a duty for the benefit of particular individuals or classes of individuals, any one within the benefit of the statute who sustains an injury by reason of a breach thereof has a right of action against the person guilty of the breach. This rule applies not only to statutory duties of public officers, but also to duties imposed by statute upon any citizen, and the private right of action is not affected by the fact that the statute also makes such breach of duty a criminal offense, or the subject of a penalty, or by the fact that the statute which imposes the duty does not in terms prescribe any remedy for its enforcement or violation."

In Wolf v. Smith, supra, the plaintiff, while working in a mine, and actively engaged in the performance of the duties of his employment, received serious personal injuries, for which he sued for damages. His complaint was grounded upon a statute of the state of Alabama imposing upon the operator, agent or superintendent of each mine the duty of keeping at the mouth thereof, "or at any other such place about the mine as shall be designated by the chief mine inspector," a stretcher and certain other enumerated articles deemed by the Legislature to be necessary for use in the carrying away of any person injured at the mine. The court, reversing the judgment made and entered after demurrer sustained by the court below, said:

> "Manifestly the statute imposes the duty of keeping the articles and emollients mentioned for the benefit of those persons in the employment of the owner or person operating the mine who may be injured at or in the mines while in the performance of their duties as such employees. It is not a common-law duty, but one newly created by statute, and which, but for the statute, might be omitted. No penalty is attached for a failure on the part of the person operating the mine to comply with the requirements of the statute; but it is a general and well-established rule that the wrongdoer is liable in damages to the party injured by the violation of a statutory duty. 1 Cyc. Law & Proc. p. 679. Neither does the statute provide a remedy for a failure to comply with its terms; but this presents no obstacle to recovery in a proper case against the wrongdoer. The common law affords the remedy, and, if the plaintiff has a cause of action, the proper remedy has been resorted to in this instance."

The Wolf v. Smith Case, it is to be admitted, is, in the facts, different from the instant case, but the principle underlying it is the same. Its importance in the instant case is in the proposition that an action for damages will lie for injuries either to person or property as the direct result of the violation of a statutory right or duty.

The California cases of Figone v. Guisti, 43 Cal. App. 606, 185 P. 694 (opinion by Mr. Justice Langdon, now an Associate Justice of the Supreme Court, then Presiding Justice of the Court of Appeal, First District), Siemers v. Eisen, 54 Cal. 418, and Wood v. Franks, 56 Cal. 217, recognize and approve the same doctrine. In Siemers v. Eisen the injuries complained of were directly caused by a failure of the defendant to comply with the terms of an ordinance of the city and county of San Francisco requiring every person having or using any animal to securely fasten such animal before leaving it on the street, or where such animal was attached to a cart, dray, etc., to lock such vehicle before leaving the animal on the street.

As stated by counsel for the plaintiffs, it is true that many of the cases cited in the footnotes of 9 L. R. A. (N. S.) 338, supra, relate to actions founded on the theory that the violation of a statute constitutes negligence per se, or as a matter of law. That, of course, strictly speaking, is no less true even as to the present case. The statement that the commission of a certain act constitutes negligence per se is merely the statement of a rule of evidence. It means that proof of the commission of acts banned by statute raises the presumption of negligence—in some jurisdictions that the commission of such acts is of and in itself negligence, or negligence per se, and conclusive, while in other jurisdictions it has been held to be merely *some* evidence of negligence. In California it has been held in a long line of decisions that the doing of an act prohibited by statute is negligence per se, or as a matter of law. But we are not particularly concerned here with those questions, or the cases discussing them, further than in so far as they consider and discuss, though in some incidentally only, yet nevertheless enlighteningly as to the present consideration, the principles upon which the instant case must be decided. This case does not rest upon negligence. Neither in point of fact nor of law was there negligence in the acts charged here against the defendants. The right of action in this case is based upon a wrong following from the breach of a statutory duty owing by all other persons to the plaintiffs as members of a class of persons for whose protection only the ordinance involved herein was and is designed. The following observations from Martin v. Herzog, 228 N. Y. 164, 168, 126 N. E. 814, 815, are quite pertinent to the present discussion:

> "Whether the omission of an absolute duty, not willfully or heedlessly, but through unavoidable accident, is also to be characterized as negligence, is a question of nomenclature into which we need not enter, for it does not touch the case before us. There may be times, when, if jural niceties are to be preserved, the two wrongs, negligence and breach of statutory duty, must be kept distinct in speech and thought. Pollock, Torts (10th Ed.) p. 458; Clark & Linseil, Torts (6th Ed.) p. 493; Salmond, Jurisprudence (5th Ed.) pp. 351, 363; Texas & Pac. Ry. Co. v. Rigsby, supra, 241 U. S. 43, 36 S. Ct. 482, 60 L. Ed. 874; Chicago, B. & Q. Ry. Co. v. U. S., 220 U. S. 559, 31 S. Ct. 612, 55 L. Ed. 582."

It will not be questioned that in California the rule above considered is applicable as well to city or county ordinances as to legislative enactments. 19 Cal. Jur. 632–634; Scragg v. Sallee, 24 Cal. App. 133, 144, 140 P. 706; Figone v. Guisti, supra. In Martin v. Herzog, supra, it is in effect said that any such distinction which might be attempted to be made, or where such distinction has been made in some jurisdictions, as between legislative acts and local ordinances, is illogical, to which statement we agree. "An ordinance, * * * like a statute," said the court in that case, "is a law within its sphere of operation, and so the distinction has not escaped criticism," citing other New York cases.

The proposition next to be considered in the present connection is: Was and is the ordinance in controversy designed to protect a particular class of persons, or the class to which the plaintiffs belong, or was its purpose for or is its necessary effect the protection of the public of the city of Stockton in general? We think that it is plainly apparent from the very nature of the ordinance that the class for whose immediate or direct protection the measure was designed consists entirely of owners of homes or other real property which must be used, if at all, for residence purposes in the residence zone or district. Owners of real property situated in the district are alone legally eligible to consent to the issuance of the permit mentioned in section 3. Such owners only may with legal force oppose or approve a proposition to establish and maintain a business or industrial enterprise within the limits of the district. Incidentally, or indirectly, it is true, the public in general may be *benefited* by the protection afforded by the ordinance to the owners of real property in a residence district, but it will not do to say that the general public as such, albeit such real property owners may be a part of such general public, will be *protected* thereby in the juridical signification of that term. Counsel for the defendants argue in their brief:

> "If it was intended that this ordinance should create an obligation between the applicant and certain of his immediate neighbors, it is not probable that the city council would have permitted this obligation to be canceled by petition signed by other neighbors, strangers to both parties."

To which we, in the first place, answer that the fact that the consents prerequisitely necessary to the issuance of a permit, if issued at all, to install a business in a residence district, can come only from the owners of real property in the district itself, supports rather than weakens the theory that such owners of such property constitute the class of persons, and the only class of persons, for whose special protection the ordinance was adopted. Secondly, it is to be observed, as we in effect suggested in the opinion in the companion case, that for the very reason, undoubtedly, that nonresident owners of real property in the district might grant their consent for the issuance of a permit for purely selfish purposes, or without regard to the better interests of resident owners of real property therein, the city council, in framing the ordinance, particularly section 3 thereof, was careful to reserve to itself the discretion of determining, after a public hearing of the application, or, if the amendment of section 3, as above indicated, is valid, in vesting the city manager with the same discretion, whether a permit should or should not be granted in any particular case.

Commenting on the cases cited by the plaintiffs, counsel for defendants say:

> "All of the cases cited by appellants are cases in which the ordinance or statute enacted an obligation between one person and another person, or class of persons, as distinguished from the general public. For instance, there are many cases providing for adequate protection of railway crossings, elevator shafts, etc. These are provided for the benefit of those who expect to cross the railroad, and those who expect to be near the elevator shafts, and hardly for the public in general."

Many of the cases cited by the appellants, it is to be conceded, are interesting to the present consideration only in so far as that therein the principle governing cases of the character of the instant case is discussed and well expounded. This is true as to the "railway crossing and elevator shaft cases." We may remark, however, that the statutes considered in those cases prescribed regulations which were in the strictest sense for the benefit and protection of the general public. They were for the protection of any of the public at large that might find it necessary to cross railway tracks or use elevators. No one of the general public is excluded from the benefit of the protection afforded by those statutes. In the present case, as is obvious, no other persons than those owning real property in the residence district are given the protection afforded by the ordinance in question. Indeed, no one other than such owners of such property needs such protection. We thus refer to the cases mentioned by counsel for the defendants (the crossing and elevator cases) because they themselves stand as concrete illustrations of the distinction between statutes designed for the protection of the public at large or in general and statutes or ordinances intended for the protection of a particular class.

Concluding the present branch of the discussion, we emphasize the proposition that the right of the plaintiff herein to claim and recover damages for any damage they may have sustained or may sustain as a result of the acts of the defendants in doing that which the ordinance prohibits, proceeds, not from or upon the theory that the acts complained of constitute a common-law nuisance, but upon the theory that, the defendants having violated a right specially given to the plaintiffs by the law, and thus having caused damage to their real property, the latter are entitled to have redressed by way of compensatory relief the wrong so committed. It is true that the maintenance of certain businesses in a residential district contrary to the ordinance here is sometimes in the cases referred to as "near nuisances." This phrase is, perhaps, used as being the more apposite to describe a situation, such as is presented here, in which the theory is, not that the acts complained of constitute a common-law nuisance, but the wrongful invasion of a statutory right given to all of a certain class of persons, for which wrong each member of such class, sustaining damage to his property by reason of the commission of such wrong, is entitled to compensatory as well as such other relief as may be necessary to his full and uninterrupted enjoyment of such right. But, whatever may be in legal nomenclature a correct or the precise description of the wrong involved in the commission of acts prohibited by legislative measures of the nature of the one here, it is unquestionably true that, if the courts were required to hold that there is no civil remedy whereby compensatory relief for damage done to one's property as the result of such acts may be obtained, the reaffirmation by our Code (Civ. Code, § 3523) of the common-law and common-sense doctrine that "for every wrong there is a remedy" would involve an idle declaration at least in some instances of civil wrongs to redress which no remedy is specially provided.

[4, 5] As to Ordinance No. 914, purporting to amend section 3 of Ordinance No. 858, as above explained, this is to be said: That, assuming that the purported amendment is unconstitutional and void, for the asserted reason that thereby an attempt is made to delegate legislative power to the city manager, in that it vests or attempts to vest in him the sole authority to allow or disallow exceptions to the operation of the prohibitory provisions of the ordinance, the result which follows is that the part of section 3 thus futilely attempted to be amended, remains or stands as it was framed in the first instance. There is no provision in Ordinance 914 expressly repealing the provision in section 3 purporting to be amended. If anything at all, the repeal of the provision, as it was originally framed, would be by implication only. "No repeal by implication can result from a provision in a subsequent statute, when that provision is itself devoid of constitutional force." Endlich on Statutes, § 192; Matter of Application of Clary, 149 Cal. 732, 737, 87 P. 580; Ex parte Sohncke, 148 Cal. 262, 82 P. 956, 2 L. R. A. (N. S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475; McAllister v. Hamlin, 83 Cal. 361, 365, 23 P. 357. But equally applicable to this case is what is said in the opinion in the companion case to the effect that, if section 3 of the ordinance is for any reason unconstitutional and void, the consequence is that there is no provision in the ordinance authorizing any exceptions to be made to the operation of the prohibitory provisions of the ordinance, or authorizing the establishment and maintenance in any residence district in the city of Stockton of any business or industrial enterprise

[6] It follows, of course, from the conclusions at which we have herein arrived, that in any event—that is, whether section 3 be valid (no permit having been issued) or for any cause invalid—the defendants, in establishing, maintaining, and conducting an undertaking parlor in the residence district involved in the present controversy, thereby committed and are committing acts in direct defiance of the prohibitory provisions of the ordinance, and that if, as the complaint charges, the real property of the plaintiffs has, by reason of the commission of such acts, been damaged, or its value for residence purposes diminished, then they are entitled to the equitable relief herein prayed for and such compensatory relief by way of damages as the evidence may justly warrant.

The judgment is reversed.

We concur: JAMISON, Justice pro tem; PLUMMER, J.

93 Cal. App. 738

NATIONAL STONE TILE CORPORATION et al. v. VOORHEIS et al. (Civ. 6428, S. F. 13216.)★

District Court of Appeal, First District, Division 2, California. Sept. 4, 1928.

Rehearing Denied Oct. 4, 1928. Hearing Denied by Supreme Court Nov. 1, 1928.

1. Corporations 🔑302—Secretary appointed by board of directors is entitled, after demand, to possession of corporation's books, records, and files.

Corporation's board of directors having reorganized and appointed a secretary, he, after demand, becomes entitled to possession of the corporation's books, records, and files, and continues to be so entitled till a legal demand be made on him by another, who has become his legal successor.

2. Corporations 🔑106—Corporation, authorized to sell stock for cash, can before payment repudiate sale made partly on time.

Corporation, authorized by commissioner of corporations only to sell stock for cash, having sold some partly on time, can before deferred payments are made repudiate, with tender of repayment.

3. Corporations 🔑106—Relief will be given corporation, basing its cause of action on repudiation, while executory, of sale of its stock, illegal because not for cash.

Courts will lend their aid to a cause of action based on plaintiff's repudiation, while still executory, of plaintiff's sale to defendant, partly on time, of shares of its stock, which by the permit of the commissioner of corporations it was authorized to sell only for cash.

4. Corporations 🔑106—Repudiation by corporation of sale of stock, illegal because not for cash, is valid, notwithstanding any illegality in holder's discharge at same time from his position of manager.

Corporation can seasonably repudiate sale of its stock, illegal because not for cash, but partly on time, though in connection with the sale the buyer is employed as manager, and in connection with the repudiation is discharged from such position; he having clear legal remedy for any illegality in the discharge.

5. Pleading 🔑8(22)—Allegations of payment to and by "the corporation" held pleader's conclusions.

Allegations of pleading that money was paid "to the corporation," without statement of payment to any specified agent, and that the money has been paid out "by the corporation," are pleader's conclusions.

6. Corporations 🔑197—Certificate of stock held properly denied recognition at stockholders' meeting, sale of stock having been illegal and repudiated.

Sale of corporation's stock, illegal because not for cash, having been repudiated by board of directors, with tender back of partial payment made, election officers, at meeting of stockholders, were within their rights in refusing to recognize the certificate of stock as representing any legally issued stock and entitled to vote.

7. Mandamus 🔑3(8)—Remedy at law for delivery by old officers to new officers of corporation's books, etc., is not afforded by statute for review of election (Civ. Code, § 315).

The remedy provided by Civ. Code, § 315, to review an election held by a corporation, not purporting to afford officers elected the relief asked by their petition for mandamus, delivery to them by the old officers of the books, records, and files of the corporation furnishes no ground for denying the petition, on the ground of plain, speedy, and adequate remedy at law.

8. Mandamus 🔑129—Mandamus to compel old officers to deliver books, etc., to new officers, held to lie, though title be incidentally involved, and unlawful discharge from employment be pleaded.

Mandamus will lie to compel corporation's old officers to turn over its books, etc., to new officers, though petitioners seek to try title to property and office incidentally, and though respondents set up an unlawful discharge of one of them from his position of manager, for which he was employed, as the latter matter need not be determined in such proceeding, but is a matter for action for unlawful discharge.

Application by the National Stone Tile Corporation and others for mandamus to J. T. Voorheis and others. Writ granted.

Sullivan & Sullivan & Theo. J. Roche, and Corbet & Selby, all of San Francisco, for petitioners.

Bronson, Bronson & Slaven and A. L. Shannon, all of San Francisco, for respondents.

STURTEVANT, J. Mandamus. The plaintiff, through its alleged officers, is seeking by this proceeding to obtain possession of its books, records, and files, etc. Its pleading sets forth a double claim.

Its first claim arises by reason of the following matters: The petition alleges the due incorporation of the plaintiff; that it has five directors, giving their names; that on February 23, 1928, a meeting of the board of directors was duly had; that at said meeting W. P. Stanton was removed as president, and C. C. H. Thomas was appointed president of the corporation; that J. T. Voorheis was removed from the office of vice president, and that W. P. Thomas was appointed as vice president; that A. L. Shannon was removed from the office of secretary, and A. L. Whittle was appointed as secretary; that after said meeting of the board of directors the newly appointed officers duly demanded of the former officers the possession of the books, records, files, etc.; and that the respondents refused to deliver them. The foregoing allegations show a complete cause of action in favor of the petitioners and against the respondents as of the date of the demand, to

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★Rehearing denied. Hearing denied by Supreme Court.

wit, February 23, 1928. The respondents have not even offered any defense thereto.

The second theory on which the petitioners rely, and the answer made thereto, will be discussed as we proceed. This action was not commenced until March 30, 1928, a little over a month after the reorganization of the board of directors above referred to. In the meantime the annual meeting of stockholders was held. Growing out of the proceedings of that annual meeting, another element was injected into the controversy. That element arose as follows: On the 18th of June, 1924, the commissioner of corporations of the state of California authorized the plaintiff to issue 200 shares in addition to those already outstanding. By the terms of that permit the plaintiff was authorized to "sell and issue 200 shares of its capital stock at par for *cash*, lawful money of the United States, for the uses and purposes recited in its application." Thereafter, on May 15, 1925, the board of directors sold to J. T. Voorheis 97 shares, for $2,000 cash and his promissory note in the principal sum of $7,700, payable five years from date, bearing 6 per cent. interest. Said stock was represented by certificate No. 43. On the date the board of directors was reorganized, and immediately after the reorganization had taken place, a resolution was adopted and ordered spread on the minutes, by the terms of which resolution the board attempted to rescind its former resolution, authorizing the issuance of certificate No. 43, and returning to J. T. Voorheis the $2,000 which he had paid in. Thereafter he was tendered the $2,000, and demand was made on him to surrender certificate No. 43, but he refused to surrender it, and refused to accept the tender. The date of the annual meeting of stockholders, as fixed by the by-laws, would have fallen on February 24, 1928. By consent of all parties interested the meeting was, by unanimous consent, postponed from time to time, and was held on March 20, 1928. Each and all of the foregoing facts stand of record, or would stand of record on the books and papers of the plaintiff corporation, except in so far as any of them have been prevented by reason of the controversy between the stockholders.

At the stockholders' meeting, when J. T. Voorheis attempted to vote certificate No. 43 for 97 shares, the attempt was challenged, and the presiding officer ruled that the purported certificate No. 43 was a void transaction, and in law constituted no evidence of issued capital stock. Acting upon that ruling, certificate No. 43 was not recognized, and the said 97 shares were not counted. Omitting said 97 shares, E. J. Thomas, C. C. H. Thomas, W. P. Thomas, J. T. Voorheis, and W. P. Stanton were elected directors. Immediately thereafter the board was again organized as follows: President, E. J. Thomas; vice president, C. C. H. Thomas; secretary, A. L. Whittle; assistant secretary, W. P. Thomas; treasurer, A. L. Whittle. If the presiding officer had received certificate No. 43, the result of the election would have been that C. C. H. Thomas would have been defeated, and A. L. Shannon would have been elected in his place. If such had been the case, it will be conceded that the election of each of the corporate officers would have been otherwise. It is alleged by the respondents that in April, 1925, J. T. Voorheis was induced to resign a lucrative employment and to purchase the stock represented by certificate No. 43 on the terms hereinabove mentioned, and as a part of the arrangement he was to become manager of the plaintiff corporation at $400 per month. On May 15, 1925, that arrangement was slightly changed, so that his salary was fixed at $450 per month. The latter arrangement continued down to the 23d day of February, 1928, when he was discharged. Respondents allege that on February 24, 1928, J. T. Voorheis "paid to said corporation, in cash, the full par value of said 97 shares, which payment was thereupon duly and regularly received by said corporation, and duly and regularly converted and applied to its own use in the ordinary course of its business, and has been paid out, and the whole thereof, by said corporation upon current obligations of said corporation; that said payment by said respondent Voorheis, and said receipt thereof by said corporation as aforesaid, was in strict accordance with the valid, binding, and subsisting agreement between said corporation and said J. T. Voorheis, whereby said corporation agreed to and did sell to said J. T. Voorheis said 97 shares, and which said agreement was independent of and in addition to the said resolution of May 15, 1925," which resolution is attached to the pleading, and is the contract of purchase and employment hereinabove referred to.

[1] When the board of directors reorganized February 23, 1928, and appointed A. L. Whittle secretary, that individual, after demand made, became entitled to the possession of the books, records, files, etc., of the plaintiff corporation, and continued to be so entitled until a legal demand should be made on him by some other person who had become his legal successor. There is no claim that there were any changes prior to March 20, 1928. The facts before us do not show that any change occurred then or subsequently.

[2-5] The petitioners state the foregoing facts, and assert that the purported issue of the stock represented by certificate No. 43 was void, and that, in legal effect, it was no issue. The respondents' reply is that the contract was illegal, and the courts will not lend their aid to either party. That rule is well settled, and the exception is equally well settled. In 6 California Jurisprudence, p. 155, § 108, the exception is stated first as follows:

> "While an illegal contract remains executory, relief should be awarded to one who repudiates it because of its illegality; yet where there

has been no withdrawal, nor attempt to withdraw from the transaction until after it has become executed, the law accords no locus pœnitentiæ."

The text is supported by Johnston v. Russell, 37 Cal. 670, 676; Wise v. Rose, 110 Cal. 159, 162, 42 P. 569; Wassermann v. Sloss, 117 Cal. 425, 428, 49 P. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209; De Leonis v. Walsh, 140 Cal. 175, 183, 73 P. 813; Green v. Frahm, 176 Cal. 259, 264, 168 P. 114; Schmitt v. Gibson, 12 Cal. App. 407, 414, 107 P. 571; Matthews v. Lopus, 24 Cal. App. 63, 66, 140 P. 306. The law is the same in nearly every other jurisdiction. 10 C. J. 501. In such a case the plaintiff's cause of action does not rest on an affirmance of the contract but on a disaffirmance thereof. The party who has partly performed by paying a part of the purchase price may recover the payment. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347; Schmidt v. Stortz, 208 Mo. App. 439, 236 S. W. 694, 697. The party that has made a purported sale which is prohibited by the statute may disaffirm the sale and recover the property back, if the purported sale remains executory. Leadbetter v. Hawley, 59 Or. 422, 117 P. 505, 506. In doing what it did, the board was not making any claim under the contract, but was seeking to wipe out what would otherwise constitute a crime. To complete the transaction the plaintiff was bound to return the moneys which it had received. It offered to do so, but the holder would not accept the moneys.

The respondents say the holder was employed and that his discharge was unlawful. If so, the holder has a clear legal remedy. They say the holder paid the remaining $7,700 on February 24, 1928, "to the corporation." This is his conclusion. They do not allege that he paid the money to any specified agent, nor do they claim he holds a receipt from any specified agent. They allege that the money has been paid out "by the corporation." Same comment. Assuming, without deciding, that on February 23, 1928, or at any time before the annual election, the holder could have paid the $7,700 to the duly appointed officers of the corporation, and that in this manner he could have completely wiped out the purported executory contract, they do not make that showing.

[6] When, on March 20, 1928, the holder of the illegal and void certificate No. 43 attempted to vote it, we think the election officers were clearly within their rights in refusing to recognize it as representing any of the legally issued stock. It was the duty of the holder of that purported certificate, of every other stockholder, and of the election officials to obey the law. The facts were not in dispute, but were all of record on the books, presumably in front of all of the persons participating in the election. Any other action would be nullification. The election was regular in all respects. That being so, it is not disputed but what A. L. Whittle, as the newly appointed secretary, is entitled to the possession of the books, records, files, etc. From what we have said, it will be seen that none of the affirmative matter set up in the return constitutes a defense to the allegation contained in the petition.

[7, 8] The respondents interposed a motion to dismiss. In support of that motion they made four specifications. They called attention to the fact that the purported contract of subscription was void and that the petitioners may not come into court relying thereon. As we have shown above, the petitioners do not rely on the contract, but claim that it has been rescinded. They call attention to the fact that the chairman of the stockholders' meeting refused to allow certificate No. 43 to be voted, and they assert he had no such power. We have ruled otherwise, and hereinabove we have stated our reasons. They assert that the petitioners have a plain, speedy, and adequate remedy at law, and they refer to the provisions of Civil Code, § 315. That section provides a remedy to review the election, but does not purport to afford the petitioners the relief which they ask in this action. The point may not be sustained. Dufton v. Daniels, 190 Cal. 577, 581, 213 P. 949. Citing the affirmative allegations which we have discussed above, they contend that mandamus will not lie where such questions must be determined. The answer is that some of the matters referred to are of such nature that they need not be determined in this action, but should be determined, if at all, in an action for unlawful discharge. Again, in this proceeding the petitioners are not seeking to try title to property or title to office except incidentally. Guaranty Loan Co. v. Treadwell, 53 Cal. App. 538, 200 P. 653; Humboldt Oil Co. v. Hoagland, 70 Cal. App. 454, 233 P. 404.

Let the writ issue as prayed for.

We concur: KOFORD, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for a hearing herein is denied. In so doing we disapprove the following portion of the opinion of the District Court of Appeal, reading as follows:

"They say the holder paid the remaining $7,700 on February 24, 1928, 'to the corporation.' This is his conclusion. They do not allege that he paid the money to any specified agent, nor do they claim he holds a receipt from any specified agent. They allege that the money has been paid out 'by the corporation.' Same comment."

205 Cal. 188

NEWSON v. HAWLEY et al.

Supreme Court of California. Sept. 14, 1928.

1. New trial ⚷68—Order setting aside verdict and directing judgment for defendant held proper, if defendants' motion for directed verdict was proper (Code Civ. Proc. § 629).

If defendants' motion for directed verdict in action for alienation of affections should have been granted, order of court, setting aside verdict for plaintiff and directing judgment in defendants' favor, was in accordance with Code Civ. Proc. § 629, and should stand.

2. Husband and wife ⚷335—Directed verdict for mother of defendant, sued for alienating plaintiff's husband's affections, held proper.

In action to recover damages for alienation of affections, brought against mother and daughter, not related to plaintiff or her husband, evidence showing only that defendant mother knew that person marrying her daughter was husband of plaintiff and consented to ceremony, without any evidence showing that she enticed plaintiff's husband to leave his wife and marry her daughter, or influenced him directly or indirectly in so doing, authorized court in directing judgment for defendant mother.

3. Husband and wife ⚷333(9), 335—Evidence showed defendant was induced by fraud to marry plaintiff's husband and authorized directed judgment for defendant, sued for alienation of affections.

In action by wife against defendant for alienation of husband's affections, evidence that husband, 33 years old, induced defendant, 18 years old, to marry him by false representations that he was a single man and that plaintiff was not his wife, and evidence that defendant openly acknowledged marriage *held* to show that defendant acted under belief that plaintiff's husband was unmarried, and that she did not maliciously deprive plaintiff of consortium of her husband, authorizing court to set aside verdict for plaintiff and direct verdict for defendant.

4. Appeal and error ⚷927(7)—Trial ⚷178—Defendant's denials, made on motion for directed verdict, could not be considered at trial, nor on appeal from order directing judgment for defendant.

In action by wife against defendant for alienating husband's affections, denial by defendant that she knew husband was husband of plaintiff, made on motion for directed verdict, could not be considered by trial court, and could have no bearing on appeal from order directing judgment for defendant.

Department 1.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action for damages for alienation of affections by Ada Mary Newson against Alida Fay Hawley and another. Verdict for plaintiff was set aside by the court on its own motion, and plaintiff appeals. Affirmed.

C. W. Humphreys and Gottesfeld, Mann, Humphreys & Carmody, all of San Francisco, for appellant.

George K. Ford and Ford, Johnson & Bourquin, all of San Francisco, for respondents.

CURTIS, J. In this case the defendants made a motion for a directed verdict, which motion was denied and the case was thereupon submitted to the jury. Thereafter the jury rendered a verdict in favor of the plaintiff, and the court of its own motion set aside the verdict and ordered judgment in favor of the defendants. From this order this appeal was taken.

[1] By section 629 of the Code of Civil Procedure, enacted in 1923, it is provided that:

> "When a motion for a directed verdict, which should have been granted, has been denied and a verdict rendered against the moving party, the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, shall render judgment in favor of the aggrieved party notwithstanding the verdict."

If, therefore, defendants' motion for a directed verdict should have been granted, then the order of the court setting aside the verdict and directing judgment in defendants' favor was in accordance with the terms of section 629 of the Code of Civil Procedure, above quoted, and should stand.

The limits within which the trial court may exercise its power to direct a verdict have been definitely fixed and determined by decisions of this court of comparatively recent rendition. In Estate of Caspar, 172 Cal. 147, at page 149, 155 P. 631, 632, it was held that:

> "The right of a court to direct a verdict is, touching the condition of the evidence, absolutely the same as the right of the court to grant a nonsuit. It may grant a nonsuit only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given."

To the same effect is Estate of Sharon, 179 Cal. 447, at page 459, 177 P. 283, 288, where the rule is stated in the following language:

> "It is a settled rule of law regarding trials by jury that in a proper case the court has full power to direct the jury to render a verdict. This power exists in favor of the defendant where there is no substantial evidence tending to prove all the controverted facts necessary to establish the plaintiff's case. It is not necessary that there should be an absence of conflict in the evidence. To deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one."

[2] This action was instituted to recover damages for the alienation of the affections of plaintiff's husband, Herbert John Newson. The defendants are mother and daughter, and are not related to the plaintiff or her husband. The evidence shows that, after an acquaintance extending over about one year, said Herbert John Newson and the defendant Alida Fay Hawley went through a form of marriage ceremony, and thereafter cohabited together as husband and wife at intervals for about one month.

The evidence against the defendant Lillie Hawley is unquestionably insufficient to support any verdict or judgment against her. The most that can be claimed in favor of the evidence as against Lillie Hawley is that she knew that plaintiff was the wife of Newson, and that, by being present at the purported marriage ceremony between her daughter and Newson, she consented to such ceremony. There is no evidence that she in any way enticed Newson to leave his lawful wife and marry her daughter, or that she ever influenced him directly or indirectly in so doing. The order of the trial court, therefore, in directing a judgment in favor of the defendant Lillie Hawley, must be sustained.

[3, 4] As to the defendant Alida Fay Hawley, the evidence, in our opinion, shows that she was the dupe and victim of a designing and unscrupulous scoundrel, rather than the pilferer of the affections of plaintiff's husband. She was but 17 years of age when she met Newson, who sought to give her dancing lessons to fit her for a professional career on the stage. During this time she had occasion to meet plaintiff a number of times, some of which were at the home of plaintiff and Newson at No. 1858 Geary street, San Francisco. There is evidence to the effect that Newson was referred to in her presence and hearing as the husband of plaintiff, and that the children of plaintiff and Newson called Newson "Daddy" in the hearing of said defendant. The evidence, however, is uncontradicted that Newson, by false and fraudulent statements, induced her to believe that plaintiff was not his wife, but was his sister-in-law, the widow of his deceased brother, and that the children were his brother's children, and not his own. He further induced this defendant to go through a marriage ceremony with him, claiming that he was a single man, and that his wife had died some years previously. At this time Alida Fay Hawley was only 18 years old, while Newson gave his age at the time he secured the marriage license as 33 years. After this ceremony he spent one night with this defendant at a hotel in San Francisco, and then persuaded her to return to her mother until he could make permanent arrangements for a home for them. On two or three week ends immediately following he took her to a hotel, and after spending the night with her had her return to her mother, giving the same reason for her return as that previously given on the day after their purported marriage.

The two defendants at this time had occasion to visit temporarily their former home at Walla Walla, Washington. While there the defendant Alida Fay Hawley wrote Newson two letters, directing them to No. 1858 Geary street, San Francisco, where she knew Newson resided with plaintiff and her children. On each of these letters she wrote a return address, signing the same "Mrs. H. J. Newson." These letters, as might have been expected, fell into the hands of the plaintiff, one of which was opened by her. This one the defendant had signed "Your loving wife." Plaintiff immediately began an investigation of her husband's conduct, with the result that she found of his unlawful attempt to enter into a contract of marriage with the defendant Alida Fay Hawley. About this time the defendants returned from Walla Walla, and, upon learning that Newson was the husband of plaintiff, the defendant Alida Fay Hawley immediately instituted legal proceedings and had her marriage with Newson annulled, and has never lived with, nor had anything whatever to do with, Newson since learning that he was the husband of plaintiff.

We think this evidence shows without any substantial conflict whatever that the defendant Alida Fay Hawley acted in this unfortunate matter under the belief and conviction that Newson was an unmarried man, and that she did not maliciously or intentionally deprive plaintiff of the consortium of her husband. While there may have been intimations in certain conversations had with her and in her presence and hearing that Newson was the husband of plaintiff, yet it is most apparent that, whatever impressions such conversations had upon her, their effect was overcome and entirely effaced by the false and misleading statements and assurances of Newson. She denied that any such conversations had ever been had with her or in her hearing, or that she had any information whatever that Newson was the husband of the plaintiff, until some time after her pretended marriage to him. Her denial, however, upon a motion for a directed verdict by her, could not be considered by the trial court, nor can it have any bearing upon this appeal from an order directing judgment in her favor.

But, conceding that such conversations were had in her presence or with her, the evidence in our opinion shows that their effort was entirely nullified by the deception of Newson, and that when she accepted his attentions, and thereafter consented to marry him, and did in fact go through a marriage ceremony with him, she did so with the honest and sincere conviction that he was an unmarried man, and therefore capable and legally qualified to become her lawful husband. Her entire conduct, both before and after the marriage ceremony, is not only consistent with this belief, but is inconsistent with any other reasonable theory of the case. She was but a young girl, just out of school, when she met Newson, a mature man of experience. She was imbued with the idea that she possessed unusual ability as a dancer and might make for herself a successful career upon the stage. In this idea she was encouraged by Newson, who became her instructor, and held out to her the promise and hope that they would go on the stage together, and make for themselves both a name and a fortune. In this way he ingratiated himself into her confidence and became her trusted friend and adviser.

Under these circumstances it is not strange that she would accept his statements as to his marriageable status, without further proof of their truthfulness, and even against certain intimations which she had received from other sources. That she made no secret of her conduct in the entire matter is strikingly shown by the fact that, while at Walla Walla, she wrote letters addressed to the house where she knew he resided with the plaintiff and her children, on the envelopes of which she gave her own address, signing her name of "Mrs. H. J. Newson." There is no substantial conflict in the evidence as to the foregoing facts. It is, in our opinion, insufficient to show that the defendant Alida Fay Hawley acted with any improper motives in her conduct toward Newson or toward the plaintiff. On the other hand, the whole evidence in the case shows her to be the innocent victim of an unprincipled imposter.

The order appealed from is affirmed.

We concur: SEAWELL, J.; PRESTON, J.

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205 Cal. 207

SWALLOW v. TUNGSTEN PRODUCTS CO.
(L. A. 8544.)★

Supreme Court of California. Sept. 19, 1928.

Rehearing Denied Oct. 18, 1928.

1. Judgment 🔑452—Purchaser of property thereafter sold under judgment had right to impeach judgment, if void by reason of facts appearing on judgment roll.

Purchaser of property thereafter sold under judgment lien had right to impeach judgment on which sheriff's sale and deed depended for their validity, if such judgment was void by reason of facts appearing on judgment roll.

2. Assignments 🔑24(3)—Bare right of assignee to sue for fraud committed on assignor will be denied as against public policy.

A bare right of assignee to file a bill in equity for fraud committed on assignor will be denied, because a transfer of such right is against public policy.

3. Judgment 🔑452 — Purchaser, without knowledge of judgment lien, has right, for purpose of establishing invalidity thereof, to show that judgment was void.

Where purchaser of property subject to judgment lien had no knowledge thereof at time of purchase, it had right, after sale under such lien, to show that judgment was void for purpose of establishing invalidity of judgment lien on alleging sufficient facts to show meritorious defense to action in which judgment was entered.

In Bank.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by A. H. Swallow against the Tungsten Products Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

For opinion of District Court of Appeal, see 265 P. 493.

Richard S. Miner, of Independence (James F. Peck, of San Francisco, of counsel), for appellant.

Robert Richards and A. H. Swallow, both of Bishop (Edward Brody, of Los Angeles, of counsel), for respondent.

SEAWELL, J. The petition for an order transferring this cause after decision by the District Court of Appeal, Second Appellate District, Division 1, to this court, was granted May 3, 1928. At that time we had before us a petition requesting the transfer of the cause entitled O. E. Vaughn v. Pine Creek Tungsten Co., a corporation, to this court, after decision by said District Court of Appeal (265 P. 491). That petition was denied. Both proceedings were attacks made upon the same judgment in a different form. The latter case presented the question whether the plaintiff was entitled to have the judgment therein obtained vacated and set aside on the ground that defendant, a foreign corporation, had not been personally served with summons. The specific ground upon which the motion was pressed was that the person served as the general manager and designated agent of said foreign corporation was neither the manager nor designated agent of said corporation, and therefore no service was made upon said corporation. Other points were made, but they are not germane to a consideration of the question here in hand. The District Court of Appeal had held in that case that

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★Rehearing denied.

no fraud was charged against the plaintiff in the motion and no charge was made that any fraud was committed on the court by said plaintiff, and, the motion being faulty in the respects pointed out, was not supported by the case of McGuinness v. Superior Court, 196 Cal. 223, 237 P. 42, 40 A. L. R. 1110, in which case the motion was based upon the extrinsic fraud of the party to the action wherein the review was sought and fraud was found to have been committed upon the court. It was further held that a motion to set aside a default and vacate a judgment entered thereon on matters dehors the record in a case where no extrinsic fraud is alleged should be limited to one year from the time of entry of judgment on personal service. The fact that the notice of motion was served more than one year after entry of judgment constituted one of the grounds assigned for denying the relief sought.

The order of transfer was made in the instant case to give opportunity for a fuller consideration of the two important questions raised by petitioner, to wit, first, that a defendant in an action to quiet title cannot collaterally attack a judgment valid upon its face and which forms one of the links in plaintiff's title; second, that a subsequent purchaser of lands incumbered by the lien of a judgment valid on its face, and whose rights in said lands were not affected by the rendition of the judgment, has not the right to attack the judgment on grounds of fraud or mistake which the original judgment defendant would have had. Authorities are to be found in this and other states which give a color of support to the claims made by both appellant and respondent.

The present action was brought by respondent to quiet his title to certain mining claims, all of which is more fully set forth in the opinion of the District Court of Appeal (265 P. 493), which we append as a part of the opinion on the case. There is no doubt that the answer sets forth all substantive matters necessary to constitute a direct attack on the judgment. The allegations of fraud are fully set out and are in the usual form. The attack upon the judgment is direct and in no sense collateral. The discussion of this branch of the case comes well within the rule announced in Follette v. Pacific L. & P. Corporation, 189 Cal. 193, 208 P. 295, 23 A. L. R. 965. The cross-complaint, although not so designated by the pleader, is such in substance. It is therein alleged that the Pine Creek Tungsten Company was the owner of and in possession of said group of mining claims or locations from October 28, 1918, to December 28, 1922, on which last-named day it sold and transferred all of its interest, right, title, and claim in said mining claims to the Soda Products Company, a corporation; that the corporation last mentioned entered upon and took possession of said group of mining claims, and developed, operated, and prospected the same to March 14, 1923, on which day it sold and transferred its interest therein to the Tungsten Products Company, a foreign corporation; that said foreign corporation thereupon entered upon and took possession of said mining claims; that it has since been in the possession of said claims, and it and its predecessors in interest have expended more than $150,000 in opening, developing, and prospecting said mining claims and in purchasing machinery for the operation of the same; that respondent and his grantor have at all times known of the work of development and the large sums of money that were being expended by the several alleged owners of said claims, but that each remained silent, and that none of said corporation from which appellant claims to deraign title had notice at any time, direct or indirect, of the commencement or pendency of said suit wherein Vaughn was plaintiff and the Pine Creek Tungsten Company was defendant until April, 1924; that upon making said discovery appellant took prompt action to protect its rights.

The judgment sought to be voided was rendered in the case of Vaughn v. Pine Creek Tungsten Co. (Cal. App.) 265 P. 491. The complaint was filed June 19, 1922, and summons was issued forthwith and returned as served June 30, 1922. Default judgment was entered on July 17, 1922. On February 10, 1923, an amended return of service of summons was filed. The writ of execution was issued on said judgment February 19, 1923, and said group of mining claims was sold to the judgment creditor, O. E. Vaughn, March 29, 1923. The sheriff executed and delivered his deed to O. E. Vaughn on April 12, 1924. On April 14, 1924, said Vaughn quitclaimed to A. H. Swallow, Esq., who brought an action to quiet his title in and to said group of mines. The judgment going in his favor, this appeal was taken.

The trial court took the position that the judgment, being valid upon its face, was immune from what was regarded as a collateral attack by a party who had no interest in the subject of the action at the time the judgment was entered. Being of this view, the court excluded all offers of evidence which, if true, would have had the effect of impeaching the integrity of the judgment. There has been much discussion by counsel as to whether false averments in the return of service of summons, which, if not inserted, would render the service invalid, fall within the definition of extrinsic or intrinsic fraud.

"Fraud practiced upon the court is always ground for voiding the judgment, as where the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair." 34 C. J. 282. The species of fraud that furnishes the best example of extrinsic fraud is that kind which is practiced upon a defendant to keep him away from the trial, or to prevent him from claiming his rights in the premises, or from setting up an available defense. The judgment in the instant case was a default judgment entered by the clerk. The judicial power which directs the entry of judgments was imposed upon if the allegations of the cross-complaint are true. If to induce a defendant to absent himself from the place of trial by the employment of fraudulent acts or to prevent him by fraudulent contrivance from setting up an available defense amounts to extrinsic fraud, it must inevitably follow that a fraud committed against the defendant by a false return of service of summons, when, in fact, no service was made, whereupon a default judgment is entered without giving the defendant an opportunity to have his day in court, is also extrinsic fraud, and is fully as disastrous to the rights of a defendant as though he had been betrayed into absenting himself from the trial. In fact, the latter illustration includes all if not more of the elements of iniquity than the former illustration does. In both instances the defendant has not had his day in court. In the first case he was deceived into the notion that his rights would be preserved; in the other case, by the practice of fraud, the fact that an action was pending against him was concealed from him. Not being present in court, he was not able to combat any intrinsic fraud that may have been practiced against him.

People v. Mullan, 65 Cal. 396, 4 P. 348, presented the question as to whether Mullan, the transferor of lands to the Cucamonga Company, a corporation, had been served with summons in an action previously brought against him. Said corporation, as the assignee of Mullan, moved to set aside the judgment on the ground that no service of summons had been made on its assignor, Mullan. It was there held that the corporation was in legal effect the assignee and legal representative of Mullan and stood in his shoes, citing section 473, Code of Civil Procedure, and U. S. v. Patterson, 15 How. 10, 14 L. Ed. 578. These and other authorities are cited in the opinion of the District Court of Appeal. In the instant case, neither O. E. Vaughn nor respondent has at any time been in possession of the mining properties involved in this case. Appellant and its predecessors in interest, beginning with the Pine Creek Tungsten Company, have successively at all times been in possession of said properties since 1918. The cross-complaint, in our judgment, presents important questions of equity which entitle the pleader to be heard on the issues made. We express no opinion as to whether appellant will be able to establish the truth of its allegations.

The cross-complaint contains allegations from which an inference of fraud as to the procurement of the judgment sought to be annulled is the inevitable result. This is true also as to the proposition that the court in which the judgment was entered was unduly imposed upon. The opinion of the District Court of Appeal, per Conrey, P. J., which we herewith adopt as a part of our decision, follows:

This is an appeal from a judgment for plaintiff in an action to quiet title to an interest in certain mining claims located in Inyo county in this state. The defendant in its answer, among other things not necessary to consider here, alleged that from the 28th day of October, 1918, and up to the 28th day of December, 1922, the Pine Creek Tungsten Company was the sole owner and in possession of a one-half undivided interest in the said mining claims; that on the 28th day of December, 1922, said Pine Creek Tungsten Company sold and conveyed its said one-half undivided interest therein to the Natural Soda Products Company, which thereupon entered into possession of said mining claims, and operated the same until the 14th day of March, 1923, when it sold and conveyed said one-half interest in said mining claims to the Tungsten Products Company, the defendant in this action, and that defendant then entered into the possession of said mines, and operated the same, and was operating the same when its answer was filed herein. The defendant alleged that the title claimed by plaintiff was based wholly upon a certain sheriff's sale (of date March 29, 1923) of said property of said Pine Creek Tungsten Company, made by virtue of the execution issued on a judgment which had been entered on the 17th day of July, 1922, in the case of Vaughn v. Pine Creek Tungsten Co., and that said judgment was void for several reasons; the facts alleged being the same referred to in the decision this day filed in Civil No. 5260, Vaughn v. Pine Creek Tungsten Co., 265 P. 491, an appeal from an order of the superior court refusing to set that judgment aside. In the appeal in that case we held, on the authority of Smith v. Jones, 174 Cal. 513, 163 P. 890, that the judgment could not be set aside on the grounds urged by the moving party, because more than a year had elapsed after the judgment was entered before the motion was made.

[1] It is contended by respondent here that, even if that judgment was void, as alleged, for want of service of summons, nevertheless that the defendant in this action had no right to impeach it, because this defendant was not a party to the action in which the judgment in Vaughn v. Pine Creek Tungsten Co., was entered, and had no interest in said mining claims at the date of that judgment. The judgment was entered in the superior court of the state of California, in and for the county of Inyo, the county in which the mines are located, and, if valid, became a lien on the title of said Pine Creek Tungsten Company in those mines on the date of its entry. If that judgment was void, it was not such lien.

Unquestionably, appellant herein, claiming title in the manner hereinabove stated, would have a right to impeach the judgment on which the sheriff's sale and deed depend for their validity, if the judgment was void by reason of facts appearing on the judgment roll. In Vaughn v. Pine Creek Tungsten Company, supra, we have held that the judgment was not void on account of any such apparent defects. But appellant herein further contends that the court erred in refusing to allow appellant to show, by evidence extraneous to the record in the former action, that there was no service of summons upon any authorized representative of the Pine Creek Tungsten Company, and that therefore the default judgment rendered against that defendant was void.

Respondent relies upon the rule that one who comes before the court solely as assignee of a defendant's right to have a judgment set aside on grounds of fraud will be denied relief, because such right is not assignable. He further contends that this rule applies in a case where, although fraud is not alleged, the judgment is sought to be impeached on account of some error extraneous to the record which left the court without jurisdiction and the judgment void as between the parties thereto. The decision in Bennett v. Wilson, 133 Cal. 379, 65 P. 880, 85 Am. St. Rep. 207, lends a degree of support to respondent's argument. On July 17, 1896, Wilson had obtained a money judgment against a corporation. At that time there was outstanding another money judgment against the corporation in favor of one Swearingen, and a second judgment in favor of Bennett. On July 18, 1896, under an execution on the Swearingen judgment, certain real property of the corporation was sold to one Cole. On January 15, 1897, Bennett, as redemptioner by virtue of his judgment, redeemed from the sale to Cole. Thereafter, and within 60 days from the date of Bennett's redemption, Wilson, claiming a right of redemption under his judgment, attempted to redeem by paying the redemption money to the sheriff. Bennett refused to acknowledge Wilson's right of redemption, and demanded a deed from the sheriff. Bennett then brought his action, wherein he attacked the validity of Wilson's judgment lien, and sought to compel the sheriff to convey the property to him in accordance with the sale to Cole under the Swearingen judgment. Wilson's judgment had been entered after default of the corporation, which default was based upon a return of summons showing that the summons had been served on the corporation through service on one Fant as general manager thereof. Bennett alleged, and sought to prove, that Fant was not such general manager, but that, in fact, Wilson himself was the general manager, and that the service and default were obtained by collusion between the sheriff and Wilson. The trial court, in the case of Bennett v. Wilson, found that the charges of fraud and collusion were not sustained, but also found that Fant was not the general manager, and did not represent the corporation; that there had been no service of summons on the corporation; and that the default and judgment were void. Wilson and the sheriff appealed to the Supreme Court, and the judgment against them was reversed. In its decision, after outlining the facts, including those to which we have referred, the Supreme Court said:

> "These facts are not sufficient to bring the plaintiff within any class recognized by the authorities as entitled to impeach a judgment regular on its face. It is ingeniously put by the respondent's counsel that the entry of the judgment was 'an imposition on the court.' But this was not the case. The judgment was entered by default by the clerk, whose legal duty it was to enter it, and who had no discretion in the matter. Nor, had there been such imposition, would it have been any concern of the plaintiff. The relations of Wilson to the corporation, in the absence of explanation, might give rise to a presumption of fraud against it. But fraud against the corporation, even had it been found, would not entitle the plaintiff to impeach the judgment. Meckley's Appeal, 102 Pa. 536; Sponsler's Appeal, 127 Pa. 410 [17 A. 1097]; Biddle v. Tomlinson, 115 Pa. 299 [8 A. 774]."

The foregoing decision appears to have been grounded upon the proposition that, because the judgment of Wilson against the corporation was regular on the face of the record (although there was in fact no service of summons), and because, at the date of entry of that judgment. Wilson had not yet become a redemptioner from the execution sale under the Swearingen judgment, it followed that no rights of Bennett existing on the 17th day of July, 1896, were affected by the entry of Wilson's judgment, and that therefore he had no right to impeach the Wilson judgment.

Before accepting the decision in Bennett v. Wilson as conclusive of the matter at issue, let us see how the rule has been stated and applied in some other cases. In People v. Mullan, 65 Cal. 396, 4 P. 348, it appeared that on January 4, 1881, judgment had been rendered against Mullan in an action affecting the title to certain land. A motion was made by the Cucamonga Company to set aside that judgment on the ground that there was no service of summons on Mullan. The Cucamonga Company was a corporation "to which the land involved in the action has been conveyed, and a certificate of purchase therefor assigned by Mullan on the 20th of October, 1881." The superior court rejected the company's offer to prove that no affidavit of publication of summons was ever made, and that there was no order authorizing such publication. (It should be noted that at that time the affidavit for publication of summons and the order of publication were not by law included in the judgment roll.) The judgment was reversed; the Supreme Court holding that the corporation was in legal effect the assignee and legal representative of Mullan, and standing in his shoes. In Crossman v. Vivienda Water Co., 136 Cal. 571, 576, 69 P. 220, 223, the Mullan Case, supra, was cited as authority for the proposition that "one who succeeds to property that is subject to a judgment may appear to have it vacated, though he was not party to the judgment."

[2] Whitney v. Kelley, 94 Cal. 146, 29 P. 624, 15 L. R. A. 813, 28 Am. St. Rep. 106, is a case wherein the plaintiff, as grantee of defendants in a former action, filed his complaint to set aside the former judgment upon the ground that it was procured through certain frauds practiced upon plaintiff's grantors, defendants in said former action. The appeal was from a judgment dismissing the action, after demurrer sustained, and this judgment was affirmed. Sundry decisions and paragraphs from text-writers are quoted and discussed in this decision in relation to the rule which denies to any person the right to proceed in equity "against a judgment or decree to which he was not a party, and which did not at its rendition affect any of his rights." The rule is not without its exceptions. Of course, a bare right to file a bill in equity for fraud committed upon the assignor will be denied, because the transfer of such right is against public policy. Again, it has been laid down as a general rule that:

> "Where an equitable interest is assigned in order to give the assignee a locus standi in judicio in a court of equity, the party assigning such right must have some substantial possession and some capability of personal judgment, and not a mere naked right to overset a legal instrument or to maintain a suit."

In some of the cases cited in Whitney v. Kelley, emphasis was laid upon the fact that the parties claiming the right to attack upon grounds of fraud the validity of judgments rendered against the assignors were claiming as assignees, of a mere naked right, and not as subsequent purchasers in possession of property conveyed to them under circumstances which made the right of setting aside the prior fraudulent judgment, or other fraudulently obtained instrument, a mere incidental right for the protection of the assignee's property rights. So the Supreme Court in Whitney v. Kelley summarized its conclusions thus:

> "If plaintiff's grantors had nothing but a mere naked right to file a bill to set aside this judgment, then this plaintiff, their grantee, can have no title. It is essential that a party complaining in equity should have some present substantial interest in the subject-matter of the suit. He must have a direct interest in the result of the litigation, and his complaint must clearly indicate that fact. The plaintiff here has no interest in this land, for his grantors had no interest when they transferred to him."

The former judgment rendered against Whitney's grantors had been a judgment denying their claim of title. Therein we find a difference between that case and the case now before us. At the time, when the Pine Creek Tungsten Company conveyed to the Natural Soda Products Company, the grantor was the owner, and in possession of the property conveyed. The same is true respecting the conveyance by the Natural Soda Products Company to the Tungsten Products Company on March 14, 1923. The Tungsten Products Company became owner, and was in possession, of the property from and after said 14th day of March, 1923. It is true that there was an outstanding judgment which created an apparent lien against the property, but there had been no execution sale or conveyance by way of enforcement of that judgment lien. Appellants alleged and offered to prove these facts, and further to prove that neither appellant nor said Pine Creek Tungsten Company had any notice or knowledge of said action or judgment of Vaughn v. Pine Creek Tungsten Company until the month of April, 1924; that, during the intervening period of time since the entry of said judgment of Vaughn, appellant and its predecessors laid out and expended at least $150,000 in the development of the mining claims which are the subject of this action, and that during said period of time both Vaughn and plaintiff, Swallow, knew that said work was being carried on and said expenditures were being made on said property, and stood silently by, and permitted said work to be done and said money to be expended, without giving the said corporations or any agent of them any notification of the existence of said former judgment or of any proceedings connected therewith. The offered evidence was rejected. If the facts be such as appellant alleged and offered to prove, it is manifest that a grave injustice has been done and will be confirmed, if it be held that the offered defense must be rejected merely because the title of the owner of the property has been conveyed to appellant. If the Pine Creek Tungsten Company through its responsible officers had known of the existence of said judgment, and if in substance and essence appellant's claim was primarily and principally in the nature of a cause of action directed against that judgment, the rule might well be applied which denies the right of an assignee of such claim to assert his claim by way of equitable action or defense.

In Emmons v. Barton, 109 Cal. 662, 42 P. 303, the court referred to the rule stated in Whitney v. Kelley, supra, that a mere right to complain of fraud is not assignable. But the court said that this rule "does not apply to a case where the right to sue for a fraud is merely incidental to a subsisting substantial property which has been assigned, and which is itself intrinsically susceptible of legal enforcement." The same proposition is repeated in Kemp v. Enemark, 194 Cal. 748, 756, 230 P. 441. In the case at bar, we are now considering appellant's contentions, not upon the basis of fraud used in the obtaining of the judgment in question, but only upon the basis of the court's failure in that action to obtain jurisdiction over the defendant therein. Nevertheless, the principles controlling the right of the assignee to protection against the results of the void judgment and of the proceedings thereunder are practically the same, whether the infirmity of the judgment has resulted from fraud or has resulted from mistake in connection with the service of the summons in that action. In Marriner v. Smith, 27 Cal. 649, the plaintiffs were grantees of one Goode, pursuant to purchase of the land from Goode after entry of a money judgment obtained by Smith against Goode. The facts alleged were sufficient to show extrinsic fraud committed by Smith, which prevented Goode from defending against the action. Referring to the limitations upon the right of a grantee of the judgment debtor, where the grant has been made after entry of the judgment, the Supreme Court said:

> "Goode * * * is not a party to this action. He has made no complaint against the judgment. Of course the plaintiffs cannot interfere on his behalf, and they have no interest in the matter, except so far as the judgment lien may affect their property. They have no right to have the judgment absolutely vacated and annulled. The only question is, as to whether plaintiffs stand in such a relation to the judgment against Goode and the parties thereto, as to entitle them to the aid of a court of equity to remove a judgment lien upon the land described in the complaint, and to an injunction against a sale under said judgment."

[3] So here, although appellant cannot interfere on behalf of the Pine Creek Tungsten Company to have the judgment set aside, or ask to have it absolutely vacated and annulled, nevertheless appellant, so far as its status in relation to such judgment is concerned, has the right to show the void character of the judgment, for the purpose of establishing the invalidity of the judgment lien, which is the very foundation of the plaintiff's claim of title. To the extent necessary for that purpose, appellant had the same right that the Pine Creek Tungsten Company would have had to allege and prove that the judgment was void, either by reason of fraud or by reason of mistake leading to the default and the entry of judgment thereon. In the exercise of this right appellant was, of course, subject to the same limitations which would have bound the Pine Creek Tungsten Company in seeking to obtain equitable relief against such judgment. It is a necessary condition to the allowance of such relief that facts be alleged sufficient to show that there was a meritorious defense to the action in which the judgment was entered. "Even though a judgment may have been obtained through fraud, or without service of process, a court of equity will not grant relief against it in favor of a party who 'claims only the barren right of being permitted to defend against a claim to which he had no defense.'" Lee v. Colquhoun, 175 Cal. 16, 164 P. 894. Appellant herein alleged, in his answer, facts which, if established, would constitute a defense in the former action, in that the note sued on was made without consideration, and without any authorization for execution of the same. At the trial, appellant made ample offers of evidence tending to establish these defenses, and the offered evidence was excluded; the court holding that the defendant "must rely upon what the judgment roll records show."

We are of the opinion that the rulings of the court were erroneous in the particulars hereinabove stated, and that appellant was thereby deprived of the opportunity to present an apparently good defense to the action.

The judgment is reversed, and cause remanded for a new trial.

We concur: RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; TYLER, Justice pro tem.

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205 Cal. 225

OCEAN ACCIDENT & GUARANTEE CORPORATION, LIMITED, OF LONDON, ENGLAND, v. JOHNSON et al. (L. A. 10389.)

Supreme Court of California. Sept. 20, 1928.

Insurance ⚷188(2)—Testimony of witness, based on general recollection relating to matters assured was required to keep records of under policy, held properly excluded.

In suit for premiums under employers' liability policy, basing premium upon entire remuneration earned during policy period by all assured's employees, and making assured's failure to keep records of remuneration earned by employees classified according to kind of work performed cause for insurer to apply to entire remuneration earned premium rate applicable to most hazardous work performed, testimony of assured's witness seeking to show segregation of employees so as to secure lower rate based on witness' general recollection, assured having failed to keep books to supply the proper information, *held* properly excluded.

In Bank.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by the Ocean Accident & Guarantee Corporation, Limited, of London, England, against Henrietta Johnson and another, doing business under the firm name and style of the Pioneer Transfer Company, to recover unpaid premiums for employer's liability insurance. Judgment for plaintiff, and defendants appeal. Affirmed.

For opinion of District Court of Appeal, see 263 P. 279.

A. L. Hubbell and Honnold & Hubbell, all of Esconido, for appellants.

George H. Moore and Hubert Starr, both of Los Angeles, and Dorsey Whitelaw, of El Centro, for respondent.

PER CURIAM. At the time this action was before the District Court of Appeal, Second District, Second Division, each of the three justices thereof prepared and filed separate opinions, in one of which the justice writing the same dissented from the conclusion reached by his two associates in the respective opinions prepared by them. It was largely due to this diversity of sentiment among the members of the District Court of Appeal that we granted the petition for a hearing in this court. After a more thorough examination and study of the several opinions rendered by the members of the District Court of Appeal and the law applicable to the questions involved herein, we have arrived at the conclusion that the opinion written by Mr. Justice Craig of said District Court of Appeal coincides with the views of this court, and we hereby adopt the same as the opinion of this court. Said opinion is as follows:

The transaction out of which this action arose is one of employer's liability insurance. The suit is for unpaid premium thereon. The counts are contained in the complaint. The first count alleges that the defendants became indebted to the plaintiff in the sum of $1,113.77 on account of premiums earned on a written policy of workmen's compensation insurance covering a period of one year, of which only $591.89 had been paid, and $521.79 was due and unpaid. The second count alleges an account stated upon the same transaction by which the defendants agreed to pay the plaintiff $1,113.77, and had paid $591.89. From the bill of exceptions it appears that at the trial plaintiff introduced evidence to show that it issued a policy as alleged, that the work covered by it as stated in the contract was "truckmen, general trucking (not otherwise classified), classification No. 7208, premium rate $3.77. Pay roll to include all such employees as drivers, drivers' helpers, chauffeurs, chauffeurs' helpers, stablemen, blacksmiths, repairmen, and riggers, excluding only clerical office employees and storage warehouse employees." Also, that the place stipulated as that where the work was to be done was "Calexico, Imperial county, Cal." Section H of the policy is one over which the controversy principally arose. It reads, in part, as follows:

> "The premium is based upon the entire remuneration earned during the policy period by all employees of the assured, and all employees of any contractor or subcontractor of the assured, engaged in the trade, business, or work described in said declarations. * * * The assured shall keep complete and accurate record of the remuneration earned by employees classified according to the kind of work performed, and shall cause contractors and subcontractors to do likewise by inserting in all contract agreements entered into a provision requiring such records to be kept for examination by the assured and the corporation. Failure to keep such records on the part of the assured shall entitle the corporation to apply to the entire remuneration earned the premium rate applicable to the most hazardous work performed."

Evidence was introduced sufficiently establishing the account stated as alleged in the complaint, by which the defendants agreed to pay the plaintiff's bill of $1,021.79, and that of this only $591.89 was paid. The prima facie case was also proved on the other count.

Both sides rely upon Frankfort Marine Accident & Plate Glass Ins. Co. v. California Artistic Metal & Wire Co., 28 Cal. App. 74, 151 P. 176, to sustain their respective contentions as to the law bearing upon the issues presented by the first count. The facts of the case are similar to those in the one before us. The policy there construed contained a provision similar to section H of the contract here presented, but counsel construe the language of the opinion differently.

It was sought by testimony of the secretary of the defendant company to segregate the pay roll, but the evidence offered was simply the "general recollection" of the witness, and this was founded upon no substantial data. The ruling of the trial court refusing admission of such testimony was sustained. The principles upon which the decision was based are, we think, applicable here. They are most clearly expressed in the opinion of the court in denying the application for rehearing. One reason which is indicated as sufficient to uphold the ruling of the superior court is:

> "That the proposal to prove the fact by the 'general recollection' of an officer of the defendant, after the latter had said that there were available to him no data upon which an estimate could be made, was properly rejected by the court as involving proof incompetent for that purpose.
>
> "We do not hold that a witness, in some instances, may not properly be permitted to give his 'best recollection' as to the existence or nonexistence of a particular fact relevant and material to some ultimate issue, in cases where the issue thus sought to be proved is not required to depend wholly for its establishment upon that character of proof and where there exists possible opportunity for the party against whom

it is received to offer adversary proof upon the point to which it is addressed. In the case at bar, however, the ultimate question to be affected by the proposed proof, based entirely upon the 'general recollection' of the witness, is the most vital in the case to the plaintiff. And, it is to be said, equally vital to the defendant; yet readily it can be perceived how impossible it would have been for the plaintiff to have met or attempted to overcome the force and the possible effect of testimony of so dubious an evidentiary nature and how easily thus its rights might be wholly destroyed. Through no fault of its own, the plaintiff was wholly without means of knowing, or the ability even to approximate (not even enjoying the doubtful advantage of general or the best recollection) how much of the total compensation paid to its employees by the defendant was received by the 'outside employees,' and, manifestly, had the defendant been allowed to make proof of that fact by a witness upon his mere 'general recollection' thereof, based upon no data of a substantial character, the plaintiff's rights would have been placed at the mercy of testimony possessing little or no probative value and as to which an adversary showing was wholly impossible."

This quotation is most apt in its application to the facts of the instant case. While it is claimed here that the rejected testimony was the definite recollection of the witness as to employment of particular employees, it was based upon no "substantial data," and in fact upon no data of the character required by the contract of the parties. In the Frankfort Case the books included a record of all time spent by the employees whether within or without the shop. The issue was upon the segregation on that basis, and the books failed to supply the information. In the instant case it appears that the books are in identically the same condition. They show all of the time spent, but do not segregate it as to the character of work done or place of its performance. As to the lack, all data capable of being used for segregation purposes, the situations are the same. In the absence of such data stipulated by the parties as thus necessary, it is of no moment that here a witness stated that he knew the employees, nor would it meet the stipulations agreed upon by the parties themselves as to data required to show such segregation if he could tell what each did and where each worked. As in the opinion quoted, such testimony would have been determinative of the most vital issue in the case. The insurer would have been utterly at a loss to have secured or produced adversary proof. The insured had full opportunity to have kept and preserved competent evidence, and its failure to do so was not only neglect of its own interests, but a clear disregard and dereliction of a duty owed the insurer in a confidential relation of agency for the latter; and, finally, the injury which the appellants may sustain by being refused permission to use the evidence offered is the natural result of their own neglect, and to permit them now to foreclose the respondent from its day in court (which would be the practical result of allowing the issues in question to be established by the mere unsubstantiated recollection of the witness) would violate the maxium which forbids a party taking advantage of his own wrongful act.

Appellants further contend that there was testimony to the effect that $2,500 of the pay roll was paid to warehousemen, and that their work is not covered by the policy. The most that can be said to sustain this claim is that some conflict in the testimony appears to exist, but the only evidence to be found in the bill of exceptions indicating that any of the pay roll covered work of warehousemen is the statement of the witness Hill, based merely upon his general recollection, as to the competency of which evidence we have stated our views.

Finally, appellants make the contention that a part of the pay roll as reported by respondent's auditor was for work in Mexicali, whereas the policy provided that it should cover work only in Calexico, Imperial county, Cal. The only place where the word "Mexicali" occurs is in a statement rendered by the company to defendants which was introduced in evidence as a part of the proof of the alleged account stated. The bill of exceptions does not contain the entire statement. It merely quotes the summary of which all that is germane to the question here under consideration is, "Total $31,547.36; Mexicali $1,093.88." With no more of the context than this from which to judge, it would be mere speculation to conclude that the word "Mexicali" as here used indicates that any work was performed outside of Calexico. On the other hand, the bill of exceptions contains the statement, which, of course, we must accept as true, that:

> "On the trial evidence was introduced by plaintiff in support of all findings of fact made by the court."

One of the findings to which reference is made is that all of the allegations in paragraph 3 of the plaintiff's first cause of action are true. These allegations contained one to the effect that the defendants became indebted to the plaintiff in this transaction in the sum of $1,113.77, which, according to the statement above mentioned, rendered by the plaintiff, includes the item, "Mexicali, $1,093.88"; hence the necessary inference that the work was done in Calexico. Upon the meager information contained in the bill of exceptions bearing upon this point we are not in a position to say that the trial court's finding in this behalf is unsupported by the evidence.

In view of our decision concerning the issues presented in the first count, it is unnecessary to pass upon appellants' contention concerning the court's rulings to do with the alleged account stated as set forth in the second cause of action.

The judgment is affirmed.

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93 Cal. App. 745

RANDLEMAN v. BOERES. (Civ. 3538.)★

District Court of Appeal, Third District, California. Sept. 4, 1928.

Rehearing Denied Oct. 4, 1928. Hearing Denied by Supreme Court Nov. 1, 1928.

1. Malicious prosecution 🔑64(2)—Evidence held insufficient to show malice or lack of probable cause in prosecuting defendant on charge of burglary.

In action for malicious prosecution on the charge of burglary, findings that prosecution was actuated by malice, and that charge against plaintiff was false, because no burglary was in fact committed, *held* not sustained by evidence, but evidence showed probable cause.

2. Malicious prosecution 🔑20—Honest belief, reasonably founded, that one has clearly recognized another in commission of crime, furnishes probable cause to assume his guilt.

An honest belief, reasonably founded, that one has clearly recognized an individual in the actual commission of a crime, secured by means of a close view of his features in the bright moonlight, furnishes probable cause to assume his guilt, without further circumstances.

3. Fraud 🔑58(1)—Perjury 🔑33(1)—Substantial proof is necessary to sustain finding or charge of fraud or perjury.

A finding or charge of fraud and perjury must be based on substantial proof.

4. Appeal and error 🔑1001(1)—General verdict cannot stand, if not supported by evidence at trial.

The general verdict of a jury has no firmer foundation than the record of the evidence adduced at the trial, and specific finding cannot aid general verdict, in the absence of substantial evidence to support finding.

5. Malicious prosecution 🔑56—Burden is on plaintiff to prove want of probable cause and malice in malicious prosecution case.

In action for malicious prosecution, burden is on plaintiff to prove want of probable cause and malice.

6. Malicious prosecution 🔑23, 32—Malice may be inferred from lack of probable cause, if established by proof; but want of probable cause may not be inferred from mere existence of malice.

Though malice may be inferred from lack of probable cause, it is a question of fact, which must be established by proof, like any other material fact; but want of probable cause may not be inferred from mere existence of malice.

7. Malicious prosecution 🔑64(2)—That accused was held by magistrate for trial is prima facie showing of probable cause.

Proof that at preliminary hearing accused was duly held by the magistrate for trial in the superior court constitutes prima facie showing of the existence of probable cause for the prosecution, and mere fact of acquittal does not destroy effect of such prima facie showing.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Action by Merle P. Randleman against Matilda Boeres. Judgment for plaintiff, and defendant appeals. Reversed.

Gilbert F. Boreman and Wm. J. Clark, both of Los Angeles, for appellant.

Benjamin Elconin, of Los Angeles, and Arch G. McLay, of Huntington Park, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a $2,000 verdict of a jury, rendered in an action for malicious prosecution instituted against the respondent on a charge of burglary. The record is devoid of substantial evidence to support the necessary elements of malice or lack of probable cause, and the judgment must therefore be reversed.

[1] The appellant resided with her husband and daughter in a cottage at Huntington Park, Los Angeles, Cal. The respondent was 22 years of age and unmarried. He lived with his parents, about a block from the residence of appellant. These families were not acquainted. The appellant had never spoken to the respondent, although she knew who he was. There was no previous association between them, except that upon a single occasion she and her daughter were introduced to the respondent at a party given the previous May by a neighbor, during which the respondent invited appellant's daughter to dance with him, which she declined to do. There was no criticism or adverse comment against the respondent by any member of the appellant's family. The record affirmatively refutes the inference of any conduct or declarations on the part of appellant which would indicate malice, ill will, or spite toward the respondent. The appellant did not even recall his name. He was referred to in her household, with no disparaging intent, as Rudolph Valentino. This was a mere nickname.

August 13, 1924, about 2 o'clock a. m., the home of appellant was burglarized. Her husband was a traveling man. He had planned to leave by train for Riverside, very early that morning. They retired at 11 o'clock the previous evening, sleeping in a double bed, in a room adjoining the living room. The gray trousers of Mr. Boeres, containing a purse with small change and a bill-fold

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★Rehearing denied. Hearing denied by Supreme Court.

pocketbook containing two $10 greenbacks, a railroad ticket, and some business cards, were thrown upon the chiffonier. The bedroom contained three windows, the shades of which were raised, permitting the bright moonlight which existed that night to illuminate the room, so that all objects therein could be clearly discerned. Some time after midnight the appellant was aroused by the barking of dogs. She testified that she was restless and lay awake much of the night, impressed with the responsibility of calling her husband in time for the early train. He also had been aroused by the barking of dogs, but was sound asleep at the time of the entry of their room by the burglar. Suddenly, without previous warning, their bedroom door communicating with the living room was silently opened; a man stealthily entered and, passing the foot of the bed, hastened to the chiffonier and seized the trousers, which he threw across his left arm, and hurried out of the room. A small purse, wristwatch, and ring which were lying upon the dresser were untouched. In passing the bed, the burglar raised his coat collar with his right hand to conceal his face. During this occurrence the appellant lay frightened and silent. She testified, however, that she had a clear view of the burglar's face and recognized the respondent. She was positive of his identity. He wore a dark blue or black suit of clothes, with a gray cap. The moment he left the room she sprang from the bed, screaming, "There is a man in the house," and rushed to the closet to get a gun. The commotion awakened her husband, who exclaimed, "What is the matter?" Amid this confusion the daughter entered the room from her adjoining bedroom, crying, "Mamma, what is the matter?" To which the appellant excitedly rejoined, "Rudolph Valentino took your father's trousers." After some conversation, the daughter asked if she should call an officer, to which the appellant assented. The daughter immediately telephoned the news of the burglary to the sheriff's office.

Three detectives were at once detailed to investigate the matter, and soon arrived at the Boeres residence. Upon their arrival, the appellant related the circumstances to these officers, and stoutly maintained that she saw his features and identified the burglar. She referred to him as Rudolph Valentino, but some one present suggested that his name was Merle Randleman. She told them where the respondent lived, on Live Oak street, about a block away, and within an hour of the time of the burglary, at about 2:30 or 3 o'clock a. m., they called at his residence. Mrs. Randleman, his mother, was up attending to her husband, who was suffering from an attack of asthma, and she answered the doorbell. She told the officers that her son had gone to a show the night before, but reached home and had retired at 10 o'clock. The respondent was called, and informed the officers that he drove his car to the Lyric Theater about 7 o'clock the previous evening, and that he had stopped at a drug store for an ice cream soda on the way home, but that he was in bed by 10 o'clock, and had been asleep ever since that time. His story apparently constituted a complete alibi, and was corroborated by both of his parents. Subsequently, however, he told the officers, Jones and Higgins, that he arrived home the night of the burglary about an hour before the officers called at his home. He also failed to account for a flat passkey which the officers found upon his key ring. The officers returned to the Boeres residence and informed appellant that the Randleman family had told them the respondent had gone to bed at 10 o'clock on the previous evening, and, in regard to her claim that she had recognized him as the burglar, it would merely be her word against their flat denial, and that she might get into trouble by charging him with the crime. In the morning Mr. and Mrs. Boeres, in company with Officer Purrier, carefully searched the premises for further evidence of the crime. She pointed out distinct finger prints appearing in a smudge of black grease which she found upon the white enamel of the outer door jamb. A footprint outlined in dirt or sand was seen upon the bedroom rug. A tool-chest of the daughter's automobile, which had been parked in the rear of the building, was found open. A vial of chloroform in a bottle labeled "pills" was found in the grass at the rear of the dwelling. The tracks, identified by respondent's witness Lowther as those of a man followed across the premises to a neighbor's fence, where the shrubbery was broken, and where early the morning of the burglary Mrs. Van Wert had found the purse belonging to Mr. Boeres, together with some papers near the fence. These foot tracks continued beyond the fence across the adjoining lot. While this group were talking at the Van Wert fence, Mrs. Duncan, who lived in a cottage two or three houses beyond, observing them, inquired what had happened. Mrs. Boeres, or some one else in the group, replied that they had been robbed. Mrs. Duncan then asked if they had lost a pair of gray trousers. Upon being assured that they had, she said her husband had discovered a pair that morning under a walnut tree in their back yard. These proved to be Mr. Boeres' trousers. The bill-fold purse, however, was not found. The Duncan premises, where the trousers were found, were directly in the course of the tracks of the burglar, which ran in the general direction of the Randleman home. The officer, Purrier, testified:

> "The entrance [to appellant's home] was gained via pass key—side entrance. * * * Criminal ran in a northeasterly direction across center of block to a point opposite the house of Merle Randleman [the respondent], thence turning in the direction of his place, the tracks disappearing in the lawn across the street, though proceeding toward [respondent's] house."

Because of the warning given to appellant by the detectives, she abandoned the effort to prosecute the case, and nothing further was done regarding the matter for about two months. October 9, 1924, Mr. Jones and Mr. Higgins, members of the burglary squad from the sheriff's office, voluntarily visited appellant's home in the process of checking up on the neighborhood burglaries which had been reported, in which no action had been taken. During this interval the appellant had shown no activity or interest in prosecuting the criminal case. At the request of the officers, she once more related the circumstances of the affair, asserting her belief that she had recognized the respondent as the burglar. They asked her why she had not filed a charge against him, and she told them that the other detectives had told her she might get into trouble because of the likelihood of respondent's acquittal on proof of his alibi. Jones told her that, if she was still willing to file the charge, they would go with her to the magistrate. At the officer's suggestion, and because of their encouragement, she did accompany them to the office of Justice Miller, where she again related the facts of the case. He prepared a complaint charging the respondent with burglary, and she signed and swore to it. A warrant of arrest was issued and served upon the respondent. He was taken in custody and imprisoned for about one day, when he was released on bail. In due time the preliminary hearing took place, at which both the appellant and the respondent were sworn as witnesses. The defense of an alibi was urged by the respondent, but the magistrate, in the exercise of his judgment, assuming there was probable cause to believe that he was guilty of the charge, bound him over for trial in the superior court. At the trial, which occurred January 13, 1925, the accused was acquitted, either because the jury was not satisfied of his guilt beyond a reasonable doubt, or because they thought he was innocent. This action for malicious prosecution was subsequently instituted.

Upon trial of the present action, the jury rendered a judgment of $2,000 against the appellant for malicious prosecution, and also adopted special findings to the effect that her prosecution of the accused was actuated by malice, that her charge against him was false, and that no burglary was in fact committed. It is difficult to account for these extravagant findings. After a careful reading of the entire record, we are persuaded that a burglary was committed as charged by the appellant, that there is absolutely no evidence to indicate malice on her part toward the respondent, and that there is no substantial proof of a lack of probable cause to believe that the accused was guilty of the crime. The case of Johnson v. Southern Pacific Co., 157 Cal. 333, 107 P. 611, defines the term "probable cause" as "a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true."

[2, 3] It may be conceded that independent of the belief of appellant that she had recognized the burglar, the remaining circumstances fail to furnish probable cause to assume that he was guilty. It may be further conceded that the appellant was mistaken in her identity of the burglar But an honest belief, reasonably founded, that one has clearly recognized an individual in the actual commission of a crime, secured by means of a close view of his features in the bright moonlight, furnishes probable cause to assume his guilt, without further circumstances. In the present case, however, further facts, in addition to appellant's recognition of the burglar, appear to warrant the conclusion that she had probable cause to believe in his guilt. The footprints of a man wearing a shoe about the size of respondent's were traced by Detective Purrier from the scene of the burglary "across the center of the block to a point opposite the house of Merle Randleman, then turning in the direction of his place, * * * toward his house." Along this trail were found the stolen purse and trousers. Respondent's prosecution of this action and his defense of the judgment on appeal are based entirely upon his contention that the appellant fabricated her entire story of the crime, that the burglary did not occur, and that she perjured herself in swearing to the identity of the respondent. But there is no evidence to support this fanciful theory, except some slight, immaterial contradictions in the testimony. In an illogical effort to escape from a total absence of proof of malice and a lack of probable cause, the respondent in his brief says:

> "* * * The same brain that framed and fabricated and foisted this 'pipe dream' on the jury also arranged for the planting of the trousers and the planting of the purse."

This extravagant language is in direct conflict with the undisputed testimony of the record. The evidence affirmatively shows that the appellant had no malice or ill will toward the respondent, and no motive for fabricating her story of the crime. A finding or charge of fraud and perjury must be based upon substantial proof. It was a man's fingerprints which were found in the grease on the door jamb. It was the tracks of a man's shoes which led along the trail where the stolen articles were found. The stolen trousers and purse were discovered and reported by different neighbors, whom the appellant scarcely knew. There was sufficient genuine excitement and criminal clews, difficult to counterfeit, to convince a bevy of expert officers that a crime had been actually committed. No sensible person can read the record with an unprejudiced mind without being convinced that a genuine burglary was committed, and that the appellant and her family were victims of the crime.

[4] The general verdict of a jury has no firmer foundation than the record of the evidence adduced at the trial. A specific finding

that malice existed, or that the appellant perjured herself, cannot aid the general verdict, in the absence of substantial evidence, to support these findings. The record fails to support these special findings.

[5, 6] The burden is always upon the plaintiff to prove both want of probable cause and malice. While malice may be inferred from a lack of probable cause, it is a question of fact, which must be established by proof like any other material fact. Griswold v. Griswold, 143 Cal. 617, 77 P. 672. Upon the contrary, a want of probable cause may not be inferred from the mere existence of malice. Franzen v. Shenk, 192 Cal. 572, 611, 221 P. 932. One may possess malice toward an accused, and yet have such probable cause to believe in his guilt as to warrant a prosecution of the crime. In an action for malicious prosecution, it is necessary for the plaintiff to show affirmatively, both malice and a lack of probable cause. Cooper v. Armour (C. C.) 42 F. 215, 8 L. R. A. 47; Ricord v. Central Pac. Ry. Co., 15 Nev. 167.

[7] In the present case the appellant established a prima facie showing of probable cause by proof of the fact that at a preliminary hearing the accused was duly held by the magistrate for trial in the superior court. It is settled law that this showing constitutes a prima facie existence of probable cause. Johnson v. Southern Pacific Co., 157 Cal. 333, 339, 107 P. 611; 18 R. C. L. 42, § 25. Upon the contrary:

> "The great weight of authority and reason is that the mere fact of the acquittal of the defendant upon the trial of a criminal charge, is not prima facie evidence of the want of probable cause for the prosecution." 18 R. C. L. 40, § 23.

In the present case the respondent utterly failed to support the burden resting upon him to show either that appellant's prosecution of him was actuated by malice, or that the criminal proceeding was instituted without probable cause.

For this reason the judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

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94 Cal. App. 4

PEOPLE v. COHEN. (Cr. 1673.)

District Court of Appeal, Second District, Division 1, California. Sept. 11, 1928.

1. Criminal law 🔑1158(1), 1159(2)—Appellate court will not weigh evidence on appeal against verdict of jury or findings of trial court.

On appeal, appellate court will not undertake to weigh evidence as against verdict of jury or findings of trial court.

2. Criminal law 🔑1038(3)—Defendant, not requesting addition to instruction on effect of accusatory statements made in his presence, could not object on appeal to failure to give addition.

Where court instructed jury that admissions of fact made in presence of defendant were effective only as admissions as to persons making same, and could be considered only in considering attitude and conduct of defendant at time when statement was made in his presence, defendant on appeal could not object to court's failure to further instruct that jury should consider circumstances under which defendant failed to reply to accusatory statements made in his presence; such addition not being requested when instruction pursuant to stipulation of counsel was given.

3. Criminal law 🔑782(4)—Requested instruction that jury must seek theory on which to acquit defendant, not theory for conviction, held properly refused.

In prosecution for possessing still, requested instruction that it is not jury's duty to seek for theory on which to convict defendant, but it is their duty to seek for theory on which to acquit defendant, *held* properly refused.

4. Criminal law 🔑829(9, 18)—Requested instructions on presumption of innocence and on reasonable doubt held properly refused, where court read statute thereon (Pen. Code, § 1096; § 1096a, added by St. 1927, p. 1039).

Where court read to jury Pen. Code, § 1096, and section 1096a, added by St. 1927, p. 1039, no further instruction on subject of presumption of innocence or definition of reasonable doubt was required, and hence requested instructions on presumption and reasonable doubt were properly refused.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Jack Cohen was convicted of possessing a still, and he appeals. Affirmed.

C. B. Conlin and E. R. Simon, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

CONREY, P. J. The defendant was convicted of the crime of "possession of still," in that he did willfully, etc., own and have in his possession a certain still worm and other described devices, designed, used, and intended to be used in the manufacture of intoxicating liquor for beverage purposes. He appeals from the judgment and from the order denying his motion for a new trial.

The information was filed against appellant jointly with one Tom Collins, who pleaded guilty and is not now before this court. The points presented on behalf of appellant are: That the evidence is insufficient to sustain the verdict; that one of the instructions to the jury is erroneous; and that the court erred in refusing to give certain instructions requested by appellant.

[1] We have examined the evidence as set forth in the record. It is sufficient to establish the facts charged in the information. The argument of counsel on this branch of the case relates chiefly to points on which the evidence is conflicting. All such argument is met by the familiar rule that on appeal this court will not undertake to weigh the evidence, as against the verdict of a jury or the findings of a trial court.

[2] The instruction to which appellant objects had relation to the evidence of certain admissions of fact which were said to have been made by Collins in the presence of Cohen. The instruction informed the jury in effect that such admission was effective as an admission of those facts as to Collins only, and could be considered by the jury for only the one purpose of considering the attitude and conduct of the defendant Cohen at the time when such statement was made in his presence, if the jury should find that it was so made. The objection now made to the instruction is that the court failed to further instruct the jury that they should take into consideration the circumstances under which the defendant failed to reply to the accusatory statements made by Collins in his presence. It is not shown that, at the time when the instruction was given, appellant asked for this addition to the instruction. On the contrary, it is admitted that the instruction was given pursuant to stipulation of counsel. Under these circumstances the defendant has no ground of complaint concerning this matter.

The defendant requested, and the court refused, to give the following instructions:

> "You are instructed that it is not your duty to seek for a theory upon which you may convict the defendant, but, on the contrary, it is your duty as jurors to seek for a theory upon which you may acquit the defendant."
>
> "You are instructed that, unless the prosecution proves beyond a reasonable doubt to a moral certainty each and every material allegation in the information, it is your duty as jurors to acquit the defendant."
>
> "You are instructed the suspicious circumstances are not in themselves sufficient to convict the defendant, and the chain is never stronger than its weakest link, and unless the chain of evidence is complete—by that it is meant, that unless the evidence establishes the guilt of the defendant completely—then you must acquit the defendant."
>
> "You are instructed that this defendant is presumed to be innocent at all stages of the proceeding, and this presumption of innocence clothes the defendant at all stages of the proceeding, and goes with you jurors into the jury room, and is there to be considered by you, together with all the other evidence in the case."

[3, 4] No authority is offered in support of the first of these refused instructions, and we think it was very properly refused. It is not the duty of a jury to "seek for a theory." The other three were merely extensions, or particular statements, of the rules concerning reasonable doubt and the presumption of innocence. The court stated these rules by reading to the jury section 1096 of the Penal Code. Where this is done, no further instruction on the subject of presumption of innocence, or defining reasonable doubt, is required. Pen. Code, § 1096a, added by St. 1927, p. 1039.

Taking the instructions as a whole, and notwithstanding the refusal of the court to give the requested instructions to which we have referred, we are of the opinion that the record contains no prejudicial error, and that there has been no miscarriage of justice in this case.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

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94 Cal. App. 1

WEST v. NEECE et al. (Civ. 3555.)

District Court of Appeal, Third District, California. Sept. 7, 1928.

Bills and notes 🔑489(3)—Defendants, sued on note given to settle action on earlier note, could not prove want of consideration therefor, without alleging it (Civ. Code, §§ 1605, 3105, 3106).

Where defendants, in settlement of action against them on note, gave another note and were assigned a certain other note and rights in stock, *held* that, in subsequent action on the note given in settlement of action, they could not show want of consideration for the first note, unless by proper pleadings they brought the prior transactions in question, under Civ. Code, §§ 1605, 3105, 3106.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Sam B. West against G. W. Neece and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Eugene Tincher, of Long Beach, for appellants.

James L. Giffin, of Long Beach, for respondent.

WEYAND, Justice pro tem. This action was brought to enforce the payment of a promissory note, dated June 7, 1924, in the sum of $2,000, and which note was by its terms payable November 15, 1924. Said note was executed by the appellants above named. The complaint is in the usual form, and it alleges that on December 15, 1924, the appellants paid on the principal of said note the sum of $150, and that they paid on said day the sum of $70 on the interest thereon.

In the answer of the appellants, after making denial of the execution of said note, and denial of the payments of interest as in said complaint set out, the appellants apparently attempt to set up an affirmative defense of failure of consideration. In that behalf they allege that the note sued upon was given in consideration of the plaintiff's promise to deliver to defendants $10,000 worth of the capital stock of the Long Beach Realty Company, a corporation, and that this stock was never delivered as promised. The trial court found against the appellants on the issues thus tendered, and gave plaintiff a judgment for the amount due on the note, less the payments. From this judgment the defendants appeal.

The evidence discloses that, prior to the execution of the note here involved, and on November 1, 1923, one J. M. Hulett had made and executed his promissory note to plaintiff in the sum of $1,850. Hulett had attempted to secure the payment of this note by giving an order for the delivery of the above-mentioned shares of stock, which were then in process of being issued. The delivery of this stock was prevented by an order of the corporation commissioner of the state of California, excepting as to $450 worth thereof hereinafter referred to. The evidence further shows that on November 1, 1923, the present defendants gave to plaintiff herein their promissory note in the sum of $2,000, and that just prior to June 7, 1924, plaintiff herein had brought suit thereon against the present defendants for its collection. Upon the bringing of this suit, a settlement was effected, whereby the defendants were assigned the Hulett note, and were given a dismissal of the suit then pending against defendants herein.

As a part of this settlement the defendants herein made and executed two several documents relating to the Hulett note and stock, and the promissory note then in suit against the defendants. One of said instruments was an acknowledgment of the assignment by plaintiff herein to defendants of the Hulett note, and the instrument instructing the delivery of the stock above referred to. The second instrument was a written acknowledgment of the receipt of the Hulett note and the note previously given by defendants, and the dismissal of the suit against said defendants, as consideration for the execution of the note now in suit.

No form of fraud or deceit was alleged. Apparently defendants were attempting to show by testimony that there was no consideration for the execution of the note of November 1, 1923. This could not be allowed, unless by proper pleadings they brought those prior transactions in question. This they did not do. The note of November 1, 1923, was regularly sued upon, and in settlement of that suit then pending the defendants executed the present note, and accepted an assignment of the rights to the above-mentioned stock, and actually received stock of the value of $450, and they accepted a dismissal of the suit then pending against themselves.

The prior note of December 1st given by defendants must be deemed to have been given for a valuable consideration. Section 3105, Civ. Code. Such pre-existing debt constitutes value. Section 3106, Civ. Code. Any benefit conferred by the present plaintiff on defendants was, if lawful in other respects, a sufficient consideration for the execution of the present note in question. Section 1605, Civ. Code. The former transactions being deemed legal in every way, and there being no pleading whereby the prior dealings were attacked, the trial court did not err in its refusal to permit defendants to go into all the transactions leading up to the execution of the first note. More especially is this so because of the written acknowledgments of the defendants at the time of the execution of the note here in suit.

We see no occasion to cite further authority in support of the views herein expressed.

The judgment of the lower is affirmed.

We concur: FINCH, P. J.; HART, J.

PEOPLE v. CARROW. (Cr. 1668.) ★

District Court of Appeal, Second District, Division 1, California. Sept. 11, 1928.

Hearing Granted by Supreme Court Nov. 9, 1928.

1. Receiving stolen goods ⚷8(4)—Evidence of defendant's admissions that he knew property found on his premises was stolen showed knowledge of theft sufficient to support conviction for receiving stolen property.

In prosecution for receiving stolen property, evidence of general conduct of defendant, including admission that he knew property was stolen, together with fact that property was found under clod of dirt in front yard of defendant's residence, where defendant admitted he had concealed property, was sufficient indication of knowledge by defendant that property had been stolen to support conviction.

2. Indictment and information ⚷114—Allegation of prior conviction of felony held not part of offense charged, but interposed solely to increase punishment (Pen. Code, §§ 667, 668, 1168).

Allegation in information, under Pen. Code, §§ 667, 668, 1168, that before commission of offense of receiving stolen property, for which defendant was being tried, he had been convicted of felony and served term of imprisonment, related only to punishment which might be inflicted if defendant were found guilty, was intended only for purpose of increasing punishment, and had nothing to do with determination of status of guilt or innocence, so far as crime of receiving stolen property was concerned.

★Superseded by opinion of Supreme Court, 278 P. 857.

3. Indictment and information 🔑114—Corpus delicti of charge for receiving stolen property held not changed by further charge of prior conviction for felony (Pen. Code, §§ 667, 668, 1168).

Under information charging defendant with receiving stolen property, and that prior to commission of offense defendant had been convicted of felony and served term of imprisonment, for which he was subject to additional punishment, under Pen. Code, §§ 667, 668, 1168, corpus delicti of charge did not differ from corpus delicti in any other case, where defendant might be charged with receiving stolen property.

4. Criminal law 🔑1202(3)—Admissions by defendant that he had previously been convicted of felony held sufficient to establish prior conviction (Code Civ. Proc. § 1844).

Under information charging defendant with receiving stolen property and with having been convicted of prior felony, admission by defendant that he had previously been convicted of grand larceny for stealing automobile tires and served term in prison, together with testimony by another witness regarding prior admission to same effect made by defendant to witness, was sufficient to establish prior conviction, under Code Civ. Proc. § 1844.

5. Criminal law 🔑1202(3)—Proof of prior conviction of grand larceny in another state by defendant, charged with receiving stolen property, held not to require proof that property in prior conviction exceeded $200 (Pen. Code, §§ 487, 489, 667, 668).

Under information charging defendant with receiving stolen property and with prior conviction of felony, under Pen. Code, §§ 667, 668, in sister state, prosecution was not required to prove that act itself, as distinguished from statutory offense, was such that, if committed within state, would have been punishable by imprisonment in state prison, and hence, where defendant was charged with prior conviction of grand larceny in sister state, it was not necessary to show that value of property exceeded $200, required by Pen. Code, §§ 487, 489, to constitute offense of grand larceny.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Charles W. Carrow was convicted of receiving stolen property, and he appeals. Affirmed.

Joel Terrell, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

HOUSER, J. The information upon which defendant was convicted in substance charged him with the commission of the crime of receiving stolen property; also that, in the state of Kansas, prior to the commission of said offense, defendant had been convicted of a felony and had served a term of imprisonment therefor. In addition to finding defendant guilty, the jury found that he had suffered a prior conviction, as charged in the information. In accordance with the provisions of the statute (section 1168, Pen. Code), defendant was sentenced to imprisonment in the state prison for the term prescribed by law. He appeals from the judgment.

[1] This court is unable to agree with appellant in his contention that the evidence was insufficient to support the verdict as to the charge of receiving stolen property. That defendant was in possession of the property in question and that it had been stolen is conceded. With relation thereto, the general conduct of defendant, including his admission that he knew it was "hot" (meaning that he knew the property had been stolen), together with the fact that the property was found under a clod of dirt in the front yard of defendant's residence, where he admitted that he had concealed it, were sufficient indications of knowledge of the fact on the part of defendant that the property had been stolen.

The next reason assigned by appellant for reversal of the judgment is that the evidence adduced on the trial was insufficient to support the verdict as to the charge of prior conviction of defendant. Assuming the soundness of appellant's contention, its importance becomes apparent from the fact that, by virtue of the provisions of sections 667 and 668 of the Penal Code, the term of imprisonment is largely increased of a person found guilty of a crime who theretofore has been convicted of an offense punishable according to the laws of this state by imprisonment in the state prison, and who has "served a term therefor in any penal institution."

The record shows, and it is conceded by respondent, that the only evidence admitted on the trial of the action relating to the alleged prior conviction of defendant consisted of testimony to the effect that, following the arrest of defendant, he had admitted that theretofore he had been convicted of grand larceny for stealing automobile tires, and had "served a term" in the state prison at Lansing, Kan.; also that, on cross-examination of defendant, he admitted that theretofore he had been convicted of a felony.

In the case of People v. Chadwick, 4 Cal. App. 63, 73, 87 P. 384, 389, where a question similar to that here involved was under consideration, it is held that the allegation in an indictment of previous conviction of a defendant is a distinct element of the charge, and that the defendant has a right to insist that the prosecution establish the existence of that element by competent evidence before he can be convicted thereof. See, also, People v. Jones, 31 Cal. 565; People v. Delany, 49 Cal. 394; People v. Simonsen, 107 Cal. 345, 40 P. 440; People v. Tapia, 131 Cal. 647, 63 P. 1001; People v. Coleman, 145 Cal. 609, 79 P. 283; People v. Vertrees, 169 Cal. 404, 146 P. 890; People v. Quarez, 196 Cal. 404, 238 P. 363; People v. Ray (Cal. App.) 267 P. 593;

People v. Johnson, 73 Cal. App. 214, 238 P. 814, and People v. Villanueva, 74 Cal. App. 276, 240 P. 43.

[2, 3] It would seem, however, that in none of the cases to which reference has been had was the distinction directly drawn, or great consideration given to the point that the defendant was not again on trial for the commission by him of the first offense. It must be apparent that, in circumstances such as are presented by the allegations in the information herein, the defendant was charged with the commission of the second offense only, and the issue as to his prior conviction of a felony was interposed solely for the purpose of increasing the punishment for the commission by him of that offense. Otherwise, if convicted, defendant would have been subjected to a second punishment for the crime first committed by him. The allegation in the information that, before the commission by defendant of the offense of receiving stolen property, he had been convicted of a felony for which he had "served a term of imprisonment," had no relation to the offense with the commission of which defendant was charged, but related to the punishment only which might be inflicted if defendant were found guilty of the crime of receiving stolen property. People v. Wallach, 79 Cal. App. 605, 250 P. 578.

Obviously, the *offense* remained the same, without reference to the former status (criminal or otherwise) of the person who committed it. Moreover, it is as to the punishment for the commission of the second offense only that any provision may be found in the particular, or any, statute by which a difference is provided as affecting a person who may commit such crime. The corpus delicti of the charge, as applied to the instant case, differed in no respect from the corpus delicti in any other case where the defendant might be charged with the offense of receiving stolen property. Whether, therefore, defendant had been convicted of a felony, and had "served a term of imprisonment therefor," had nothing whatsoever to do with the determination of the status of guilt or of innocence, so far as the crime of receiving stolen property was concerned.

In the case of People v. Eppinger, 109 Cal. 294, 41 P. 1037, the defendant therein was charged with the crime of making, uttering, and passing a fictitious check and with having suffered a prior conviction for petit larceny. The jury found the defendant guilty as charged, but, in violation of the requirements of section 1158 of the Penal Code, failed to find whether the defendant had suffered such previous conviction. While in the opinion expressed by the Supreme Court language may be found which may be taken to indicate that the offense of making, uttering, and passing a fictitious check, together with the charge that theretofore the defendant had been previously convicted of the crime of petit larceny, constituted but a single offense, nevertheless the force and effect of the judgment of the court is to the contrary, in that it is ruled that the "verdict rendered should be treated as a finding against the defendant upon the crime charged, and in favor of the defendant upon the question of prior conviction," together with a direction of the lower court to sentence the defendant as for a conviction for making, uttering, and passing a fictitious check. To the same effect are People v. Dueber, 34 Cal. App. 686, 168 P. 578, and People v. Franklin, 36 Cal. App. 23, 171 P. 441. See, also, Ex parte Hall (Cal. App.) 263 P. 295.

In the case of People v. Thomas, 110 Cal. 41, 42 P. 456, the defendant was charged with the commission of the crime of burglary, with a prior conviction of an identical offense. On arraignment, defendant confessed the prior conviction. On the trial, over the objection of the defendant, a witness testified in substance that the defendant had admitted to him that he had "served two years in Folsom for burglary." In deciding whether the defendant had suffered substantial prejudice by reason of the admission of such testimony, the court said in part:

> "* * * The defendant having, upon arraignment, confessed the prior conviction, or pleaded guilty thereto, there was no issue as to the prior conviction to which the testimony was applicable. It was not an admission that he had committed the offense upon which he was being tried, and was wholly inadmissible as evidence tending to prove the commission of that offense. * * *"

It is manifest that, if a charge as to the commission of a crime, together with an allegation of prior conviction, constitute a single offense, a verdict of guilty would cover the entire situation; whereas, if, as required by the provisions of section 1158 of the Penal Code, in addition to the verdict of guilty, a finding by the jury be necessary as to "whether or not he has suffered such previous conviction," such requirement is a clear indication that the charge of "previous conviction" is not to be taken as a part or parcel of the main charge against the defendant, but is an issue to be determined by the jury, solely for the purpose (if found in the affirmative) of increasing the punishment to be inflicted on the defendant.

[4] Section 1844 of the Code of Civil Procedure provides that:

> "The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason."

The existence of certain exceptions other than those contained in the statute may be conceded, but, so far as is known to this court, none of them applies to a situation such as is here presented. Nor may it be successfully contended that, because defendant himself may have been a witness not "entitled to full credit," the rule has no application, for it appears that, not only did defendant make the admission in open court, but another witness testified regarding a prior admission to the same effect, made by defendant to such witness. In addition thereto, defendant would be in no position to now contend that he had testified falsely regarding the matter. It thus becomes apparent that the rule suggested by appellant, to the effect that the admission by defendant that theretofore he had been convicted of a felony was, in itself, insufficient to establish the fact, is incorrect in principle and cannot be sustained.

[5] In effect section 668 of the Penal Code provides that if the prior conviction of the defendant occur in "any other state, * * *" in order that the punishment of such defendant on conviction of a felony subsequently committed by him in this state may be increased by reason of such former conviction, the offense of which he was formerly convicted must have been such that under the laws of this state it would have been punishable by imprisonment of the convicted person in the state prison. As hereinbefore indicated, the evidence herein was sufficient to establish the prior conviction of defendant of the crime of grand larceny. By the provision of section 489 of the Penal Code, the crime of grand larceny, or what is now termed "grand theft," is punishable by imprisonment in the state prison. This court is not impressed with appellant's contention to the effect that, in addition to establishing the fact that theretofore defendant had been convicted of a felony, for the commission of which crime he had served a term in a penal institution, it was also incumbent upon the prosecution to establish the further fact that the *act itself*, as distinguished from the statutory *offense*, was such that, if committed within this state, would have been punishable by imprisonment in the state prison.

In this state, in order to constitute grand larceny (or grand theft), the value of the property taken must exceed $200. Section 487, Penal Code. To sustain the contention of appellant would mean that the duty devolved upon the prosecution to establish the fact that the automobile tires stolen by defendant in the state of Kansas were of a value exceeding $200. It is at once apparent that such a construction of the statute would place a tremendous burden upon the prosecution, not only in a case like the one before the court, but in every case in which the fact of a former conviction of a defendant, especially where it occurred in a foreign jurisdiction, was sought to be established. It is inconceivable that such was the legislative intention. The words of the statute are plain and readily understood, as intended to convey the meaning that it is the *offense*, as designated by the statute, rather than the act constituting the offense, which, "if committed within this state, would be punishable by the laws of this state by imprisonment in the state prison."

Appellant also complains of the refusal of the trial court of defendant's request to give to the jury certain specified instructions. An examination of the record herein discloses the fact that, in substance, each of such instructions was covered by other instructions which were given to the jury. As a consequence defendant was in no wise injured by the action of the court in that regard.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

93 Cal. App. 775

MILWAUKEE BLDG. CO. v. WETZEL.

(Civ. 3388.)

District Court of Appeal, Third District, California. Sept. 7, 1928.

1. Contracts 🔑28(3)—Evidence held to support finding that parties entered into contract to furnish material and labor for building being constructed by plaintiff.

In action for damages for breach of alleged contract, whereby defendant agreed to perform labor and furnish materials for store fronts and iron doors, and elevator doors for passenger elevators, and other iron work for plaintiff, a general contractor, in construction of building, evidence *held* sufficient to support finding that parties entered into contract for alleged breach of which plaintiff asked damages.

2. Contracts 🔑28(3)—Evidence supported finding that plaintiff contractor accepted defendant's bid to furnish labor and materials for store fronts and other parts of building.

In action by general contractor for damages for breach of alleged contract, whereby defendant agreed to furnish materials and labor for store fronts and other parts of building being constructed by plaintiff, evidence *held* sufficient to support finding that there was an acceptance of defendant's bid.

3. Appeal and error 🔑1011(1)—Trial court's findings on conflicting evidence were conclusive on appellate court.

Trial court's findings on conflicting evidence were conclusive on appellate court, there being nothing in plaintiff's evidence marking it as inherently improbable, or such as would justify court in holding as matter of law that it was not of sufficient probative force to uphold decision.

4. Contracts 🔑349(4)—In action for breach of contract to furnish materials and labor, excluding blank form plaintiff sent defendant for submitting bid held not error.

In action by general contractor for damages for breach of contract, whereby defendant agreed to furnish material and labor for store fronts and other parts of building, denying admission in evidence of printed form, which plaintiff sent to defendant for purpose of inserting therein his proposal or bid for work, *held* not error, where defendant's bid and acceptance thereof by plaintiff, through or by means of purchase orders, were introduced in evidence.

5. Contracts 🔑349(1)—In action for breach of contract, excluding evidence regarding whether certain item appeared on plans as recorded held not error.

In action by general contractor for breach of contract, whereby defendant agreed to furnish material and labor for store fronts and other parts of building, excluding evidence on cross-examination of plaintiff's witness as to whether "iron frames and sash," as contained in plans and specifications on which defendant framed and tendered his bid, appeared on plans as recorded in county recorder's office, *held* not error, where defendant undeniably based his bid on plans and specifications which contained words "iron frames and sash."

6. Appeal and error 🔑931(5)—Presumption is court considered all relevant testimony received and incompetent testimony received without objection.

Presumption is that court, in deciding case, considered all relevant and material testimony received, and even incompetent testimony, if it was received without objection.

7. Evidence 🔑158(27)—Excluding evidence regarding similarity between plaintiff's exhibit and plans from which defendant made up bid held not error, plans being best evidence.

In action by general contractor for breach of contract, whereby defendant agreed to furnish material and labor for parts of building, excluding answer to question, "Have you determined whether or not they (Plaintiff's Exhibit 8) are similar plans to those from which you figured in order to submit your bid?" which was designed to establish that words "iron frames and sash," which were in Exhibit 8, were not in plans from which defendant made up his bid, *held* not error, since plans themselves were best evidence of facts sought to be shown.

8. Evidence 🔑129(6)—Evidence regarding another's first bid in comparison with other bids held competent to show bid was substantially same as successful bid on reletting contract after breach and on damages.

In action by general contractor for breach of contract whereby defendant agreed to furnish material and labor for parts of building, evidence regarding B.'s first bid for work in comparison with other bids then made *held* competent, to show that B.'s bid was substantially same as its successful bid on reletting of contract after defendant's breach, and also, on matter of measure of damages, to show that B.'s bid on reletting involved reasonable price for same work.

9. Trial 🔑105(1)—Evidence admitted without objection was in record for purposes of decision.

Where question objected to was elsewhere fully gone into without objection, it was in record for all purposes of decision.

10. Appeal and error 🔑1058(1)—Rulings on evidence held harmless, where testimony excluded was elsewhere admitted without objection.

Where testimony sought to be brought out by one of questions and testimony excluded by ruling as to the other were elsewhere permitted to go into record without objection, rulings, if erroneous, were harmless.

11. Damages 🔑120(3)—For breach of contract to furnish material and labor for building, measure of damages was amount which would compensate party aggrieved for all detriment proximately caused thereby (Civ. Code, § 3300).

For breach of defendant's contract to furnish plaintiff, a general contractor, with labor and materials for store fronts and other parts of building, measure of damages was amount which would compensate plaintiff for all detriment proximately caused thereby, or which in ordinary course of things would be likely to result therefrom, under Civ. Code, § 3300.

12. Evidence 🔑112, 113(8), 601(4)—Contract price is some evidence of reasonable value of services and materials, and supports finding to that effect.

Where one has contracted to perform services and furnish materials to be used in work to be done thereunder, the stipulated contract price therefor is some evidence of the reasonable value of such services and materials, and is sufficient to support a finding to that effect, in the absence of contrary evidence.

13. Evidence 🔑112, 113(1)—Later contract can only be taken as evidence of reasonable value of work and materials left undone on breach of earlier contract, to extent that both contracts substantially correspond.

If later contract, entered into on original contractor's failure to perform, exceeds in total price that of the original or abandoned contract, by reason of the inclusion therein of certain items which were not embraced within plans and specifications on which abandoned contract was based, it can be taken as evidence of reasonable value of work to be performed and materials to be furnished to extent only that the two contracts substantially correspond.

14. Damages 🔑189—Evidence held not to authorize recovery of damages for breach of contract on basis of cost of work done by another involving additional items.

In action by general building contractor for damages for breach of contract in which defendant agreed to furnish material and labor for certain parts of building, evidence *held* insufficient to authorize award of damages to plaintiff, based on cost to plaintiff for having work completed under subsequent contract with another, after defendant's breach as being reasonable value of work unperformed, in view of fact that work called for by subsequent contract included numerous items not included in original contract.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the Milwaukee Building Company against Kurt O. Wetzel, doing business as the K. O. Wetzel Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Superseding opinion in 266 P. 312.

Newlin & Ashburn, of Los Angeles, for appellant.

Isaac Pacht and Clore Warne, both of Los Angeles, for respondent.

HART, J. A petition for a rehearing was granted herein solely for the purpose of enabling us to give further consideration to the question whether the damages awarded by the judgment were, as counsel for the defendant vigorously contend is true, in excess in a material measure of the damages to which the evidence showed the plaintiff was entitled in consequence of the damage it actually sustained through defendant's breach of his contract. After a more scrutinizing examination of the evidence addressed to that question than was given to it in our original investigation of the record, we have satisfied ourselves that counsel for the defendant are right in the statement in their petition that the evidence does disclose that the plans and specifications upon which the Bayer-Rothgeb Company successfully submitted its bid, after the defendant abandoned his contract with the plaintiff for doing the work and furnishing the materials called for by the said contract, contained certain items which were not a part of the plans and specifications upon which the defendant submitted his bid, and which increased the cost of the work and the materials over the cost thereof under the latter's contract.

We adhere to the conclusion announced in the opinion originally filed herein as to the making of the contract between the plaintiff and the defendant and the refusal by the latter to perform the terms thereof, as alleged in the complaint. The judgment, however, must be modified in accord with our modified conclusion that the aggregate sum thereby allowed the Bayer-Rothgeb Company as damages for defendant's breach of his contract is materially in excess of what the evidence shows it entitled to. A more specific consideration of the evidence upon which the modification is predicated will be found in the body of the opinion. The following is the opinion heretofore filed herein, modified in accord with the foregoing considerations:

This is an action by the plaintiff to recover from the defendant damages for the alleged breach of a certain contract. Judgment passed for the plaintiff in the sum of $3,131, the amount prayed for in the complaint. The defendant moved for a new trial, the same being denied. This appeal is from the judgment upon a bill of exceptions.

The plaintiff, a corporation organized and existing in pursuance of the laws of California, prior to and at the time of the commencement of this action, was and is engaged in the business of general contractor for the erection and construction of buildings, with its principal place of business in the city of Los Angeles. The defendant, Kurt O. Wetzel, prior to and at the time of the commencement of this action, was doing business in said city under the fictitious firm name of K. O. Wetzel & Co.

At some time prior to and at the time of the commencement of this action the plaintiff was, "and still is, engaged, as the general contractor, in the erection, building and construction of that certain building * * * at No. 806 South Broadway, in the city of Los Angeles, commonly known as the Carleton F. Burke building, according to plans and specifications provided" in the contract for the erection and construction of the same. "Said plans and specifications provided for the furnishing and construction of * * * certain store fronts and iron doors to store, and iron front, iron doors, and iron grille on the wood doors to the building lobby, and iron elevator doors for two passenger elevators, and other iron work to be furnished in and about said premises." On October 31, 1922, the defendant entered into a written agreement with plaintiff to furnish said iron or metal, and to perform all work, labor, and materials necessary therefor, for the sum of $4,752, and further in said contract agreed to complete said work on or before the 8th day of February, 1923.

The complaint, from which the foregoing statement is taken, alleges that the defendant breached said contract by failing and refusing to comply with the terms thereof; that, in order to complete said building in compliance with the terms of its contract, the plaintiff "was forced to and did secure from other persons and firms engaged in the same line of business, to wit, in the furnishing of iron and metal work and doing labor with regard thereto, such as required by the plans and specifications to be followed by this plaintiff, bids and estimates of the best price at which they would furnish the materials and do and perform the labor necessary to install the same as per the original agreement with the defendant; * * * that the lowest bid or estimate for said materials and work was the sum of $7,883; * * * that plaintiff has by its contract duly made become indebted in said sum for the iron and metal work which was to have been furnished by defendant under his said contract aforesaid." It is alleged that, by reason of the defendant's failure to comply with and perform his said contract, the plaintiff has been damaged "in a sum equal to the difference between the sum of $7,883 and the sum of $4,752; the first-named sum being the amount which plaintiff was compelled to pay for the material and the work because of defendant's breach of his contract with plaintiff to furnish said material and work, and the last-named sum the amount defendant agreed to furnish said material and work for, the difference between said sums being the sum of $3,131. It is further shown by the complaint that the contract of plaintiff to erect said building provided that for its noncompletion within the time specified therein the plaintiff shall be penalized in the sum of $100 for every day until completed.

The defendant's answer first specifically denies the material averments of the complaint and then sets up a special defense. The brief of counsel for the plaintiff correctly epitomizes the averments of said special defense, and we will therefore adopt the same herein, as follows:

> "As a second and separate defense defendant alleged substantially that he had received requests for the submission of a bid for certain work, designated as item No. 1 and item No. 2, said request being accompanied by certain plans and specifications. That defendant submitted bids therefor, but that neither of said bids was ever accepted. The plaintiff delivered to defendant a certain 'purchase order' calling for defendant to 'furnish and install complete ornamental wrought iron and cast iron front entrance and doors, except the lobby door and frame, which are omitted as per our plans and specifications and your bid 10/31/22, $2,952.' That said work order called for other and different work and material. That defendant returned said work order and requested that it be changed to conform to request for bid, but that plaintiff refused to change said purchase order. That defendant was ready, willing, and able to perform work called for in bid, and plans and specifications submitted to him at time of making, but plaintiff refused to allow him to so complete the contract. That as to item No. 2 plaintiff never accepted bid of defendant, but that plaintiff delivered to defendant a 'purchase order,' calling upon defendant to 'furnish and install complete passenger elevators frames and doors, as per our plans and specifications and your bid 10/31/22, $1,800.' That the original request for bid did not include any elevator 'frames.' That defendant demanded correction and elimination of item of 'frames,' but that plaintiff refused. That defendant was ready, willing, and able to perform as per his bid, but plaintiff refused to allow him so to do."

The court found that the allegations of the complaint were true, and specifically found that the averments of the special defense were untrue. The defendant contends that the findings derive no support from the evidence, and that the court, in certain rulings upon the question of the legal propriety of certain evidence, committed prejudicial error.

The defendant first declares and contends that the finding that the parties entered into the contract for the alleged breach of which damages are asked by plaintiff in this action is afforded no support by the evidence. The finding so attacked, of course, constitutes the primary foundation of the judgment and without which the judgment, of course, could not stand. It is not conceived to be necessary to enter herein into a minute examination and consideration of the evidence to show, as a careful review of the record has convinced us is true, that the finding that the defendant breached his contract with plaintiff is sufficiently supported. As is true in the general run of cases taken to the appellate courts, there is here a substantial conflict in the evidence upon that vital question. The presentation herein of a general statement, in synoptical form, of the testimony which supports the finding referred to should be made, and even with such a statement considerable space in this opinion will be required.

[1] It appears, as the complaint alleges and the court found, that the defendant, on the 31st day of October, 1922, submitted a bid to the plaintiff for performing the metal and iron work described in the findings hereinabove set forth for the building mentioned in the complaint, and also for the furnishing of the materials necessary for such work. This bid, it appears from the testimony of defendant (who was called as a witness for examination by the plaintiff under section 2055 of the Code of Civil Procedure), was submitted to plaintiff in response to an invitation therefor by the latter some two weeks prior to said 31st day of October. At the time said invitation was made, the defendant (so he testified) and M. C. Montgomery, "estimator" of the plaintiff, together "went over the plans and specifications." Defendant testified that, on said 31st day of October, he and Montgomery again jointly examined the plans and specifications, and that immediately thereafter on that day he (defendant) signed his bid. Wetzel further testified that his bid was reduced to writing by Montgomery in the office of the plaintiff in his (defendant's) presence; that the "figures" set forth in the bid "as they were marked down in prices had been given to them by myself over the telephone some days previous to this meeting and making out of this written document as to the price of this work." Wetzel stated that, after he was solicited to make a bid on the work and prior to submitting his bid, he prepared shop drawings of a part of the work. He stated that, on the 31st day of October, 1922, he went to the office of Montgomery in response to a telephone call from some party connected with the plaintiff. At that time, after stating to defendant that he had certain work for the performance of which he desired a bid from him (defendant), Montgomery proceeded to explain the character of the work to be done. Defendant testified that:

> "In order to make it possible to make any bid at all on this work, Montgomery had a set of architectural plans * * * for the Burke building, * * * and pointed out on these

plans what kind of work was to be done. Then Mr. Montgomery, having absolutely no details of any kind referring to this work, had to explain to me in a positive way in what manner and in which way we should make this bid, and what work was to be done, and how this particular work was to be treated."

Wetzel said that his business was that of a manufacturer of wrought iron and cast iron, and that he had followed that work for 20 years; that it was not possible to determine from the architectural plans "the class of cast iron store front to be used in that building." Wetzel proceeded to testify that:

> "In order to have a complete understanding of the class of work to be incorporated in a cast iron store front it is necessary besides the set of architectural plans to have full size details * * * which carry the exact conditions of the work as it is carried out in its actual form, size and appearance and ornamentation."

Such details, he stated, were not shown by the specifications to which he subscribed his name and upon which he submitted his bid. Continuing, he testified:

> "Referring to the conversation with Mr. Montgomery held prior to October 31, 1922, Mr. Montgomery explained to me just in what manner they expected this front to be designed by them in time, in detail work, and in order to make a bid for it he explained what parts of the work they expected to be furnished, and what parts of the work should not be considered. And as for the questions, which I have asked very many, Mr. Montgomery he has answered me. * * * In consequence of this conversation I based my price and all on this conversation. * * * At the time of this conversation with Mr. Montgomery he gave me a written paper or order, whatever you might call it, that indicated just what was wanted. There was more conversation on other work, also, if that is necessary to state. This is not all. And Mr. Montgomery conversed with me on this matter perhaps more than one hour, and brought out all detail work about the thing and the conversation to more than one hour. He also asked me how long this work should take, and all such things like that. We discussed the elevator doors, and as to what particular plans should be followed. * * * At the time that I submitted the estimate, Plaintiff's Exhibit 1, or prior to that, I had examined the plans and specifications. I had a set of architectural plans given to me for figuring, and I had my instructions as to the extent of the work from Mr. Montgomery, and on this I made my estimate. The plans that I had were supposed to be the architectural plans, either the set in evidence or one just like it."

The bid of Wetzel was dated October 31, 1922, was addressed to "Meyer & Holler, Milwaukee Building Co.," and was in form as follows:

> "Gentlemen: I, we, propose to furnish, as per plans and specifications, all labor and materials for the iron front and doors work on Burke job.
>
> "State alternate figures, additions, omissions, or discrepancies between plans and specifications:

Cast iron front complete..........................	$3,452 00
Deduct for store doors only....................	280 00
Deduct for store doors frame..................	385 00
Deduct for lobby doors only....................	160 00
Deduct for lobby doors frame..................	340 00
Elevator doors as per Wetzel's details, using Elevator Supply Co.'s hangers.........	1,800 00
Elevator doors as per M. B. Co. detail pr. sheet No. 13, using Elevator Supply Co.'s hangers pr...................................	1,800 00

> "Time limit 3 mo.
>
> "K. O. Wetzel Co.,
> "Signed by Kurt O. Wetzel."

Wetzel testified that either on the 11th or 12th day of November, 1922, he received from plaintiff two written documents addressed to him (defendant) called "purchase orders," which contained a specification, in somewhat general language, of the work which he was to perform in pursuance of the terms of his bid. The first of these orders, as they are identified as exemplars in the record (Exhibit 2), called for the furnishing and installation of "complete elevator 'frames and' doors as per our plans and specifications and your bid, 10/31/22, $1,800." This document was signed by "J. O. Graham, Manager of Construction" of plaintiff. The second (Exhibit 3), likewise addressed and signed, read:

> "Furnish and install complete ornamental wrot and cast iron front entrance and doors, except the lobby door and frame, which are omitted as per our plans and specifications and your bid 10/31/22, $2,952.00."

Accompanying the above, when sent to defendant, was a letter from the plaintiff by "E. A. Waugh, Manager of Construction," in which it was stated:

> "We hand you herewith drawings Nos. 1, 2 and 3 of the Baker Iron Works covering the elevator door frames which they are furnishing on the Carleton F. Burke Bldg.; also your drawing of elevator doors which is approved by us."

Upon receiving said orders, Wetzel signed the specifications and plans. Wetzel did not, after receiving the "purchase orders," proceed with the carrying out of his agreement, and refused to do so. Wetzel claimed that the matter of the ornamentation of the iron work, as given in the specifications, was too indefinite to justify any attempt to figure on definitely or safely, even by estimate, and that the character thereof, when finally given in detail, deviated materially from the specifications as they were explained and interpreted by Montgomery in the conversation between him and the latter on October 31, 1922. There were other objections made by Wetzel to the order (Exhibit 3) for "passenger elevator frames and doors," in that his bid did not contemplate elevator "frames." But these matters are explained by other witnesses for the plaintiff, and their testimony will now be considered in its application to all the disputed questions of fact herein, and which, as above stated, affords strong support to all the vital findings. Before doing this, however, it is well here to say that Wetzel stated that:

> "Ordinarily the giving of an order is an acceptance of the bid—an authorization to go ahead with the work. We took those as orders."

M. O. Montgomery, referred to above, testified to the details of the conversation with Wetzel on October 31, 1922, when the plans and specifications for the work on the Burke building, on which he (witness) had asked Wetzel to submit a bid, were fully discussed; that, before submitting his bid, Wetzel examined the plans and specifications (marked in the record as Exhibit 8)—

> "and after doing so he submitted a bid and signed it. The words 'iron frames and sash' (claimed by Wetzel not included within his bid) were on the plans which were shown to Mr. Wetzel on the 31st of October. There is no change on these plans with reference to the iron work from what was on there on the 31st of October. That remains the same. I had no conversation with Mr. Wetzel along the line that he was not to do the sash. There was no understanding (as Wetzel here claims) between us that the sash was to be pine instead of iron. This is delineated as outlined upon these plans of the work which was to be done by Mr. Wetzel under his bid. We submitted these plans and specifications to other bidders in the same line of work, and got bids from other people for this very work. There were four bids, including Mr. Wetzel's. He was the lowest bidder. It is not the usual practice to have detail drawings, in order to bid on a job of this kind. The usual practice is to take what we call scale drawings, meaning small scale drawings, and submit them to the bidders or subcontractors for estimate, and the one that is finally successful in getting the work is then later on furnished with full-size enlarged scale details, in order to actually execute the work that he has bid on. It is always presumed that there is enough information in the small scale work to render an intelligent bid. It is the same with this set of plans. * * * I submitted it to those that I had originally taken bids from at the time Mr. Wetzel bid. I submitted it to the Architectural Iron Works, the Bayer-Rothgeb Company and the Lowith Iron Works, the same firms who bid about October 31st. I submitted these very plans, which were approved by Mr. Wetzel, those plans, plus some details that had been made in the meantime. The work was finally awarded to the Bayer-Rothgeb Company. * * * I do not know off-hand the amount of their bid. It was more than Mr. Wetzel's bid by $3,000 or $4,000, I think. The bid of the Bayer-Rothgeb Company was slightly lower than its original bid, in the neighborhood of $500 lower. The other bids which we received after February 3d were about the same as the original bids of those firms. I think they let the bids stand, as I recall it, just as they were. There might have been some slight modification."

Montgomery further testified that, prior to the submission of the bid by Wetzel, he had a conversation with the latter, as to which conversation he (Montgomery) testified:

> "At that conversation I told Mr. Wetzel what we desired him to bid on. I outlined the work for him in a more or less helpful way. I submitted the plans and specifications and supplemented them with explanations. I do not recall exactly the conversation, but I remember of running over the plans and specifications with him and pointing out the fact that the job was a commercial job of iron work, such as is usually used in buildings of that type, and pointed out the features of the work that he was to do—the store fronts, elevators. I remember showing him the sketch of the elevator door, things which I thought might be of help in working up a price on it. I told him with respect to the cast iron store front that it was the ordinary commercial work for that class of building. From the architectural plans that we had before us at the time it is possible to determine very closely the amount of ornamentation which will go into that cast iron work. I think the drawings or architectural plans would cover the extent of the ornamentation fairly well. It would show the general character and nature of it, right on the face of it, whether it were elaborate or not on the small drawings. I remember of telling him that it would be a commercial job. In our practice, and I believe in iron work in general, we refer to a 'commercial job' as a job of the type you would use in the business district, to distinguish it from a finely hand wrought and hand work forged job that might be used in very high-class residential or public work. The term does not have reference to degree of ornamentation. It would not affect that, because in casting iron the ornamentation is not an important feature—the amount of it. We did not in that conversation mention sash."

Throughout his entire testimony, both on direct and cross examination, Montgomery repeatedly asseverated that the whole of the work upon which Wetzel was invited to and did submit a bid was fully and in detail explained to the latter.

The witness Graham, called on behalf of plaintiff, stated:

> "That he was placing the orders and contracts at the time of the Burke job, and that he was instructed by Mr. Waugh that Wetzel was going to get the orders; that the orders were drawn by him, and that he called Wetzel to the office, showed him the plans and specifications, the order, and the bids; that Wetzel signed the plans and specifications, after looking at them, and took the orders with him; that Wetzel returned the following day and stated that the words 'elevator frames' appearing in the purchase order (Plaintiff's Exhibit 2) were improperly included; that he (Graham) immediately saw it was a typographical error; that Wetzel was told that the words stated did not belong there, and that the Baker Iron Works had the order for the frames, and that he then scratched out the words 'frames' on Wetzel's copy and on the office copy; that Wetzel then took the orders with him again and left the office, saying that he would go

ahead with the work; that he did not at that time raise the question that the order called for wrought iron and cast iron front entrance and doors; that subsequently, and about January 26, a letter was written, sending Wetzel details of the Baker Iron Works for the elevator door frames that were needed by Wetzel to complete the work; that up to that date Wetzel had not given Graham any information that he would not go ahead with the work, although he had been in the office several times between November 15 and January 26; that, after the letter of January 26 was written, Wetzel came in with the orders and stated that they were not right, and left the orders with Graham, who told him that he would have to see Mr. Waugh; that later Wetzel came back to see Waugh, and afterwards Graham mailed the orders left back to Wetzel."

The witness Waugh, manager of construction for the respondent company at the time in question, testified:

"That Mr. Wetzel came to the place about the 1st of February; that the orders were there at that time; that Wetzel complained of the details elaborated on the plans and stated that he did not want to go ahead with the work; that he asked how they elaborated, and was informed that there were two particular items objected to by Wetzel: One was the cast iron stops, and the other was the steel sash on the mezzanine floor of the front. That he then informed Wetzel that the iron stops were not a part of his contract, and that if the company wanted them he would be given an additional order to cover the item, but that the item of sash was a part of the original contract, and was in the plans and specifications that had been signed. The witness Wetzel then said, 'Yes, that was the worst thing I ever did, was to sign those plans and specifications;' that Wetzel did not indicate at that conference that he would not go ahead with the work; that the Bayer-Rothgeb Company, the subsequently successful bidder, who performed the work, had no other form of contract except their bid and the purchase order or acceptance."

The witness Buxton, testifying for plaintiff, stated:

"That he was a draftsman, and had been engaged in that line of work for some 20 years, and was working for respondent company at the time in question; that after November 15 he had possibly six conversations with Wetzel regarding the iron work, discussing various features of the order; that certain changes and revisions were made pursuant to the directions of Wetzel, which were entirely in matters of detail; that in none of such conversations did Wetzel indicate that he was not going on with the contract; that there was no different work required in the details furnished Wetzel from that specified in the plans."

[2] The above digest of the testimony clearly shows that the contention that the finding that there was an acceptance of Wetzel's bid by the plaintiff is not supported by any evidence cannot be sustained. It is to be observed that Wetzel himself testified that:

"Ordinarily the giving of an order is an acceptance of the bid—an authorization to go ahead with the work."

Furthermore, Wetzel's conduct with reference to the transaction, after receiving the orders, plainly shows that he regarded and assumed that the sending of the orders to him amounted to an acceptance of his bid by plaintiff, and thus a completed contract. This testimony corresponds with that of the other parties submitting bids for the work. It was admitted by Wetzel that, in his deposition taken before the trial of this action, the main objections to the plans and specifications upon which he framed and submitted his bid revolved around the item of ornamentation—that is, that the nature and the extent of the ornamentation could not be determined from said plans and specifications. In the same deposition, it was shown at the trial, Wetzel stated that certain items which he claimed were not included in his bid "are not even of any great importance."

But further consideration herein of the evidence in detail upon the question whether the plaintiff accepted defendant's bid is not necessary. It is enough to say that these results, which are either expressly or impliedly within the court's findings, are clearly deducible from the evidence: That defendant, upon the small scale plans or drawings and the specifications, and also the conversations with Montgomery explaining the undelineated details of the work, based his bid; that the plans or drawings in their very nature contemplated extrinsic explanation of the smaller details as to ornamentation; that such a course is usual in such transactions, and known so to be by those experienced in iron and structural steel work; that the plaintiff accepted defendant's bid, after which further oral explanations as to details were made to defendant; that the latter, after such acceptance, pointed out to one of plaintiff's agents an item which was erroneously included in one of the purchase orders delivered to defendant, and that thereupon, acknowledging the error, plaintiff's agent struck out and eliminated said item from said purchase order; that at no time, when personally consulting any of plaintiff's agents about his bid after the same was ratified or accepted by the plaintiff, did Wetzel say or intimate that he did not intend to proceed with the execution of the terms of his agreement; and that he expressed no such intention until addressing to plaintiff a letter, dated February 3, 1923, to the effect that the details previously delivered to defendant by plaintiff (the purchase orders) so far deviated from "the intended work" as to justify him in declaring "your order canceled." From defendant's own testimony and his conduct with respect to the transaction, the court could expressly have found that the truth was that, after his bid had been accepted by plaintiff, he discovered and concluded that he had entered into an improvident agreement, from a financial point of view, and for that reason, and not because he was not given sufficient information as to details, etc., he resolved to repudiate his engagement. He specifically stated, it will be noted, that he based his bid on the drawings and his conversations with Montgomery.

[3] Of course, the effect of the testimony of the defendant and his witnesses, at variance with that introduced by the plaintiff upon the salient questions of fact, was merely to create a conflict, and the court's findings against the defendant are therefore conclusive upon this court, there being nothing in the plaintiff's evidence which marks it as inherently improbable, or such as to justify us in holding, as a matter of law, that it is not of sufficient probative force to uphold the decision in all respects.

[4] The first of the several assignments of error based upon certain rulings of the court urged here grows out of the ruling denying admission in evidence on the offer of defendant of a printed form which plaintiff sent to defendant for the purpose of inserting and so specifying therein his proposal or bid for the work. The form, save certain printed words indicating the different items of which the work was to consist and as to which the bid was to be made, was a blank, and, of course, was unsigned. The ruling excluding the paper was proper. We can conceive of no service which it could render as evidence in this case. The defendant's bid and the acceptance thereof by plaintiff, through or by means of the purchase orders, were, as seen, introduced in evidence. These, with the conversations between the several agents of the plaintiff, particularly the conversation with Montgomery, explaining the details of the work, and upon which, mainly, the defendant stated he based his bid, were all that were necessary to show, at least with approximate accuracy, the particular nature and extent of the work for the performance of which the plaintiff solicited the defendant to submit a bid. The blank form, therefore, could have reflected no light upon the proposition or any issue in the case.

[5] It is next objected that there was error in the ruling forestalling an answer to the question to the witness Montgomery on cross-examination by defendant's counsel as to whether the words "iron frames and sash," as contained in the plans and specifications upon which defendant framed and tendered his bid (Exhibit 8), "appeared upon the plans as recorded in the county recorder's office"; the original plans and specifications having been filed in the recorder's office with the original contract—that is, the contract for the erection of the building between plaintiff and the owners thereof. The ruling was correct. The defendant undeniably based his bid on "Exhibit 8," which, as seen, contained the words "iron frames and sash." We cannot conceive what relevant or possible purpose the fact, if it was a fact, that said words were not indicated on the original plans, could serve in the present case. It may be added that Montgomery stated that the plans recorded and the plans submitted to defendant were different in some of the matters of detail.

[6, 7] The point next urged is that it was error for the court to sustain the plaintiff's objection to the following question to defendant by his counsel:

> "Have you determined whether or not they (Plaintiff's Exhibit 8) are similar plans to those from which you figured in order to submit your bid?"

The proposition which the question was designed to establish was that the words "iron frames and sash," which, as seen, were on "Exhibit 8," were not on the plans from which defendant made up his bid. Defendant elsewhere testified that those words were not on the plans according to which his bid was prepared. Counsel for defendant, on page 79 of his opening brief, expressly so admits, contending, however, that, the question being specific as to that matter, the ruling disallowing an answer thereto would show that the court "left out of consideration entirely that testimony in arriving at its conclusion as to what contract defendant made." The presumption is that the court, in deciding the case, considered all the relevant and material testimony received, and even incompetent testimony, if it was received without objection, as was the testimony of defendant on that subject. The ground upon which the court disallowed an answer to the question was that the plans themselves were the best evidence of the fact thus sought to be shown, and upon that ground the ruling was legally correct.

[8, 9] Over objection by defendant, the court permitted the witness Montgomery, in response to a question by counsel for plaintiff, to state what the bid by the Bayer-Rothgeb Company was for the work, when that company submitted its bid in the first instance, in comparison with other bids then made—that is, the bid of the Bayer-Rothgeb Company and other bids submitted in the first instance in the month of October, when defendant was the successful bidder. The purpose of this testimony was to show that the Bayer-Rothgeb bid was then substantially the same as its successful bid on the reletting of the contract in February, 1923, and also upon the matter of the measure of damages, as far as it might tend to do so, to show that the bid of said company on the reletting involved a reasonable price for the same work. We think the testimony was competent for that purpose. At any rate, the same question was elsewhere fully gone into without objection, and it was, therefore, in the record for all the purposes of the decision below.

[10] There are two other assignments un-

der the present head. We will not give them special notice herein, though it may be said that, even if we were required to hold that they were technically erroneous, the testimony sought to be brought out by said questions was elsewhere permitted to go into the record without objection. The rulings, therefore, were harmless in their effect upon defendant's rights, assuming, but not deciding, that they involved error.

[11] Another question raised by the defendant here is that the award of damages was founded "upon a state of facts which the record does not support." The rule applicable to cases such as the one here is embraced within or declared by section 3300 of the Civil Code, as follows:

> "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

[12, 13] It was practically stipulated by and between counsel, on the close of the taking of the testimony, that the rule as to the measure of damages in the instant case is that adopted by the court in its findings and as established by the above section of the Civil Code. It is a well-established rule—at least, it may be so declared, so far as our own jurisdiction is concerned—that in a case, such as the one in hand, where a party has entered into a contract with another to perform certain services and furnish materials to be used in work to be done thereunder, the stipulated contract price therefor is some evidence of the reasonable value of such services and materials, and, further, that the contract price is itself sufficient evidence of the reasonable value of such services and materials in such a case to support a finding to that effect in the absence of any evidence to the contrary. Bacigalupi v. Phœnix Bldg., etc., Co., 14 Cal. App. 632, 112 P. 892, a case involving an action for damages for the abandonment before completion of a contract for the erection and construction of a building. See, also, Angell v. Hopkins, 79 Cal. 181, 21 P. 729; Bunting v. Salz, 3 Cal. Unrep. Cas. 193, 22 P. 1132; Greenebaum v. Taylor, 102 Cal. 624, 36 P. 957; Levy v. Scott, 115 Cal. 39, 46 P. 892; Dunne Invest. Co. v. Empire State Surety Co., 27 Cal. App. 208, 150 P. 405, 411; Wallace v. Ah Sam, 71 Cal. 197, 12 P. 46, 60 Am. Rep. 534. But, in the application of the foregoing rule in a particular case, it must appear that the later contract is in all substantial respects similar, in terms, conditions, specifications, and total price, to the contract which has been abandoned by the party originally agreeing to do the things which such contract requires to be performed or done. In other words, the later contract, if it materially exceeds in total price that of the original or abandoned contract, by reason of the inclusion therein of certain things to be done which were not embraced within the plans and specifications upon which the abandoned contract was based, can then, obviously, be taken as evidence of the reasonable value of the work to be performed and materials to be furnished to the extent only that the two contracts substantially correspond with respect to the plans and specifications, or the conditions and the terms according to which the work is to be done and the materials therefor to be furnished.

[14] Upon a re-examination of the evidence, we have been persuaded, as counsel for the appellant maintains is true, and as above it has been stated, that in material respects "the award of damages was founded 'upon a state of facts which the record does not support.'" The briefs of counsel fail to particularize, with the same degree of clarity as does the petition for a rehearing of this cause, the difference, as shown by the evidence, existing between the two contracts in respect to the specifications upon which the bids were respectively submitted to the respective contractors and in accord with which said contracts were respectively made. In their petition, counsel for the defendant show in detail the several and various items not contained in the specifications upon which the defendant submitted his bid for the work to be done and the materials required for performing the work and which items were contained in the specifications according to which the Bayer-Rothgeb Company tendered its bid and agreed to perform the work and provide the materials therefor. A careful comparison of the statement in the petition with the evidence has convinced us that the variance thus pointed out by counsel in that particular between the respective specifications is well-grounded.

We will therefore follow in a general way the petition for a rehearing in pointing out herein the items which should be excluded from the award of damages as fixed by the judgment. These consisted of the following: (1) Cast iron stops to hold the glass on the front of the building in position, as called for by the Bayer-Rothgeb specifications and contract, in lieu of copper stops, as provided for in the defendant's specifications and contract, and a marquee, admittedly not in the defendant's specifications, but introduced for the first time in those of Bayer-Rothgeb Company, the excess in the cost of cast iron stops over copper stops being from "$150 to $200," as was shown by the uncontradicted testimony of the witness C. R. Fleishman, secretary of the defendant, and the additional expense created by the introduction of the marquee into the Bayer-Rothgeb contract over and above the total price provided in the contract of the defendant, being from $15 to $20. (2) Geared hangers called for by the

Bayer-Rothgeb plans, specifications, and contract, instead of nongeared hangers as contained in the defendant's bid and called for by his contract; the excess in cost of geared hangers as called for by the Bayer-Rothgeb contract over nongeared hangers, as called for by the defendant's contract, being the sum of $360. The total of these, as figured by the defendant, upon the basis of the minimum sums at which the two items first named (the glass stops and the marquee) are respectively estimated, is the sum of $525, in which sum the damages awarded by the judgment must be reduced.

The Bayer-Rothgeb contract, or the total price for which it was stipulated therein that said concern would do the work described in said contract and furnish the materials therefor, is itself sufficient evidence, in the absence of any evidence to the contrary, of the reasonable value of such work and materials, in so far as the same corresponds or conforms, in the character and the extent thereof with the work and the materials called for by the defendant's contract. In other words, with the elimination from the Bayer-Rothgeb contract of those items set forth in its plans and specifications, and consequently contained in its contract, and which items were not shown on the plans and specifications upon which the defendant submitted his bid, the contract of the former, or the total price for which the Bayer-Rothgeb Company thereby agreed to do the work and furnish the materials therefor, is, as it thus stands, itself sufficient evidence of the reasonable value of such work and materials, no countervailing proof upon that question having been introduced in the case.

The judgment is hereby modified, by deducting from the amount of damages thereby awarded the sum of $525, and, as so modified, it is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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94 Cal. App. 19

CORCORAN v. HARRIS, Judge of Superior Court. (Civ. 6467.)

District Court of Appeal, First District, Division 2, California. Sept. 14, 1928.

1. Execution 🔑393—Judgment debtor may be required to appear before referee appointed in county other than where judgment was recovered, if he resides or has business there (Code Civ. Proc. § 714).

Under Code Civ. Proc. § 714, superior court has power to appoint referee in another county, and to require judgment debtor to appear before such referee, if judgment debtor resides, or has his place of business in county in which he is required to appear.

2. Execution 🔑374—Judgment creditor entitled to order requiring judgment debtor to appear for examination cannot harass debtor to no purpose (Code Civ. Proc. § 714).

Under Code Civ. Proc. § 714, providing that, when execution against property of judgment debtor is returned unsatisfied, judgment creditor "is entitled to" order requiring judgment debtor to appear and answer concerning his property, judgment creditor is not permitted to harass judgment debtor to no purpose.

3. Execution 🔑380—Second examination of judgment debtor is within superior court's discretion and should not be made, unless new facts are disclosed.

Second order of examination of judgment debtor is wholly within discretion of superior court, and should not be made, unless new facts are disclosed to court which were not known to judgment creditor at time of former hearing.

4. Courts 🔑475(1)—Power to order arrest of judgment debtor and require appearance held within exclusive jurisdiction of superior court in county where judgment was rendered and cause pending (Code Civ. Proc. § 715).

Under Code Civ. Proc. § 715, power to order arrest of judgment debtor and require him to enter into undertaking to appear when directed, and not to dispose of any property in meantime is within exclusive jurisdiction of superior court in county where judgment was entered and cause pending.

5. Execution 🔑371, 393—Order for examining judgment debtor should issue out of superior court in county in which judgment was entered or referee should be appointed in county of debtor's residence or place of business (Code Civ. Proc. § 714).

Under Code Civ. Proc. § 714, order for examination of judgment debtor should issue out of superior court sitting in county in which judgment was entered, and if judgment debtor neither resides nor has his place of business in such county, same court should appoint referee to hear matter in county of debtor's residence or place of business.

Application for writ of prohibition by David Corcoran to restrain Hon. T. W. Harris, as Judge of the Superior Court, from proceeding further under an order of examination. Writ granted.

E. S. Page, W. E. Rode, and Laurence R. Chilcote, all of Oakland, for petitioner.

Earle Warren, Dist. Atty., and R. H. Chamberlain, Jr., Deputy Dist. Atty., both of Oakland, and Jack A. Seaman, of San Francisco, for respondent.

NOURSE, J. This is an original application for prohibition seeking to restrain the respondent, as judge of the superior court in Alameda county, from proceeding further under an order of examination issued by him under a judgment rendered in Los Angeles county. The theory of petitioner is that the superior court of the county where the judgment has been rendered and where execution has been returned unsatisfied has sole jurisdiction to direct the judgment debtor to appear and be examined. The proceedings were instituted under section 714, Code of Civil Procedure, which reads:

> "When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he does not reside in this state, to the sheriff of the county where the judgment roll is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from a judge of the court, requiring such judgment debtor to appear and answer concerning his property before such judge, or a referee appointed by him, at a time and place specified in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides or in which he has a place of business."

[1-4] The power of the superior court to appoint a referee in another county and to require the judgment debtor to appear before such referee has never been denied, if the judgment debtor resides or has his place of business in the county in which he is required to appear. Though the section provides that the judgment creditor "is entitled to" such an order, it is not designed to permit him to harass the judgment debtor to no purpose. This would seem to follow from the well-settled rule that a second order of examination is wholly within the discretion of the superior court, and that it should not be made unless new facts are disclosed to the court which were not known to the judgment creditor at the time of the former hearing. Watson v. Pryor, 49 Cal. App. 554, 193 P. 797; People v. McKamy, 28 Cal. App. 196, 151 P. 743; McCullough v. Clark, 41 Cal. 298. Under section 715, Code of Civil Procedure, the superior court may order the arrest of a judgment debtor and may require him to enter into an undertaking that he will appear when directed, and that he will not, in the meantime, dispose of any of his property not exempt from execution. This power is likewise lodged in the discretion of the court. But to say that the superior court has discretion to make such orders is idle, unless we hold that the power rests alone in the superior court sitting in the county where the judgment was entered and the cause pending. Otherwise two or more courts might make conflicting orders at the same time upon the same subject-matter without any relief to the parties aggrieved.

[5] Section 714 appears in the chapter of the Code entitled proceedings supplemental to execution. It follows immediately the chapter relating to execution of judgments. In many of the sections of this chapter covering the issuance of the writ, the stay, the service, the order for a new writ, and the order for injunctive relief, the expression "the court" is used in the same manner as it is used in section 714. The long-established practice has been that such orders should issue out of the court sitting in the county where the cause is pending. The same practice has been followed generally as to orders issued under section 714, and respondent has failed to advance any reason why this practice should be departed from.

We are satisfied that the proper construction of section 714 is that an order for the examination of a judgment debtor should issue out of the superior court sitting in the county in which the judgment was entered, and that, if the judgment debtor neither resides nor has his place of business in such county, the same court should appoint a referee to hear the matter in the county of the debtor's residence or place of business. It follows that, in the matter complained of, the respondent was without jurisdiction to make the order.

Let a peremptory writ issue.

We concur: BUCK, Presiding Justice pro tem.; STURTEVANT, J.

CONSUMERS' SALT CO. v. RIGGINS. ★

(Civ. 6143.)

District Court of Appeal, Second District, Division 2, California. Sept. 13, 1928.

Rehearing Granted Oct. 11, 1928.

1. Mandamus 🔑129—Mandamus lies to compel delivery of corporate seal, books, etc., to newly elected secretary.

Mandamus is the proper remedy to compel delivery of corporate seal, books, etc., by former secretary to newly elected secretary of corporation.

2. Appeal and error 🔑437—Judgment requiring issuance of new stock certificate to adjudged owner is not vacated by appeal and deposit of certificate to stay judgment (Code Civ. Proc. §§ 944, 946).

Judgment requiring cancellation of stock certificate and issuance of new one to person adjudged rightful owner is not vacated by appeal and deposit of new certificate with clerk of court on condition that judgment be stayed, under Code Civ. Proc. § 944, but is held in abeyance pending appeal, under section 946, and certificate is ineffective for any purpose, since reversal of judgment would render it a nullity.

3. Mandamus 🔑5—Corporation secretary, elected by vote of holder of majority stock certificate issued under suspended judgment, from which appeal was pending, held not entitled to mandamus to deliver corporate seal, books, etc., pending determination of such appeal (Code Civ. Proc. § 944; Civ. Code, § 312).

Corporation and one elected secretary by vote of one adjudged rightful owner of certificate for majority of stock issued under stayed

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★Hearing granted. 277 P. 352.

judgment, from which appeal was pending, will not be granted writ of mandate, requiring former secretary to deliver corporate seal, books, etc., to new secretary, pending appeal from such judgment, on theory that one may not go behind legal title to stock, as disclosed by corporate books, to determine ownership thereof for voting purposes, under Civ. Code, § 312, where such books showed that new stock certificate, required to be issued by such judgment, was issued and deposited with clerk to stay judgment under Code Civ. Proc. § 944.

Application by the Consumers' Salt Company and C. L. Mullholand for a writ of mandate requiring J. R. Riggins to deliver the corporate seal, books, etc., to petitioners. Writ denied.

Harry M. Irwin, of Los Angeles, for petitioners.

Newby & Newby, of Los Angeles, for respondent.

CRAIG, J. The petitioners are a corporation organized under the laws of this state and a stockholder claiming to be its newly elected secretary, who pray a writ of mandate requiring the respondent Riggins, Mullholand's predecessor, to deliver to them the corporate seal, books, papers, etc., of said corporation. Respondent contends that his alleged successor was not legally elected, and is therefore not entitled to hold the office of secretary, or to demand possession of its records.

It appears that prior to said election, and on September 16, 1927, in a suit involving the ownership of certificate No. 40, for 225,000 of a total issue of 300,010 shares outstanding of the capital stock of the corporation, judgment was rendered decreeing that one B. D. McAlvay was the rightful owner thereof, and that said certificate be canceled and a new one issued to him therefor. On November 15, 1927, the defendant in that proceeding, petitioner herein, appealed from such judgment, and respondent alleges that, solely for the purpose of staying execution pending the appeal, he caused said certificate to be canceled, a new one numbered 47, for the same number of shares, to be issued, and deposited with the clerk of the superior court.

It is also alleged that the new certificate bore a statement in writing that it was issued only upon condition that judgment be stayed, under the provisions of section 944 of the Code of Civil Procedure, to abide its final determination, and that the same conditions were entered in writing upon the stock books of the corporation. Thereafter, and on July 16, 1928, at a stockholders' meeting, which was regularly called, Mullholand and McAlvay and three other stockholders were declared elected directors, for each of whom the former voted 93,750 shares, and the latter voted 225,000 shares. A meeting of directors was then called for the election of officers, whereupon the petitioner Mullholand was declared elected secretary. He thereafter demanded of respondent Riggins, the former secretary, possession of the office and its paraphernalia, which was refused.

The petitioners contend that, notwithstanding the appeal, certificate No. 40 was canceled and a new one issued by action of the corporation, that the sole test of the right to ownership of stock is the entry thereof in the corporate books, and that the judgment was self-executing. Respondent insists that by appeal and deposit of said certificate the judgment was stayed, and hence that it was of no force or effect; that McAlvay was not the owner of the 225,000 shares which he voted for the election of Mullholand as director, and that the latter was therefore not legally qualified for the office of secretary or entitled to possession of the records demanded.

The provisions of the Code of Civil Procedure applicable to the instant controversy are as follows:

Section 943 recites, in part, as follows:

> "If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the execution of the judgment or order cannot be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint, or unless an undertaking be entered into. * * *"

Section 944 provides that:

> "If the judgment or order appealed from, direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the judgment of the appellate court."

Section 946 further provides:

> "Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein. * * *"

[1, 2] If the petitioners be entitled to the relief prayed, we think it settled beyond question that mandamus is the proper remedy. Potomac Oil Co. v. Dye, 10 Cal. App. 534, 102 P. 677. However, that petitioners' interpretation of section 312 of the Civil Code, and decisions construing the same, that "every person, * * * having stock in his own name on the stock-books of the corporation at least ten days prior to the election," is entitled to vote under all circumstances, is not supported by the authorities cited. Petitioners' argument is founded upon the theory that one may not go behind the legal title of stock as disclosed by the corporate books to determine ownership for voting purposes. In the instant case, however, the ownership of said stock is a question in litigation; the certificate

in question was issued and deposited with the clerk for the purpose of staying the operation of a judgment declaring petitioner Mullholand to be the owner, and the *face of the corporate books* definitely show that fact. The judgment is not vacated by such appeal and deposit, but it is held in abeyance pending appeal, and the certificate is ineffective for any purpose, since a reversal of the judgment would rēnder it a nullity. Di Nola v. Allison, 143 Cal. 106, 76 P. 976, 65 L. R. A. 419, 101 Am. St. Rep. 84; United States Oil & Land Co. v. Bell (C. C. A. 9th Cir.) 219 F. 790. This question was presented under a similar statute in Durfee v. Harper, 22 Mont. 373, 56 P. 589, wherein it was said:

> "The object of the law in requiring an executed certificate to be deposited with that official was to preserve the rights of parties until it might be determined by this court who owned the stock; and until such determination there could be no delivery of it, and no exercise of ownership by using those incidental rights dependent upon the decision of this court as to the ownership. A contrary ruling would oftentimes make a stay of execution by appeal valueless; for it would not stop the doing of acts to prevent which the suit may have been brought, and which, if done, are equivalent to the possession of all that the lower court may have awarded the successful party."

[3] That B. D. McAlvay is even a legal stockholder is a question depending upon a judgment which is temporarily suspended; hence the official capacities of C. L. Mullholand as director and secretary are likewise contingent upon McAlvay's title to the stock. To decide the question presented by this proceeding would require anticipation of an affirmance of the judgment upon appeal, which involves issues not before us.

The writ of mandate is denied.

We concur: THOMPSON, J.; HAZLETT, Justice pro tem.

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93 Cal. App. 695

LOBINGIER v. SKINNER. (Civ. 5822.)

District Court of Appeal, Second District, Division 1, California. Aug. 29, 1928.

1. Mortgages 🔑32(1)—Agreements by third parties with plaintiff and defendant securing payments of notes held a mortgage.

Plaintiff took a deed from persons not parties to action for the purpose of securing payment of certain moneys to bank of which he was an officer. In return therefor, plaintiff executed in favor of such parties an agreement termed a contract of sale, agreeing to sell property to them and setting forth certain notes to be paid plaintiff. The parties giving the deed entered into another somewhat similar agreement with defendant and entered into two other agreements, termed supplemental to original, with plaintiff. *Held*, in an action to quiet title between mortgagees, that, in view of Civ. Code, § 2924, such agreements constituted in effect a mortgage, in which plaintiff with his two prior liens was the first mortgagee and defendant the second.

2. Mortgages 🔑435—Demurrer to complaint in foreclosure for nonjoinder of mortgagors shown to have conveyed all their interest to plaintiff before action held properly overruled.

In action to quiet title, where case was made out as clearly an action to foreclose a mortgage, demurrer to plaintiff's complaint for failing to join certain third parties who were mortgagors, where they were shown to have conveyed all their interest in property to plaintiff before commencement of action, making it unnecessary to join them as parties, and where defendant neglected to bring them in as parties in cross-complaint filed by him, *held* properly overruled.

3. Mortgages 🔑559(6), 568—Defendant in foreclosure, not naming mortgagors in cross-complaint, cannot recover judgment against them on note, but can only litigate claim to priority of lien.

In foreclosure action, defendant not naming mortgagors as parties in his cross-complaint cannot recover personal judgment against either of them on note made by them, but can only litigate his claim to priority of lien and a share in proceeds of foreclosure sale.

4. Mortgages 🔑487—Decree of sale in mortgage foreclosure without equity of redemption held to violate statute (Code Civ. Proc. § 700a et seq.; Civ. Code, § 2889).

In action to quiet title determined to be merely mortgage foreclosure action, decree for sale to be made without equity of redemption *held* violation of Code Civ. Proc. § 700a et seq., in that defendant had lien on land by way of mortgage and had right of redemption; such being favored in law under Civ. Code, § 2889.

5. Mortgages 🔑458—Filing supplemental complaint on day findings and judgment in mortgage foreclosure were signed held not material error.

That supplemental complaint served on defendant in foreclosure action was not filed until day when findings and judgment were signed and evidence was received and proof of expenditures made in care and protection of property by plaintiff after commencement of action and in accordance with mortgage contract which were beneficial to defendant as well as other parties *held* not a material error.

6. Mortgages 🔑563—As respects validity of disposition of proceeds of sale, defendant in foreclosure, not served with notice terminating mortgagors' rights to redeem and of quitclaim deed to plaintiff, held not prejudiced.

As respects validity of disposition of proceeds of sale, defendant in foreclosure action *held* not unduly prejudiced by not being served notice of rescission given third parties as mortgagors, terminating their rights to redeem property, and by quitclaim deed made by mortgagors to plaintiff; defendant's lien being as effective after as before notice was served and quitclaim deed executed.

7. Mortgages 🔑563—Distribution of money from sale of land held in accordance with mortgagee's written authorization, not objected to for several years thereafter.

In mortgage foreclosure action, distribution of money realized from sale of part of land after establishment of plaintiff's prior lien *held* authorized by defendant's written authorization to pay certain sum which was not disputed, where defendant made no objection to distribution for several years thereafter.

8. Mortgages 🔑200(2), 490—Mortgagor's contract to pay taxes after March 1st, A. D., without year date, held meaningless, not obligating plaintiff mortgagee to pay any of taxes and not precluding him from charging reclaiming costs on foreclosure.

Plaintiff as mortgagee contracted with mortgagors not parties to action to pay all taxes and assessments on property to March 1st, A. D., after which the mortgagors were to pay such items; *held* that, without a year date being stated, as a covenant standing alone, clause is meaningless, and connected with evidence by court cannot be construed as meaning that it was intended plaintiff was to be obligated to pay any of taxes, therefore not making it the fault of plaintiff that property was sold for taxes, precluding him from charging reclaiming costs against proceeds of tax sale.

9. Appeal and error 🔑1152—Judgment ordering sale of property in mortgage foreclosure without equity of redemption should be corrected to allow redemption.

In action to quiet title, where facts were found completely sustaining instead an action for foreclosure of mortgage, notwithstanding its denomination by plaintiff, *held* that portion of judgment ordering property sold without equity of redemption should be corrected in that respect; a new trial being unnecessary.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by J. F. Lobingier against Henry Skinner. Judgment for plaintiff, and defendant appeals. Affirmed as modified.

Sloan Pitzer, of Alhambra, for appellant.

Nichols, Cooper & Hickson, of Pomona, for respondent.

YORK, J. [1] The complaint in this action denominates it "an action to quiet title," but it is clear from the facts alleged in the complaint and in the answer and cross-complaint of the appellant, Skinner, and from the facts found by the court, which facts were supported by the evidence, that it is nothing more nor less than an action to foreclose a mortgage. The legal title to the property in question was vested in the plaintiff by a deed to him dated June 26, 1914, and was made to him for the purpose of securing the payment of certain moneys to the American National Bank of Pomona, which bank had provided the funds to secure this conveyance to plaintiff at the request of Jennie Atkins Carette. She became the equitable owner of the property by virtue of this deed, the title to which was vested in the plaintiff as trustee for her, and title to the same was held by such trustee merely to secure the payment of the funds advanced by the American National Bank of Pomona; the said plaintiff being an officer of that bank. At the time the conveyance was made to plaintiff, he executed to Mrs. Carette what was termed a "contract of sale," agreeing to sell the property conveyed to him to Jennie Atkins Carette, the terms of which contract of sale set forth certain promissory notes wherein she promises to pay plaintiff the aggregate sum of $8,059. This contract of sale was made on June 27, 1914, and was in the usual form of contracts of sales of real estate, some of the provisions of which will be referred to later. The plaintiff, who was such trustee, was in fact acting for Mrs. Carette and the American National Bank of Pomona, and said moneys were due said bank, a fact not appearing on the face of the papers. On October 26, 1917, another contract was entered into by Jennie Atkins Carette and her husband, Charles J. Carette, and the plaintiff, denominated an "agreement supplemental" to that of June 27, 1914, wherein said Carettes agreed to secure the payment of two additional notes made by them and payable to plaintiff in the aggregate sum of $2,620. Said supplemental agreement also provided that plaintiff should be secured thereby in any additional sums due by said Carettes to plaintiff, not exceeding in the aggregate amounts $10,500. It was understood by the Carettes that said plaintiff had no personal interest in said transactions and that he was acting for the said bank.

On November 6, 1917, said Carettes entered into another agreement with plaintiff, denominated an "agreement supplemental" to the agreement of June 27, 1914, wherein they (the said Carettes) agreed that $3,350 due from Jennie Atkins Carette to the said Skinner should be secured subject to the liens of the American National Bank of Pomona, which were created by said contract of June 27, 1914, and said so-called supplemental contract of October 26, 1917. Said sum of $3,350 was evidenced by a promissory note of even date, signed by both the Carettes, and payable to said Skinner. These agreements constituted in effect a mortgage in which plaintiff, with his two prior liens, was the first mortgagee and defendant, Skinner, was the second mortgagee. Section 2924, Civ. Code; section 744, Code Civ. Proc. The court finds sufficient facts to sustain a judgment of foreclosure, and adjudges that the plaintiff holds a first lien upon the therein described lands in the sum of $15,346.61, with interest thereon at the rate of 7 per cent. per annum from the 14th day of April, 1925, to the date of payment of the sum prior to any right, title, or interest of any of the defendants; that Henry Skinner (the only appellant) has a second lien thereon in the sum of $3,638.74, with interest thereon at the rate of 7 per cent. per annum from April 14, 1925, to date of payment, which lien is found by the court to be a second lien and subject to the claim and lien of plaintiff. These are the only liens to be considered on this appeal. The court then orders the property sold at public auction as one parcel by a commissioner appointed by the court. It then orders the sale to "be made without equity of redemption," and that "upon the completion of said sale the commissioner shall execute a deed to the purchaser at such sale," and that "Henry Skinner * * * and all persons claiming from or under them * * * and subsequent to the filing of the notice of the pendency of the action * * * be forever barred and foreclosed of and from all equity of redemption * * * after the delivery of said commissioner's deed." The commissioner is ordered from the proceeds of the sale to pay, first, the fees and expenses of said sale; second, the costs of suit due the plaintiff; third, to pay plaintiff $15,346.61, with interest from April 14, 1925, at 7 per cent. per annum, and from the remainder, if any, to pay to said Skinner $3,636.74, with interest at 7 per cent. per annum from April 14, 1925. The further provisions as to the application of the proceeds of such sale are not material in the consideration of this appeal.

[2, 3] Appellant contends that the demurrer he interposed to plaintiff's complaint should have been sustained because of nonjoinder of parties, in that Charles J. Carette and Jennie Atkins Carette (held herein to be mortgagors) were necessary parties to the action. The case made out is clearly an action to foreclose a mortgage, and the fact that the Carettes had conveyed all their interest in the property to plaintiff before the action was commenced, rendered it unnecessary to make either of them parties as to plaintiff's cause of action. Defendant, Skinner, filed a cross-complaint and had the opportunity to bring both the Carettes in as parties thereto, but neglected to do so. Not having done so, he cannot, of course, recover a personal judgment against either of them on his promissory note made by them. He could only litigate his claim to priority of lien and a share in the proceeds of the sale.

[4] Appellant's contention that, if Jennie Atkins Carette has an interest in said property or the proceeds of the sale thereof, he is entitled to enforce his claim against that interest by reason of the fact that he had a mortgage on the land and her deed to plaintiff did not release Skinner's mortgage therein, though true, is not in point. During the trial it was not contended that that deed released said Skinner's mortgage. The judgment recognized his lien, but the decree of foreclosure contains the provision, "It is further ordered, adjudged, and decreed that said sale shall be made without equity of redemption," and that "upon the completion of said sale the said commissioner shall execute a deed to the purchaser or purchasers of said property at such sale." This clause we construed to be a violation of section 700a et seq. of the Code of Civil Procedure, in that said Skinner had a lien on said land by way of mortgage and had a right of redemption from such sale. Rights of redemption are favored in law. Section 2889, Civ. Code. There was no failure to find upon material issues. The appellant's contention on that point was on matters not material to the adjudication of the case.

[5] Appellant complains that on the 23d day of April, 1925, a supplemental complaint was served on appellant and on the 25th day of April, 1925, he filed written exceptions thereto, and that the supplemental complaint was not filed until the day when the findings and judgment were signed. But this was not a material error. Evidence was received in proof of expenditures made in the care and protection of the property by plaintiff after the commencement of the action, and in accordance with stipulations in the mortgage contract. These were beneficial to appellant, as well as to all parties interested.

[6] The charge of fraud against plaintiff is wholly without foundation. The contract of October 26, 1917, made between plaintiff and the Carettes, was for securing an indebtedness due the American National Bank for moneys owned to it by the Carettes which had been loaned them by the bank to care for and improve the property in question. There was no false representation on the part of any one, and the contract of November 6, 1917, in favor of Skinner was made to secure the indebtedness of Charles J. Carette to the said Skinner if the property should be more than sufficient to pay plaintiff's claim. This contract, as made, specifically stated that the Skinner lien was subordinate to the liens created by the two prior agreements; therefore citations to section of the Civil Code and decisions relating to breaches of trust by a trustee are not in point. The claim that appellant was unduly prejudiced by a notice of rescission that was given to the Carettes, terminating their rights to purchase said property without notice to appellant, and by the quitclaim deed that was made by Carettes to plaintiff without notice to appellant, has no merit or force, in that neither of said acts affected appellant's rights in the premises. Appellant's lien was as effective after as before the said notice was served and said quitclaim deed executed.

[7] After the claim of lien of appellant had been establishd by contract with the Carettes

and plaintiff, appellant, in writing (by his attorney, Sloan Pitzer), authorized the American National Bank to sell about 8 acres of said property when it could pay to appellant his proportion of the proceeds of said sale, after deducting $1,000 for the said Jennie Atkins Carette, $300 for Edward Winterer, held to be third lien claimant, cost of survey, and certificate of title, the balance to be divided between the bank and appellant under a certain contract of June 27, 1914, in proportion to the amount due each under said contract. Here it may be noted that the contracts subsequent to that of June 27, 1914, were considered and treated as supplemental of the original contract. The sale was made for $8,840, and a division of the purchase price was made as follows:

Jennie Atkins Carette	$1,000 00
Edward Winterer	330 00
Henry Skinner	1,574 00
Taxes paid	32 38
Certificate of title and recording	31 80
Applied to Lobingier contract	5,871 82
Or a total disbursed of	$8,840 00

Appellant now contends that said distribution was not made in accordance with his authorization, and therefore that the judgment for plaintiff should have been for a less sum. Appellant testified that he was not consulted before the payments were made, that they did not consult with him before they paid $1,000 to Mrs. Carette; but his written authorization to pay Mrs. Carette that sum is not disputed, and there is no contention as to this payment by any one but appellant. As to the amount appellant received, he does not specify what he should have received, and there is no evidence that the Carettes received any further proceeds of said sale. Appellant received from the American National Bank a statement of the disbursements of the proceeds of this sale, a check for $1,574, stated to be his portion, cashed it, and made no objection to the distribution of the proceeds of the sale for several years thereafter.

[8] Appellant contends that an amount paid by plaintiff to restore to plaintiff the title to the property after it had been sold for taxes, and a deed made by the state conveying the title to one J. J. Richart should not have been allowed plaintiff, in that it was, as alleged by appellant, the fault of the plaintiff that the property was sold for taxes. The contract made between the plaintiff and Jennie Atkins Carette, which we hold to have been a mortgage to plaintiff as trustee for the payment of certain moneys to the American National Bank of Pomona, in form a contract of purchase and sale, contained these provisions:

"And said party of the second part (Jennie Atkins Carette) further agrees to pay all taxes and assessments of every kind and nature levied or assessed on or against the said premises, and each and every part thereof, from and after the first day of March, A. D. ——, inclusive of the said latter date, and the said party of the first part (Lobingier) hereby agrees to pay all taxes and assessments levied or assessed on or against said premises prior to said date."

The circumstances considered by the trial court were that the Carettes were really owners of the property at the time the contract of June 27, 1914, was made; that the respondent had no interest in it; that he took the title to secure an indebtedness to the American National Bank of Pomona, and in the negotiations leading up to the making of the contract nothing was said about plaintiff paying any taxes. Without a year date being stated, as a covenant standing alone, it is meaningless. Connected with the evidence taken by the court, it cannot be construed as meaning that it was intended that plaintiff was to be obligated to pay any of the taxes. It was therefore not the fault of the plaintiff that the property was sold for taxes, and he should not be required to deduct the cost of reclaiming it from the holder of the title under the tax sale, from the proceeds of the sale under judgment of foreclosure. The court therefore did not commit an error in adjudicating the amount due the plaintiff because of the expense of obtaining a deed from the purchaser from the state.

Appellant's contention that plaintiff should not have been allowed interest except on the notes is not sustained by the evidence. The contract distinctly provides that interest on all sums paid by plaintiff which plaintiff was authorized to pay under the terms of the contract should be repaid to him, "together with interest from the date of payment at the same rate of interest as is provided to be paid in the notes hereinbefore set out." The interest was allowed on items where payments had been made in accordance with the said contract.

The contention that the Carettes were to have five days' notice to perform is not founded on the evidence, in that the Carettes requested plaintiff to do the work and make the expenditures, and appellant was benefited rather than prejudiced by the payments made by plaintiff in protecting the property. The contract which was made by and between plaintiff and Charles J. Carette and Jennie Atkins Carette for the purpose of securing the payment of two notes payable to plaintiff, one in the sum of $500 and the other in the sum of $2,120, was denominated a "supplemental agreement" to that of June 27, 1914, and provided for securing the payment thereof on the property described in said contract of June 27, 1914, and "additional sums" advanced by plaintiff to them, not exceeding $10,500. Under this agreement it appears that plaintiff advanced to the Carettes two sums of $75 and $675.

[9] That portion of the judgment which orders the property sold without equity of re-

demption cannot be sustained. The facts found are so complete in sustaining an action for the foreclosure of a mortgage, which this action was, notwithstanding its denomination, that a new trial is unnecessary, and the judgment will be complete with the correction indicated.

It is ordered that there be, and there is hereby, stricken from said judgment the clause, "that said sale shall be made without equity of redemption," and, as so modified, said judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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94 Cal. App. 7

PEOPLE v. KASPAROFF. (Cr. 1681.)

District Court of Appeal, Second District, Division 1, California. Sept. 12, 1928.

1. Arson 🔑37(1)—Evidence held sufficient for conviction of burning insured house with intent to defraud.

Evidence on prosecution for burning insured house with intent to defraud *held* sufficient to prove the corpus delicti, and that defendant was the guilty person.

2. Criminal law 🔑1036(1)—Objection at time is necessary for error in admission of evidence.

That there may be error in admission of evidence, it is necessary that there be objection at the time.

3. Criminal law 🔑404(4)—Rug, with part burned cut off, held admissible on prosecution for burning insured house and contents.

That rug was partly burned in the fire, and that after its return to defendant the burned part was cut off, *held* enough to justify its admission on prosecution for burning insured house and contents with intent to defraud.

4. Criminal law 🔑1036(9)—In view of limited purpose of offer, and waiver of objection by counsel, error held not predicable on admission of photographs in arson case.

Error cannot be predicated on admission of photographs taken at the house five days after the fire, which defendant was charged with setting to obtain insurance, they having been offered merely for purpose of illustration in connection with descriptive testimony, and defendant's attorney having stated that he had no objection, when it was suggested that the photographs be shown to the jury.

5. Criminal law 🔑681(1)—Exclusion of vial of camphorated oil, offered in arson case to account for smell of oil, held not error; it not being shown to have been in possession of occupant.

Refusal to permit defendant in arson case to introduce in evidence a vial of camphorated oil, offered in connection with evidence that an inmate of the house had been using camphorated oil, in support of theory that this might have accounted for the smell of oil where rug was on fire, *held* not error, there having been no evidence that the vial had been in the possession of the occupant.

6. Criminal law 🔑665(1)—Matter of excluding witnesses during trial is in court's discretion.

Exclusion of witnesses from courtroom during trial is a matter committed to the court's discretion; so that, in the absence of a showing of abuse of such discretion, it is not ground for complaint that the court refused to exclude some of them.

7. Criminal law 🔑1144(14)—That jury was instructed to consider only the evidence, and not statements of counsel, in determining facts, may be presumed.

There being no complaint of the instructions, it may be presumed that the jury was instructed that statements of counsel are not evidence, and that only the evidence should be considered in its determination of the facts.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Pete Kasparoff was convicted of arson, and was denied a new trial, and he appeals. Affirmed.

A. M. Astor, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Asa Keyes, Dist. Atty., and Hugh McIsaac, Deputy Dist. Atty., both of Los Angeles, for the People.

CONREY, P. J. By information duly filed the defendant was accused of three offenses, to wit, the crime of burning insured property with intent to defraud an insurance company, the crime of attempt to commit murder by attempting to kill and murder one Satinig Kasparoff, and the crime of attempt to commit murder by attempting to kill and murder one Katrina Kasparoff. It was alleged that these three offenses were connected together in their commission. By verdict of the jury, the defendant was acquitted on the two charges of attempt to commit murder, and was convicted on the first count; that is to say, of the crime of burning insured property. Having been duly sentenced, he appeals from the judgment, and from an order denying his motion for a new trial.

[1] Appellant contends that the evidence is not sufficient to sustain the verdict of conviction, and particularly that the corpus delicti was not proven. The fire occurred on the night of December 26, 1926. The house was owned by the defendant, and was occupied by defendant with his wife and children, together with Satinig Kasparoff and her daughter Katrina. Satinig was the widow of defendant's deceased brother. The mother and daughter occupied a room by themselves in the house. Not only was the fact proven that the house was partially burned that

night, but there was evidence that the fire was of incendiary origin, and there was evidence pointing to the defendant as the author of the conflagration. It was shown that defendant had purchased the house for $350, and had moved it to a parcel of land held by him and Satinig in joint tenancy, and that defendant had insured the house and its furnishings and a small garage for a total sum of $2.800. There was much evidence concerning financial transactions between defendant and Satinig Kasparoff, concerning moneys belonging to her. While this evidence related more directly to the charge of attempt to murder, it also had some relation in connection with the insurance, to the element of motive which might have induced defendant to set the fire. Without more extensively outlining the details of the story, it plainly enough appears that the evidence is sufficient to prove the corpus delicti, and that defendant was the guilty person.

[2] Appellant contends that the court erred in its rulings upon four items of evidence, viz. in allowing one Parsegian to testify to conversations of Satinig Kasparoff with Mrs. Parsegian when defendant was not present; in admitting in evidence a certain rug, not shown to be in the same condition as when taken from the building or before the fire; in admitting in evidence some photographs and maps made at the house five days after the fire, and not in the presence of the defendant; in refusing to allow defendant to introduce in evidence a small vial of camphorated oil. The circumstances concerning admission of said testimony of the witness Parsegian were as follows:

During cross-examination by defendant's counsel of the witness Katrina Kasparoff (Anaratian), Katrina was asked to say when she first told the story concerning the fire and the attempt upon her life. Katrina replied that a week after the fire she told a friend, Shazda Parsegian. Thereafter the prosecution called Mrs. Parsegian, and asked her whether or not Katrina had conversed with her at the time stated, and had informed her of the circumstances of the fire. To this question the defendant made no objection. Mrs. Parsegian answered in the affirmative, but did not give the details of the conversation; those details were then brought out by the defendant on cross-examination, in the face of objections made by the district attorney. The matter was further developed—chiefly for purposes of explanation—on redirect examination. We see no error in any rulings of the court upon any objections then made, and the item is, at all events, of comparatively slight importance.

[3] There was testimony of witnesses to the effect that at the time of the fire they saw a rug on the floor of the room occupied by Satinig Kasparoff and her daughter; that this rug was on fire, and that there was a smell as of kerosene. Two days afterward this rug was taken in charge by officers of the fire department, who produced it in the justice's court, where a complaint had been filed against Peter Kasparoff. After that proceeding had been dismissed, the rug was delivered back to defendant. After the present prosecution had been commenced, the same rug was taken from the defendant's possession; but in the meantime the burned part of it had been cut off. The only point made in support of the objection to the introduction of the rug in evidence is that there were two days between the time of the fire and the time when the rug was first taken from defendant's house, and that no evidence was produced to show that it was in the same condition as when taken from the building, or before the fire. It is argued that, under these facts, there is no evidence that any smell of kerosene remaining on the rug was due to any condition existing at the time of the fire. This point was not made in support of the objection at the trial. The testimony that the rug had been partially burned, and that the burned part had been cut off after the rug was returned to Kasparoff was alone sufficient to justify its reception in evidence.

[4] In support of appellant's claim that the court erred in admitting in evidence photographs taken at the house five days after the fire, appellant does not refer us to the places in the record where the evidence and rulings on this matter should be found. Our own investigation, however, shows that these photographs were offered merely for purposes of illustration in connection with descriptive testimony. Also we observe that, when it was suggested that these photographs be shown to the jurors, the attorney for the defendant stated that he had no objection.

[5] The court did not err in refusing to permit defendant to introduce in evidence the vial of camphorated oil. This offer was made in connection with some evidence that Satinig Kasparoff had been using camphorated oil after an injury to her shoulder. The offer was made in support of a theory that this might have accounted for the smell of oil in the rug. There was no evidence that the vial offered in evidence had ever been in the possession of the woman. The item is of no importance, and the court did not err in its ruling.

[6] The only other grounds of appeal presented by appellant are that the court abused its discretion in refusing to exclude all of the witnesses from the courtroom, and call them in one by one, and that the district attorney was guilty of misconduct in his opening statement of the case, in certain suggestions that he intended to show that defendant's brother, John Kasparoff, had met with a violent death at a time when defendant was present, thereby insinuating that defendant had been the cause of his death.

The common rule is that the exclusion of witnesses from the courtroom during a trial is a matter committed to the discretion of the court. In this case the court did require, as to the witnesses Satinig Kasparoff and her daughter, that each one be absent during the testimony of the other. There was no abuse of discretion in refusing to exclude the other witnesses, and there is nothing to indicate any prejudice to defendant by reason of the court's ruling in this matter.

[7] In regard to the alleged misconduct of the district attorney, counsel for appellant has not cited enough of the record to show that the statement made by the district attorney was improperly made, or to show that any assignment of error was made at that time. The quoted statement of the district attorney in fact suggests the supposition that John Kasparoff was killed in some way by the machinery in the pump house where his death occurred. No complaint is made concerning instructions given by the court to the jury, and it may be presumed that, as is usual, the jury was instructed that statements of counsel are not evidence, and that the jury should consider only the evidence in its determination of the facts.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

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94 Cal. App. 12

ROWELL v. WESTERN MOTOR TRANSPORT CO. et al. (Civ. 6312.)

District Court of Appeal, First District, Division 2, California. Sept. 14, 1928.

1. Evidence 🔑450(5)—Terms of contract of assumption of obligations, if of doubtful or ambiguous meaning, may be explained by extrinsic evidence.

As in case of any other contract, meaning of any terms of contract of assumption of obligations, if doubtful or ambiguous as to obligations assumed, may be explained by extrinsic evidence.

2. Sales 🔑58—Liabilities of seller of business assumed by buyer held, in view of practical construction by parties, not to include seller's future liability under employment of another.

Under provision of contract of sale of business, whereby buyer assumed and agreed to pay "the liabilities of the seller as they existed at the close of business on the 30th day of September, 1921, but not to exceed $103,500," the seller having reported liabilities as of that date aggregating $102,498.85, made up exclusively of current liabilities actually payable as of the date named, and not including any contingent liabilities, and indicated other liabilities without specifically showing them, and the parties having acted thereon, they will be held to have put a practical construction on the contract, showing that future liability on contracts of employment by the seller were not intended to be assumed by the buyer.

3. Corporations 🔑590(3)—Corporation, merely because buying business of another, held not liable on obligation of seller.

Defendant corporation, which bought the business of the corporation by which plaintiff was employed, is not liable on the obligation to plaintiff of his employer, in the absence of contract of assumption of such obligation; it not being shown that the seller had breached plaintiff's contract, or that the consideration for the transfer was diverted from the seller to its stockholders, or that there was any fraud, there being no showing of lack of consideration, or that seller was left without assets, or that defendant was simply a reorganization of the old company under a new name, with practically the same assets, stockholders, and directors.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by L. G. Rowell against the Western Motor Transport Company and another. From judgment for plaintiff, against defendant California Transit Company, said defendant appeals. Reversed.

Earl A. Bagby, of Oakland, for appellant.

Frank J. Blake, of San Francisco, for respondent.

BUCK, Presiding Justice pro tem. This is an action to recover damages alleged to have been sustained by plaintiff by reason of his unlawful discharge prior to the expiration of the terms of his employment. The employment in question was based upon a contract entered into between plaintiff and defendant Western Motor Transport Company, which contract and the liability thereon were alleged to have been assumed by the defendant California Transit Company, who thereafter discharged the plaintiff.

The case was tried before the court without a jury. Neither of the defendants offered any evidence on their own behalf, and the case was submitted upon the evidence educed on behalf of the plaintiff. The court thereupon made findings and gave judgment in favor of the plaintiff and against the defendant California Transit Company, in the sum of $4,500, and in favor of the defendant Western Motor Transport Company, for its costs. From this judgment, the defendant California Transit Company alone appeals.

The main ground of the appeal is that the evidence is insufficient to sustain the finding of the court that the appellant assumed the obligations of plaintiff's contract of employment. The contract of employment was for the term of three years from September 15, 1921, at a monthly salary. On the 7th day of the following November the Western Motor Transport Company entered into a written contract with the appellant, whereby the first-named company sold and delivered to the appellant "all of the property and assets of every kind and nature owned by the seller save and except its franchise as a corporation," upon the condition that the—

> "buyer shall and will pay seller for said property, as soon as permitted so to do by order of the California Railroad Commission, 1,000 shares of the capital stock of the buyer, of the par value of $100 each. * * * Buyer hereby assumes and agrees to pay and discharge the liabilities of seller as they existed at the close of business on the 30th day of September, 1921, but not to exceed the sum of $103,500, and further assumes and agrees to pay the liabilities of seller, if any, incurred since said date in the conduct of the business of seller. This agreement shall not be effective until the sale herein provided for, and the stock issue herein agreed to have been approved by the California Railroad Commission."

Thereafter, on February 8, 1922, after both companies had appeared before the Railroad Commission in pursuance of the statute, such a showing was made that the commission made the following order:

> "Western Motor Transport Company, having applied to the Railroad Commission for permission to transfer its operative rights to the California Transit Company, and California Transit Company having asked authority to acquire such operative rights, and to issue $183,500 of common stock, and to assume indebtedness, a public hearing having been held, and the Railroad Commission being of the opinion that the money, property, or labor to be procured or paid for through the issue of $100,000 of stock, and the assumption of indebtedness in the amount of not exceeding $103,500, is reasonably required by California Transit Company, and that this application should be granted, subject to the conditions of this order:
>
> "It is hereby ordered that California Transit Company be and it is hereby authorized to issue $100,000 par value of its common stock to Western Motor Transport Company, and to assume not exceeding $103,500 of indebtedness of Western Motor Transport Company, all for the purpose of acquiring the properties of the Western Motor Transport described in this application.
>
> "It is hereby further ordered that this application, in so far as it relates to the issue of $83,500 of stock, be dismissed without prejudice.
>
> "The authority herein granted is subject to further conditions as follows:
>
> "(a) The $100,000 of stock which California Transit Company is herein authorized to issue shall be delivered to Western Motor Transport Company as part payment for the properties, which it is herein authorized to sell to California Transit Company.
>
> "(b) Western Motor Transport Company shall, within 10 days from the effective date of this order, file with this commission a stipulation agreeing not to distribute any of the $100,000 of stock until all claims of creditors have been satisfied."

This order was accepted and acted upon by both corporations; the seller proceeding to liquidate its business, and the buyer continuing to operate with the plaintiff in its service at the same salary as was provided for in his contract until April 1, 1924, when he was discharged without his consent.

[1] Respondent relies upon the well-established principle of equity that, though he was not a party to the contract of November 7, between the corporations, or expressly mentioned therein or directly referred to, he was nevertheless entitled to be subrogated to the rights of the obligee, and to avoid circuity of action he could bring suit on the contract if he comes within a class of persons expressly intended to be benefited by the appellant's assumption of liability. Section 1559, Civ. Code; 6 Cal. Jur. 469, et seq.

But the same equity which permits the plaintiff to be subrogated does not require that the obligor whom he is permitted to sue shall be bound to any greater or broader assumption of liability than is justified by the terms of the contract of assumption. This rule was applied in the case of Walker v. Selma Fruit Company, Inc., 177 Cal. 525, 171 P. 309. See also, Sherwood v. Gill, 36 Cal. App. 707, 173 P. 171. Also, as in the case of any other contract, the meaning of any of the terms of the contract of assumption, if doubtful or ambiguous, may be explained by extrinsic evidence.

[2] At the outstart it should be noted that the contract of November 7th herein does not, like many of the cases relied upon by the respondent, expressly state that the purchaser assumes "all of the debts and liabilities of the seller." on the contrary, in the case at bar, the purchaser agreed only to assume "the liabilities of the seller as they existed at the close of business on the 30th day of September, 1921, but not to exceed $103,500."

It is therefore evident, both as regards the identity, as well as the class, of liabilities intended to be assumed, that the above description is doubtful until its meaning can be made certain by some proper rule of interpretation. As stated in volume 6, California Jurisprudence, at page 304, with numerous citations:

> "It is well recognized that the terms of a contract may be manifested by conduct when not stated in words. And where the meaning is doubtful the acts of the parties done under a contract afford one of the most reliable means of arriving at their intention. The law recognizes the practical construction of a contract as the best evidence of what was intended by the provisions. 'Contemporaneous exposition is in general the best.'"

The first "acts of the parties done under the contract" of November 7th were in obvious pursuance of the provision of the contract that it be approved by the Railroad Commission; for, in order to provide the commission with evidence upon which it could base its approval, it appears from the proceedings introduced in evidence that "the

Western Motor Transport Company reports its assets and liabilities as of September 30, 1921," and the commission accordingly finds that:

> "Its liabilities of the same date, payment of which will be assumed by the California Transit Company, are reported to aggregate $102,498.85; the record showing, however, that certain other liabilities exist which do not appear on the company's balance sheet."

Now, in referring to the balance sheet just mentioned, it appears that the aggregate of $102,498.85 "which will be assumed by the California Transit Company" is made up exclusively of current liabilities actually payable as of September 30, 1921, and do not include any contingent liabilities of the class or kind represented by plaintiff's contract of employment. The final order of the commission set forth above, approving "the assumption of liabilities not in excess of $103,500," is obviously based upon the above finding of liabilities in the sum of $102,498.85 as identified, plus "other liabilities" not shown in the balance sheet, but—under the rule ejusdem generis—of the same class of liabilities as the identified $102,498.85. And the final conduct of the parties, in accepting and acting with full knowledge upon the above order as made, would further indicate that the parties were placing a like construction upon the language of the order when it classified the liabilities to be assumed as above. In the absence of fraud, which is not attempted to be alleged, or proven, or found in this case, we cannot substitute for the intention of the parties as above expressed some other or broader intent which counsel may argue the parties should have had but did not express.

[3] Counsel also contends that, irrespective of the contract of November 7, 1921, the money judgment herein should be sustained because, as he states:

> "The established doctrine of the law is that, when one corporation takes over all the assets of another corporation, the continuing corporation, irrespective of the existence or absence of an express agreement, must also shoulder all the liabilities of the transferor, nor can any agreement tending to limit those liabilities or exclude any of them affect the rights of any obligee of the transferring corporation."

This doctrine, with its necessary and proper limitations, is illustrated in the cases cited by counsel. See, also, very full annotations in 11 L. R. A. (N. S.) 1119, and 15 A. L. R. 1114. The reason of the rule as generally stated is that the assets of a corporation constitute a trust fund for the benefit of the creditors, which may not through either actual or constructive fraud, be fraudulently diverted to the detriment of the creditors. But in the case at bar there are no findings, either made or justified by the evidence, which would bring this case within the rule relied upon by counsel, so as to sustain the money judgment entered herein.

In the first place, it is not shown that the company transferring its assets had, prior to or at the time of the transfer, or at all, breached plaintiff's contract. Nor is it shown that the consideration for the transfer was diverted from the transferring corporation unlawfully, or at all, to its stockholders. Both these circumstances were made to appear in the complaint sustained in the case of Schaake v. Eagle, etc., 135 Cal. 472, 63 P. 1025, 67 P. 759, relied upon by counsel. Nor is there any allegation of actual fraud, or any sufficient showing of constructive fraud; for there is no showing of any lack of consideration actually received by the transferring company, or that such company is insolvent, or that the company was left without assets, or that the transferee corporation was simply a reorganization of the old company under a new name, with practically the same assets, stockholders, and directors, as appeared in the other California cases relied upon by counsel, all of which are cited or referred to in the later case of Stanford Hotel v. M. Schwind Company, 180 Cal. 348 at page 354, 181 P. 780, 783.

The judgment is therefore reversed.

We concur: NOURSE, J.; STURTEVANT, J.

205 Cal. 238

UNRUH v. KAUFFMAN et al. (L. A. 8322.)

Supreme Court of California. Sept. 26, 1928.

1. Corporations 🔑264—Stockholder's liability for corporation's indebtedness for work done held not barred by limitations on theory that work was completed before incorporation, in view of contract provisions and tentative character of prior oral agreements (Civ. Code, § 322; Code Civ. Proc. § 359).

Stockholder's liability, under Civ. Code, § 322, for corporation's indebtedness for work done, *held* not barred by three years' limitation prescribed by Code Civ. Proc. § 359, on theory that all work was completed when corporation was formed, where written contract, though referring to prior oral agreements as to commissions, percentage of work completed and amount paid therefor, provided for completion of work and payment for services performed and "to be performed," and contained important covenants not in parol agreements, which were but tentative understandings to be reduced to writing when corporation was formed.

2. Corporations 🔑269(2)—Defendant stockholder's letter, recognizing plaintiff's services to corporation in practically amount claimed, within limitation period, held admissible on issue whether action was barred (Code Civ. Proc. § 359; Civ. Code, § 322).

In action against stockholder under Civ. Code, § 322, for compensation for services rendered to corporation, letter signed by defendant as president thereof, recognizing services in practically amount claimed, on date within three years' limitation period prescribed by Code Civ. Proc. § 359, *held* admissible on issue whether action was barred.

3. Pleading 🔑236(3)—Permitting trial amendment of complaint is largely within trial court's discretion.

Permitting plaintiff to file an amended complaint during trial is largely within the discretion of the trial court.

4. Corporations 🔑271—Whether stockholder, sued for corporation's indebtedness, owned stock or held it as trustee, was fact question for trial court (Civ. Code, § 322).

In action against stockholders under Civ. Code, § 322, for compensation for services rendered to corporation, whether principal stockholder was owner of all stock in his name or held it as trustee for others was a question of fact to be determined by the trial court.

Department 1.

Appeal from Superior Court Los Angeles County; Victor R. McLucas, Judge.

Action by David S. Unruh against Milton Kauffman and others. Judgment for plaintiff, and named defendant appeals. Affirmed.

Woodruff & Shoemaker and Clyde C. Shoemaker, all of Los Angeles, for appellant.

Bradner W. Lee, Jr., Bradner W. Lee, and Kenyon F. Lee, all of Los Angeles, for respondent.

SEAWELL, J. The question presented by this appeal is whether the action brought against the stockholders of a corporation upon the personal liability provision of section 322, Civil Code, for compensation for services rendered said corporation under a contract entered into by said corporation, and the claimant is barred by the provisions of section 359, Code of Civil Procedure. The trial court held that it was not; hence the appeal.

In 1912, Milton Kauffman, appellant herein and a defendant at the trial, purchased a tract of unimproved land, consisting of about 2,000 acres, and known as tract 2371, from the E. J. Baldwin estate, for the purpose of bringing the same into a high state of development and offering lots and parcels thereof for resale in accordance with a plan of subdivision which he had in contemplation. David S. Unruh, a civil engineer, was acquainted with the lands purchased, as both he and said Milton Kauffman either had owned or did then own small tracts of land situate in the vicinity of said tract 2371 prior to the purchase of the latter by said Milton Kauffman. Kauffman and Unruh entered into an agreement whereby Unruh was to do the surveying, subdividing, laying out of, and grading the streets, and such other work of engineering as would bring said lands into a state of improvement and development that would make them readily marketable. Said improvement included the development of a water system for irrigation purposes of a capacity sufficient to produce upon said lands citrus fruits, as well as expensive land improvements not necessary here to describe. From the inception of the purchase of said lands by Kauffman it was agreed between him and Unruh, who consulted and advised with Kauffman in the matter, that as soon as feasible a corporation was to be formed and said tract of 2,000 acres was to be conveyed to it in consideration of a certain number of shares of stock of said corporation to be issued to said Kauffman as would be fair and just in the premises. Kauffman and Unruh agreed that in the meantime the latter should begin the work of construction, development, and subdivision as was forecast by the project. In furtherance of said plan, the Valencia Heights Water Company was incorporated November 6, 1912, and, by amended articles thereafter filed, it became a mutual water company operated for the benefit of the landowners.

Unruh commenced the work of construction, development, and subdivision during the fall of 1912. It was the agreement of Kauffman and Unruh from the beginning of their contractual negotiations that Unruh was to receive as compensation for all services rendered by him in connection with said tract 2371, comprising 2,000 acres of land, which services included the development of water, sinking of wells, building of reservoirs, laying out and grading of streets, subdivision, and other development work, a commission computed upon a sales price valuation of the lands to be fixed when the subdivision was finally completed and a map thereof was placed of record. Said map was recorded July 8, 1913. The method of fixing the basis of the compensation which Unruh was to receive for all services performed by him was orally agreed to in March of said year 1913. The corporation, which it was agreed from the first should be formed to finance and handle the project, was incorporated April 17, 1914, and was given the corporate name Valencia Groves Company. The capital stock consisted of 500,000 shares. Only about 2,003 shares were fully paid for or issued. Practically all of said stock issue—1,991 shares—was held and owned by Milton Kauffman. The other few shares were issued for organization purposes only. Milton Kauffman was the president treasurer manager of said corporation. It was understood between said Kauffman and Unruh from the commencement of their business engagements that Unruh was to receive as compensation for all services rendered by him 2½ per cent. commission on the sales price of the land. The oral agreement was definite as to the payment of 2½ per cent. commission, but was silent as to some of the subjects contained in the written contract, and lacked definiteness in a number of other respects. Kauffman declined to enter into a written contract with Unruh until the corporation was formed. Said contract was then made in the name of the corporation. This contract was entered into May 5, 1915, and expressly approved a prior verbal agreement or understanding existing between the corporation and Unruh, whereby Unruh was to receive for his services for subdividing said property and for completing the construction and development work thereon a commission of 2½ per cent., computed upon the sum of $421,583.30, the agreed valuation of said lots, to be paid in installments at the time of the sale of said lots under whatever terms or conditions said lots should be sold or agreed to be sold. It was further stipulated that 75 per cent. of the work required of said Unruh under his contract of employment had been done, and that he had received as part payment for his services $875.31. Said contract further provided that the corporation, "in consideration of the services performed and to be performed by the second party [Unruh], agrees to pay the second party the further sum of $9,663.90, at the times and in the manner hereinafter set forth, * * * the balance remaining unpaid of said 2½ per cent. of the total valuation of said lots, according to the schedule of valuation hereinabove referred to." It was also agreed that, if said amount, to wit, $9,663.90, or any part thereof, should remain unpaid for a period of 2 years from the date of said agreement, to wit, May 5, 1917, said amount or any unpaid portion thereof should immediately become due and payable; further, that, if Unruh should within the period of 6 months from the date of said contract, to wit, November 5, 1915, and prior to the completion of his work, for any cause discontinue his services to the corporation within such time without the consent of said corporation and without its fault, then, in that event, said corporation should be required to pay only 75 per cent. of any part of said $9,663.90 then remaining unpaid at the time of said discontinuance of services. Said contract also provided that, if said Unruh should discontinue his services without the consent of said corporation and without fault on its part at any time within a period of 1½ years from November 5, 1915, and prior to the completion of his work on said property, then the corporation was required to pay him only 80 per cent. of such sum as then remained unpaid; provided that, if the first party should at any time prior to May 5, 1917, or prior to the completion of the work on said property, dispense with the services of Unruh without his consent and without his fault, then he might demand from the corporation 80 per cent. of the sum then remaining unpaid, which sum should immediately become due and payable to said Unruh, and, when paid to him, should be in full settlement of any or all demands of said Unruh for services rendered by him. The above contract, in substance set forth, was executed in the name of Valencia Groves Company, a corporation, by Milton Kauffman, president, Ira W. Black, secretary, and David S. Unruh.

It is appellant's contention, putting it in his exact language:

> "* * * That the question of the defendant's statutory stockholders' liability is not affected by the later special contract in writing, dated May 5, 1915, and that the action, having been commenced on May 3, 1918, is barred by the provisions of section 359 and subdivision 1 of section 338 of the Code of Civil Procedure, as having been commenced more than 3 years after the liability was incurred by the corporation."

[1] Appellant insists that the liability of stockholder Kauffman for practically all of the corporation's indebtedness to Unruh (section 322, Civ. Code) was barred by the 3 years' limitation prescribed by section 359, Code of Civil Procedure, prior to the filing of said complaint, to wit, May 3, 1918. Appellant takes the position that all of the work performed by Unruh was completed prior to. or not later than, the day on which the corporation was formed, to wit, April 17, 1914, and that whatever liability attached to Kauffman as a stockholder under preorganization oral

agreements or other agreements thereafter made was barred before the action was commenced. This argument is buttressed on certain paragraphs contained in the written contract of May 5, 1915. We do not think that the interpretation placed upon the contract by appellant is sustained by the instrument considered in its entirety, or that it should be so construed in the light of the circumstances of the transaction. It is true that the preamble of the written agreement makes reference to certain prior oral agreements, such as the rate of commissions on the gross valuation of said lands and the percentage of the work completed at the time the contract was executed and the amount paid Unruh on account thereof, but it will be noted that in said preambulatory paragraphs provision is made for the completion of said construction and development work, and the first sentence of the contract following said recitals or preambles is the following:

> "Now, therefore, it is agreed as follows: The first party [corporation], in consideration of the services performed and *to be performed* by the second party [Unruh]. * * *" (Italics supplied.)

[2] Moreover, under the alleged previous oral understanding, Unruh was to receive his commission in installments as and at the time of the sale of said lots, whereas by the terms of said written contract, if any part of the commission computed on a $421,583.30 valuation of said tract 2371 should remain unpaid May 5, 1917, 2 years from the day of said contract, then said unpaid remainder was to immediately become due and payable. Other important covenants appear in the written contract which were not included in any parol agreement. In fact, there are a sufficient number of material agreements and conditions in the written contract which were not mentioned in the parol agreements as to have justified the trial court in finding them to be separate contracts. Besides, it is the clear development of the situation that the first engagements were but tentative understandings, subject to change as the interests of the project would require. At best, the oral agreements from the beginning were very little more than agreements or understandings between Kauffman and Unruh that a corporation was to be formed to handle the project, and, when formed, their engagements were to be composed and reduced to writing. Neither party had at any time prior to the execution of the written contract a concrete, definite notion as to the exact form said tentative plans, as discussed through several years, would finally assume. Both seemed to rely upon the sound judgment and fair-mindedness of the other, and were willing and intended to abide the time when all of the tentative matters would mature into concrete form and substance. The record shows that Unruh did perform services after the written agreement was entered into, and that he held himself ready to perform and did perform future services as in said contract provided. That the corporation encountered financial misfortunes was no fault of his, and he did not default in any of his agreements. A letter written by the corporation as late as May 10, 1917, to the attorney of Unruh and signed by Milton Kauffman, president of said corporation, recognizes the services rendered by Unruh in practically the amount claimed by him. No error was committed in receiving it in evidence. It will be borne in mind that prior to the formation of the corporation Kauffman was the owner of the land which he placed upon the market, and afterwards he was the active manager of said corporation and owned all of its stock except 10 or 11 shares held by his brother and the attorney for organization and administration purposes. His control of the corporation affairs was as complete and continuous after incorporation as it had been at any prior period.

Counsel for appellant relies upon Hunt v. Ward, 99 Cal. 612, 34 P. 335, 37 Am. St. Rep. 87, and Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 P. 939, and other cases of that type as authorities here for a holding that the statute of limitations commenced to run against Unruh at the moment of, if indeed not prior to, the formation of the corporation, on the theory that corporate liability then attached. We think those cases cannot be accepted as aids to the appellant in consummating respondent's defeat under the circumstances of this case. The facts herein are widely different from those treated in the cited cases. The application of the rule in those cases was proper; in the instant case it would be inappropriate and bring about an inequitable situation and one not originally in the contemplation of the parties.

[3] The court did not commit error in permitting the plaintiff during trial to file an amended complaint. That was a matter largely within the discretion of the trial court, and the defendant did not lose any substantial right thereby.

[4] As to whether Kauffman was the owner of all the stock which stood in his name or that his uncle and another were the owners of a portion thereof and Kauffman held the same as trustee for them, was a question of fact to be determined by the trial court. It cannot be said that there is no evidence to sustain the trial court's conclusion on this and other issues presented upon the trial.

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.

205 Cal. 193

PARSONS et al. v. LUHR et al.
(S. F. 12100.)

Supreme Court of California. Sept. 15, 1928.

1. Nuisance ⚷36—It was immaterial whether tree found to be nuisance, was located wholly on plaintiff's land or on boundary, as respects abatement.

Where large eucalyptus tree was found by court to be a nuisance, and plaintiff was ordered to abate it by removing its trunk and roots, extending into defendants' land, it was immaterial whether tree was situated wholly on land of plaintiff, or on the boundary line, and whether defendants' land was planted to lawn and garden, or only to lawn.

2. Trial ⚷361—Where findings justified conclusion that tree near boundary was nuisance, clerical error in another finding held not to preclude judgment directing abatement thereof.

Where other findings were sufficient to justify conclusion that large eucalyptus tree on or near boundary line was a nuisance, mere clerical error in another finding that leaves continually fell from tree and covered lawn and garden of "plaintiffs," so as to give it an untidy appearance, though defendants' property was intended to be referred to therein, *held* immaterial, and did not preclude judgment requiring plaintiffs to abate nuisance, by removing branches and roots extending into defendants' land.

3. Nuisance ⚷33—Evidence held to sustain finding that large eucalyptus tree on or near boundary was nuisance (Civ. Code, § 3479).

Finding that large eucalyptus tree on or near boundary between plaintiffs' and defendants' properties was a constant menace to defendants' property, and therefore a nuisance, under Civ. Code, § 3479, *held* sustained by the evidence.

Department 2.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by E. B. Parsons and another against G. W. Luhr and another, in which defendants filed cross-complaint. From the judgment, plaintiffs appeal. Affirmed.

Fred L. Dreher and J. Ed McClellan, both of San Francisco, for appellants.

Earl J. Sinclair and George G. Olshausen, both of Berkeley, and Howard H. Desky, of Oakland, for respondents.

LANGDON, J. Appeal by plaintiffs and cross-defendants from a judgment against them, ordering them to remove a eucalyptus tree which is growing on the boundary line between the property of the plaintiffs and the property of the defendants. The action was commenced by plaintiffs, who alleged that the tree in question was a large eucalyptus tree, having a circumference of approximately 8 feet; that it was planted for ornamentation and shade; that the trunk stands partly on the land of plaintiffs and partly on the land of defendants; that defendants have threatened and now threaten to cut down or injure or destroy said tree. It is alleged that said tree is of the age of approximately 25 years, and cannot be replaced, if destroyed, and that, unless defendants are restrained, they will cause irreparable damage to plaintiffs. An injunction is asked.

The answer and cross-complaint denies that the trunk of said tree stands partly on the lands of plaintiffs and partly upon the lands of defendants, and alleges that only a portion of the roots of said tree and certain limbs of said tree project and extend over the lands of said defendants, and further alleges:

> "That it has not been their intention at any time to cut down or destroy said tree, but simply to remove those portions of the limbs and roots thereof which extend over and upon the property of said defendants."

The pleading then continues with allegations to the effect that said eucalyptus tree has been growing upon the land of plaintiffs for many years; that it has been allowed to grow to such size that it has caused damage to the land of defendants, by lessening its value, and that, by reason of its enormous size and brittle qualities, it is a constant menace to the house and property of said defendants; that in the past limbs have fallen from said tree, endangering the lives and property of said defendants; that the land of defendants is planted with lawn and garden, and that the roots from said tree sap the land of said defendants, and extract therefrom the elements necessary to permit the growth of such lawn and garden; that the leaves continually fall from said tree, and so cover the lawn and garden of plaintiffs as to give it an untidy appearance; that the said tree, by reason of the facts alleged, constitutes a nuisance. It is prayed that the nuisance be abated, and that the plaintiffs be directed to remove the tree.

The trial court found that the parties were adjoining landowners; that for many years prior to and at the time of the trial of said action there was growing upon the land of plaintiff a large eucalyptus tree; that said tree had been allowed by said plaintiffs to grow to such a size that it has crowded over onto the land of defendants, and has pushed its roots into the land of defendants, and has and still continues to cause damage to the land of said defendants, by lessening its value, and that by reason of its enormous size and brittle qualities it is a constant menace to the house and property of said defendants; that in the past limbs have fallen from said tree, endangering the lives and property of said defendants; that the land of defendants is planted to lawn and garden, and that the roots from said tree sap the land of said defendants and extract therefrom the elements necessary to permit the growth of such lawn and garden; that leaves continually fall from said tree and so cover the lawn and garden of plaintiffs as to give it an untidy appearance. There are also omnibus findings to the effect that all the allegations of defendants' cross-complaint and answer are true, except as otherwise found, and that all the allegations of plaintiffs' complaint and of plaintiffs' answer to the cross-complaint are untrue, except as otherwise found. The judgment ordered plaintiffs to abate said tree as a nuisance by removing its trunk and its roots extending into the land of defendants.

[1] Upon the appeal it is argued at great length that the findings are not sustained by the evidence. We have examined the transcript, and have ascertained that the findings, in so far as they are material to the judgment, are abundantly supported by the record. Since the tree was found to be a nuisance, it is immaterial whether it is situated wholly on the land of plaintiffs, or on the boundary line between the lands of the parties. It is also immaterial whether the defendants' land was planted to lawn and garden, or only to lawn, as contended for by appellants.

[2] A further argument is made against the judgment because of the obvious clerical error in the finding that "the leaves continually fall from said tree and so cover the lawn and garden of *plaintiffs* as to give it an untidy appearance." This finding followed the allegation in the cross-complaint relating to this matter, and it is obvious from a reading of that pleading that a clerical error was made by the pleader, and copied by the one drawing the findings. The evidence is to the effect that the leaves fell from the tree and covered the porch and lawn of defendants. It would seem that this court should have and does have power to correct obvious typographical errors, such as this one, and it has been so held. Caine v. Polkinghorn, 54 Cal. App. 387, 389, 201 P. 936. However, if that power be lacking, the finding, read literally, would be no bar to the judgment; it would simply be immaterial, and the other findings would be sufficient to justify the conclusion that the tree was a nuisance. A question similar to the problem in the instant case was presented in the case of Stevens v. Moon, 54 Cal. App. 737, 202 P. 961, wherein it was decided that roots of eucalyptus trees, projecting into the land of neighbors and killing vegetation, by depriving such vegetation of nourishment and moisture, constitute such trees a nuisance. See, also, Shevlin v. Johnston, 56 Cal. App. 563, 205 P. 1087.

[3] The finding that the tree in question was a constant menace to the property of the defendants is sustained by the testimony to the effect that in the past large branches had fallen on the roof and porch of defendants' house, one of such branches tearing a hole in the roof; that the leaves filled the gutters, and littered the porch and lawn. Clearly, under the testimony appearing in the record here and the findings of the trial court, this tree was "an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." Sec. 3479, Civ. Code.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.

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205 Cal. 231

McINTYRE et al. v. CONSOLIDATED WATER CO. et al. (L. A. 10104.)

Supreme Court of California. Sept. 22, 1928.

1. Waters and water courses 🔑156(5)—Rate contract between water company and owners of water rights held not to affect such rights (Const. art. 14).

Where S. deeded right to certain quantity of water and proportionate interest in wells to plaintiffs' predecessor, and thereafter conveyed his property, including wells and water system, to a water company subject to plaintiffs' rights, and, because of uncertainties as to extent of plaintiffs' rights, water company entered into contract with plaintiffs, fixing rate for distribution of water to them and expressly recognizing their prior rights, *held* that plaintiffs' rights were not affected by the later contract, regardless of validity thereof, nor fact that water company was public utility under Const. art. 14, since part of water from a single source may be devoted to public service and part retained for private use.

2. Waters and water courses 🔑156(9)—Landowners having interests in water and supply system, by consenting to sale of system to public utility, held not to have abandoned their rights.

That privately owned water system was sold by defendant water company to defendant city and became part of public utility, with knowledge and consent of plaintiffs, who, as appurtenant to their lands, owned right to certain quantity of water and proportionate part of water system, *held* not to cause them to lose such rights by abandonment, notwithstanding wells and distributing system were altered and enlarged by defendants; such changes being for defendants' own benefit.

3. Constitutional law 🔑135—Eminent domain 🔑2(10)—Raising water rates fixed by contract without consent of landowners held to impair obligation of contract and constitute taking of private property for public use without compensation (Const. U. S. art. 1, § 10; Const. Cal. art. 1, §§ 14, 16).

Where cost of distributing a certain quantity of water from defendant public utility's water supply system to lands of plaintiffs, to which lands such rights were appurtenant, was definitely fixed by contract executed when water system was in private ownership, defendant's raising of rates as to such owners without their consent would impair the obligation of contract, and, so far as increase inured to benefit of public use by reason thereof, it would be taking of private property for public use without compensation, in violation of Constitution (Const. U. S. art. 1, § 10; Const. Cal. art. 1, §§ 14, 16).

4. Action ⚷6—Waters and water courses ⚷158½(2)—Complaint held to state cause of action, as against demurrer, for injunction and declaratory relief concerning water rates under contract (Code Civ. Proc. § 1060 et seq.).

In action under Code Civ. Proc. § 1060 et seq. for injunction and declaratory relief, complaint alleging that plaintiffs, as appurtenant to their lands, owned rights to certain quantity of water and interest in water distributing system under deed to their predecessor in title, that after execution of such deed water system was conveyed to water company, which entered into contract with plaintiffs, recognizing their rights and privileges and fixing rate for distribution of water, and that subsequently water company conveyed property to city, which revoked the contract and refused to furnish water to plaintiffs except on payment of higher rates, *held* sufficient as against demurrer.

Department 2.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Samuel D. McIntyre and others against the Consolidated Water Company and others. From an adverse judgment, plaintiffs appeal. Reversed.

Nichols, Cooper & Hickson, of Pomona, (A. L. Hickson, of Pomona, of counsel), for appellants.

Joseph A. Allard and Allard & Mitchell, all of Pomona, for respondents.

TYLER, Justice pro tem. Plaintiff Samuel D. McIntyre and some sixty-eight others have joined as plaintiffs to obtain an injunction and declaratory relief concerning certain water rights secured to them by contract. The proceeding is brought under section 1060 et seq. of the Code of Civil Procedure. That section provides, in substance, that any person interested under a deed, will, or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over, or upon property, may bring an action for declaration of his rights, including a determination of any question of construction or validity arising under such instrument or contract. The complaint alleges, in substance, that on the 14th day of September, 1887, one Fred J. Smith and William Everett entered into a certain written agreement, by the terms of which Smith agreed to sell and deliver to Everett, and Everett agreed to purchase, a stream of water of continuous and uniform flow of 6,500 gallons every 24 hours. The water so purchased was to be obtained from a well to be bored by Smith upon lands owned by him and delivered through pipes to a subdivision of land owned by Everett. The title to said water, together with a proportionate interest in the well, was to pass to Everett upon payment of the purchase price, which the agreement recites was made. A deed was executed by Smith to the waters and the well in conformity with the terms of the agreement. In and by said deed, Smith granted and conveyed to Everett the quantum of water mentioned, as developed by artesian wells on lands belonging to Smith described as lot 32 of the Loop and Meserve tract, rancho San Jose, county of Los Angeles, together with a perpetual right of way through the pipe line system owned by Smith for carrying the water and also a proportionate interest in the artesian wells as the water conveyed bears to the whole amount flowing from the wells through the pipe line system. At the time of the conveyance, Smith owned the water and the lands on which the well was located.

The complaint proceeding alleges: That Everett subdivided his lands upon which the water was to be delivered and plotted a subdivision and sold and transferred the various lots to different purchasers. That plaintiffs herein were the successors in title to Everett in said lands and to a portion of the waters and pipe line as conveyed by Smith to Everett. That during the years 1887 and 1888 Smith conveyed to and contracted with various people, other than Everett, different interests in said water to which certain plaintiffs herein have succeeded. That all of the water, water rights, and interest conveyed by Smith as above set forth were conveyed by way of deeds of grant duly recorded, and were and still are appurtenant to certain lands in and adjacent to the city of Pomona. About the year 1897, Smith sold to the defendant the Consolidated Water Company the well on said lot 32, together with the pipe lines, subject, however, to his former conveyances, all of which were expressly reserved from the operation of the sale. After such sale was made, there arose some uncertainty concerning the amounts of water the respective purchasers were entitled to. To obviate any dispute, the Consolidated Water Company made and executed a written agreement with the plaintiffs, which agreement is made a part of the complaint. By its terms, the water company contracted and agreed to furnish and deliver, by pumping or otherwise, to the respective signatories, plaintiffs herein, from lot 32, or other sources, the quantities of water set opposite

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their respective names, for the sum of 8 cents per thousand gallons. This contract recognizes the ownership of the water rights and privileges of plaintiffs in certain wells, and it also attempts to provide how it may be canceled or annulled. In the event of annulment, it recites that "the parties shall be restored to and retain the same rights and privileges held by them regarding said water rights as they had and were entitled to before the agreement was made, and neither party shall be subject to any damages on account of the annulment of this agreement." Plaintiffs or their predecessors in title did not by this agreement in any manner release, waive, or transfer to the water company their right, title, and interest in and to the waters, water rights, or pipe line which they had acquired from their grantor. After the water company had purchased the well and water from Smith, as above narrated, it deepened the well and otherwise improved it. Thereafter, in order to produce a greater supply of water, it drilled another hole immediately adjacent to the old well, using in part the same shafting as had been originally in use, and tapped the same water veins and channels and underground sources of water supply, and developed and brought to the surface the same waters, identically, as those which had formerly been produced and brought to the surface by the old well. The well as improved by the water company has been in use continuously by it for the production of water for sale to its consumers and patrons. The complaint then alleges that on October 1, 1926, the city of Pomona purchased from the water company its interest in the water distributing system. It is charged that immediately prior to such sale the water company caused to be served upon plaintiffs a notice of revocation of its contract above referred to, and after the sale the city of Pomona reaffirmed such revocation, and has threatened to cut off the delivery of water under said contract, and refuses to furnish water at all times to plaintiffs except upon payment of the rates and under the terms and conditions fixed generally for the delivery of water within the city of Pomona, and at rates much higher than those fixed by the contract. Then follow allegations to the effect that defendants have so altered and changed the distributing system that it is impossible for them to restore to plaintiffs their property and rights under their contract. Plaintiffs also allege that the waters were at all times privately owned, and have never been, and are not now, a public utility. The contracts and deed above referred to are annexed to the complaint and made a part thereof. Judgment is prayed (1) for an injunction against defendants raising the rates in violation of its contract; and also (2) for a mandatory injunction that defendants furnish the specified amount of water to each plaintiff at the rate provided for in the contract; and (3) for declaratory and such other relief as may be equitable.

To this complaint, defendants interposed a demurrer on the ground that it did not state facts sufficient to constitute a cause of action, and also as to certain alleged uncertainties. The trial court sustained the demurrer, and plaintiffs refused to amend, electing to stand on their pleading. They here contend that the amended complaint was sufficient against defendants' demurrer, and it should have been overruled. In support of the judgment on demurrer, respondents claim that appellants are not entitled to any relief under the facts stated in the complaint, for various reasons, and relief was properly denied them. They contend that the contract of March 15, 1900, made by and between plaintiffs and the water company, was and is invalid, as in violation of article 14 of the Constitution, as the water company was a public utility at the time the contract was entered into; that it gave a preferential right to waters dedicated to a public use, by increasing a burden upon a public utility. It is further claimed that appellants' rights in and to the waters have been lost by abandonment. Uncertainty as to particular allegations is also claimed. We see no merit in any of those contentions.

[1] Plaintiffs acquired their water rights long prior to the time the water company acquired its interest in the remaining waters of the well from Smith in 1897. The waters so acquired by plaintiffs were and now are appurtenant to their lands. They were never conveyed at any time to the water company or to any one else, nor were they ever dedicated to public use. On the contrary, the water in question and an interest in the well and distributing system were at all times held in private ownership by plaintiffs. After the sale by Smith to the water company of his interest, in 1897, some uncertainty arose as to the amount of water the respective parties were entitled to. The contract of March 15, 1900, made with the water company, was entered into for the purpose of making certain some of the uncertainties of the prior agreements. Plaintiffs did not acquire their rights under this agreement, the rights which they had formerly acquired being merely confirmed thereby. The agreement itself recognizes plaintiffs' prior rights, for it provides that upon its abrogation the parties shall be restored to and retain the same rights and privileges held by them regarding said water rights as they had and were entitled to before the agreement was made. The mere fact, therefore, that the water company was a public utility at the time the contract was made in no manner affected plaintiffs' rights to their interest in the water and distributing sys-

tem. Part of water from a single source may be devoted to public service and part retained for private use. Allen v. Railroad Commission, 179 Cal. 68, 175 P. 466, 3 A. L. R. 249. But, even if it be assumed that the contract is invalid for any reason, such fact in no manner deprives plaintiffs of their property, as in that event they are relegated to their former rights, which consist of an interest in the well and distributing system and certain waters which it is alleged defendant refuses to permit plaintiffs to use.

[2] Equally without merit is the further claim that whatever rights plaintiffs may have had in the waters and distributing system have been lost by abandonment. In this connection the claim is made that the well and distributing plant having been altered so as to become incorporated with the system now owned by the city of Pomona, a public utility, such incorporation being with plaintiffs' knowledge and consent, they have lost their rights therein, as the law will not permit such act to increase the burden of the utility. The change was brought about by defendants themselves for their own benefit in an endeavor to increase their quantity of water, and they cannot avail themselves of this act to deprive plaintiffs of their property. The law provides a simple and just means by which a public utility may acquire the private property of others.

[3] Then, again, the cost of distributing plaintiffs' waters to their lands was definitely fixed by contract, and to raise the rate without their consent would impair the obligation of a contract, and, so far as the increase inured to the benefit of the public use by reason thereof, it would be the taking of private property for public use without compensation. Allen v. Railroad Commission, supra. The further claim is made by respondents that, as the contract was annulled in the manner provided for in the instrument itself, plaintiffs are entitled to no relief in consequence of such termination. There is nothing in the complaint to show that the contract was ever annulled in the manner claimed. The pleading merely recites that defendants are refusing to deliver water under the contract. But even in the event of an annulment the parties under the very terms of the contract were to be restored to their former rights, and it is alleged defendants refuse to make such restoration. Plaintiffs have enjoyed the full use of their waters since they were acquired in 1887 down to the time the city of Pomona acquired the interest of the water company in 1926, and they have done nothing during all this period which would in any manner impair or destroy their rights in their property.

[4] The complaint in ordinary and concise language sets forth plaintiffs' cause of action, and there is no uncertainty in any of its allegations, either in form or substance, and the rights therein asserted are not shown by their pleading to have been relinquished or lost as claimed by defendants. The demurrer to the complaint should have been overruled.

The judgment is reversed.

We concur: RICHARDS, J.; SHENK, J.

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205 Cal. 245

REDD v. GARFORD MOTOR TRUCK CO., Inc., et al. (L. A. 8049.) ★

Supreme Court of California. Sept. 26, 1928.

Rehearing Denied Oct. 25, 1928.

1. Appeal and error ⚷931(1)—On appeal from verdict for plaintiff, appellate court assumes trial court, under conflicting evidence, took plaintiff's version of defendant's conduct, waiving forfeiture of truck sued for.

Where trial court, under conflicting evidence, found for plaintiff in action for claim and delivery of motor truck, it must be assumed on appeal that court accepted plaintiff's version of oral contract and acceptance of second installment as waiver of right to insist on forfeiture for nonpayment of first installment for truck.

2. Sales ⚷477(6)—Seller's acceptance of second installment held waiver of right of forfeiture for buyer's failure to pay first installment in full.

Where buyer of truck under conditional sales contract failed to pay first installment entirely, seller's acceptance without objection of second installment constituted waiver of right to insist on forfeiture because of buyer's failure to pay first installment in full when due, at least until such time as seller notified buyer of insistence on right of forfeiture.

3. Sales ⚷477(1)—Seller's repossession of truck, under oral agreement to resell same and apply proceeds on contract, held waiver of right of forfeiture for failure to pay entire first installment.

Where buyer of truck under conditional sales contract failed to pay first installment in full, and buyer returned truck to seller under oral agreement whereby seller was to resell truck and complete payments from proceeds of truck, receipt of possession of truck by seller under such oral agreement constituted waiver of right of forfeiture and repossession, until seller failed to resell truck or buyer in meantime further defaulted in making payments thereafter to become due.

4. Contracts ⚷318—Law does not favor forfeitures.

The law does not favor forfeitures.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied.

5. Sales 🔑481—Buyer, suing in action of claim and delivery for motor truck, tendering full purchase price, was entitled to repossession of truck, or value thereof, against seller waiving right of forfeiture.

In action for claim and delivery of motor truck by conditional buyer tendering full payment of truck, where evidence showed that seller waived right of forfeiture and repossession for failure to pay first installment in full, buyer was entitled to repossession of truck, or value thereof in event redelivery could not be made.

6. Replevin 🔑81—Damages claimed for detention of motor truck held compensatory only, in absence of averment on which exemplary damages could be sustained.

Where plaintiff, in action of claim and delivery of motor truck, alleged generally that he was entitled to recover $2,000 damages for detention, which allegation was denied by defendants, damages so claimed were compensatory only, since plaintiff made no averment out of which exemplary damages could be sustained.

7. Replevin 🔑82—Plaintiff, seeking compensatory damages for detention of truck, failing to prove any damages therefor, held entitled only to nominal damages.

Where plaintiff, in action of claim and delivery for motor truck, alleged only compensatory damages for detention of truck, plaintiff was put on proof of damages sustained by reason of defendant's detention of truck, and, in absence of such proof, only damages which plaintiff could recover would be nominal damages.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul Burks, Judge.

Action of claim and delivery of a motor truck by C. C. Redd against the Garford Motor Truck Company, Incorporated, and another. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

Superseding opinion of District Court of Appeal in 261 P. 1067.

W. Cloyd Snyder, of Santa Paula, for appellants.

I. R. Rubin and M. G. C. Harris, both of Los Angeles (Adolph Johnson, of Los Angeles, of counsel), for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor in an action for claim and delivery whereby he was awarded possession of a motor truck, or its value if delivery could not be had, in the sum of $3,000, together with damages for the alleged unlawful detention thereof in the sum of $2,000. On September 14, 1923, the evidence herein shows the plaintiff to have been the owner of a certain motor truck, and on said day he entered into an agreement with the defendants for the purchase under a conditional sales contract of that certain Garford motor truck which is the subject of the present action, by the terms of which agreement the plaintiff turned over to the defendants the motor truck which he then owned at an agreed value, which was to be credited upon the payment of the Garford motor truck he was about to purchase, which left apparently a balance due upon the latter of $4,120.15, and which by the terms of said agreement was to be paid by the plaintiff to the defendants in 18 monthly installments, the first of which was to be the sum of $465, payable on October 14, 1923, the remainder of said installments being in the sum of $215, payable upon the 14th day of each month thereafter, time being expressly made the essence of said agreement. The plaintiff was given immediate possession of the truck.

On October 1, 1923, the plaintiff was notified in writing that his first installment of $465, with interest thereon, would become due on October 14, 1923. On that date the plaintiff gave the defendants his check for the sum of $300, without any special direction as to how the same should be applied. At that time it appears that he was entitled to a credit of $50 on account of the sale by the defendant of the other truck. It appears, also, that there was due by the plaintiff to the defendants the sum of $94.50 upon an open account. The defendants thereupon credited the plaintiff with said payment of $300, and also with the $50 credit to which he was entitled, and then charged against said credit the said sum of $94.50 due upon said open account, which left a balance of $255.50, which the defendants applied to the payment pro tanto of the installment which had fallen due upon said date. Shortly thereafter the defendants sent to the plaintiff a written notice to the effect that his second installment of $215, with interest, totaling $239.95, would become due on November 14, 1923, and on the latter date the plaintiff paid to the defendants the amount of said installment in full.

Thereafter, and on the morning of November 21, 1923, the plaintiff, as the evidence discloses, returned said Garford motor truck to the defendants, and thereupon, as he testified, entered into an oral agreement, by the terms of which the defendants were to sell said truck, and were to pay from the proceeds thereof whatever amounts were due or to become due the defendants upon account of the purchase price thereof, paying the balance, if any, to the plaintiff. At a later hour in said day the plaintiff returned to the sales room of the defendants, and was then informed that the defendants had elected to repossess said truck under the terms of the written agreement for its purchase, and on account of the failure of the plaintiff to pay in full the amount of the installment which had fallen due upon October 14th, and upon which it was claimed a balance of

$236.96 remained due. On the following day the plaintiff offered to the defendants his check in full payment of said amount and demanded repossession of the truck, which were both refused, whereupon, and on November 23, 1923, the plaintiff commenced this action in claim and delivery for said truck, or for the value thereof, fixed at $3,000, and for damages in the sum of $2,000 for its unlawful detention.

Upon the trial of the cause before the court sitting without a jury, the trial court, upon the foregoing facts, made its findings of fact and conclusions of law in the plaintiff's favor, and thereupon made and entered the judgment from which this appeal has been taken.

[1-4] It is the contention of the appellants that since, by the terms of the written agreement for the purchase by means of an installment contract of the aforesaid Garford motor truck, time being expressly made the essence of said agreement, there was on November 21, 1923, a balance of $236.96, which had been overdue since October 14, 1923, upon the first installment payable on the latter date upon and under the terms of said agreement, the said defendants were entitled to declare a forfeiture thereof and to repossess said truck, and that, having done so lawfully, they were entitled to refuse to accept from the plaintiff the proffered balance due upon said installment on the following day, and that, having thus lawfully repossessed said property, the plaintiff was not entitled to maintain this action, and hence that the judgment therein should have been in favor of the defendants for their costs. On the other hand, the respondent, while admitting that on and after October 14, 1923, there had remained due from himself to the defendants the said balance of $236.96, on account of which the defendants might at any time prior to November 14, 1923, have declared a forfeiture of said agreement and have thereupon lawfully repossessed said truck, contends that such right of forfeiture and repossession was waived by the defendants, when, on November 14, 1923, they accepted from the plaintiff payment in full of the second installment upon said contract due on said date, at least until, after receiving without objection said second installment, they had given notice to the plaintiff of their intention to claim said forfeiture unless within a reasonable time the plaintiff should make the payment of the balance due upon the amount of the first installment.

The plaintiff further insists that when, on the morning of November 21, 1923, he voluntarily returned said truck to the possession of the defendants under the oral agreement to which he testified, the defendants were to sell the same and from the proceeds of such sale pay in full whatever amounts remained due upon the purchase price of the truck, and when the defendants received the possession of said truck under such oral agreement they thereby further and fully waived whatever rights of forfeiture and repossession they might have theretofore had under the original agreement. It is true that as to this latter oral agreement the evidence given by the plaintiff and that given by the manager of the Garford Motor Truck Company touching said latter transaction is in direct conflict; but since the trial court found in the plaintiff's favor upon the issues tendered in said action, we must assume that it not only accepted the plaintiff's version of said oral agreement, but also interpreted the acts of the defendants in accepting without objection the second installment due to them under the terms of the original agreement as a waiver of their right to insist upon a forfeiture because of the failure of the plaintiff to pay in full the amount of the first installment when due, at least until such time as they had notified the plaintiff of their insistence upon said forfeiture in the event that the latter failed to make prompt payment of said balance due after receiving such notice.

We are of the opinion that the trial court was correct as to each and both of its foregoing conclusions. That the law does not favor forfeitures is well settled by the decisions of this court in numerous cases, and, as was well said in the case of Knarston v. Manhattan L. I. Co., 124 Cal. 74, 77, 56 P. 773, 774:

> "Evidence tending to show the waiver of a forfeiture will be looked upon with kindly eyes."

The case of Boone v. Templeman, 158 Cal 294, 110 P. 947, 949 (139 Am. St. Rep. 126), is a leading authority in this state upon the subject of forfeiture of installment contracts, and we find therein, quoted with approval, the statement of Mr. Pomeroy in his work on contracts, to the effect that:

> "The one entitled to insist upon a punctual performance by the other or else that the agreement be ended, may waive his right and the benefit of any objection which he might raise to a performance after the prescribed time, either expressly or by his conduct, and his conduct will operate as a waiver when it is consistent only with a purpose on his part to regard the contract as still subsisting, and not ended by the other party's default."

In the case of Hoppin v. Munsey, 185 Cal. 678, 683, 198 P. 398, it was held that the making by the vendee and acceptance by the vendor without objection of subsequent payments upon an installment contract operated as a waiver of the right of forfeiture which had arisen by virtue of the vendee's previous default, to the extent, at least, of requiring the vendor to notify the vendee of its intended insistence upon such forfeiture unless the amount in default was promptly paid. The cases of Pacific Finance & Investment Co. v.

Pierce, 48 Cal. App. 600, 191 P. 1115, and Benedict v. Greer-Robbins Co., 26 Cal. App. 468, 147 P. 486, are not inconsistent with the views above expressed, since in the first of these cases there was an express provision in the original contract of conditional sale to the effect that the acceptance by the vendor of any installment payment was not to operate as a waiver of its right to retake possession of the property without previous demand or notice on account of any previous defaults, while in the second of said cases the default of the plaintiff consisted not only in his failure to make the required payments in the first instance, but also in his failure so to do after he had been notified of the vendor's insistence that the balance remaining due upon such installments must be promptly paid. For like reason the case of Silverstin et al. v. Kohler & Chase, 181 Cal. 51, 183 P. 451, 9 A. L. R. 1177, contains nothing inconsistent with the views above expressed, since in that case the defaults of the vendee which entitled the vendor to retake the property were future defaults occurring after certain intermediate installments had been paid.

But even if it should be conceded, as the appellant herein contends, that the fact of their acceptance of the second installment due upon said original agreement would not of itself suffice to work a waiver of their right to take repossession of said truck on account of the plaintiff's previous partial default, we are satisfied that by the subsequent executed oral agreement entered into between the parties on the morning of November 21, 1923, by the terms of which the plaintiff yielded and the defendants took possession of said truck under a definite agreement to undertake the sale of the same, and by and through such sale when accomplished to repay to themselves all sums due and to become due under said original contract, they fully waived whatever rights they still possessed, if any, to claim a forfeiture thereunder, until their efforts in the way of the resale of the said truck had failed to prove seasonably successful, or that the plaintiff in the meantime had further defaulted in making the payments thereafter to become due upon said original contract of conditional sale. The conduct of the defendants in accepting the repossession of said truck upon the foregoing terms and conditions was utterly inconsistent with any right which they might otherwise have claimed to retake said property under the forfeiture terms of the original agreement, and to use the expression of Mr. Pomeroy approved in Boone v. Templeman, supra:

> "It is consistent only with a purpose on his part to regard the contract as still subsisting, and not ended by the other party's default."

[5-7] This being so, we are satisfied that the trial court correctly decided that the plaintiff was entitled in this action to the repossession of said truck, or the value thereof in the event such redelivery could not be made. We are, however, by no means satisfied that the trial court was also correct in that portion of its judgment wherein it was decided that the plaintiff was entitled to damages in the sum of $2,000 for the detention by the defendants of said property. The plaintiff in his complaint states generally that he is entitled to recover "the further sum of $2,000 damages for detention thereof." The defendants in their amended answer deny that the plaintiff is entitled to said sum, or any amount whatever, as damages for their detention of said property. The damages which the plaintiff thus sought, and which the defendants deny, were compensatory only; the plaintiff having made no averment upon which a claim of exemplary damages could be sustained. Lamb v. Harbaugh, 105 Cal. 691, 39 P. 56. This being so, the plaintiff was put upon proof as to the fact and extent of whatever damages he had sustained by reason of the defendants' detention of said truck. The record is entirely lacking in such proof, and in the absence thereof the only damages which the plaintiff would be entitled to have awarded him would have been nominal damages. In this state of the record the trial court was in error in awarding to the plaintiff the sum of $2,000, or any other sum, other than merely nominal damages, against the defendants.

This being so, that portion of the judgment which awards the plaintiff the sum of $2,000 damages by reason of the detention by the defendants of said property must be stricken from said judgment, and, with this amount eliminated, the judgment in the plaintiff's favor for the redelivery to him of said truck, or for the value thereof in the sum of $3,000, if such delivery cannot be had, must be and the same is hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; TYLER, Justice pro tem.

205 Cal. 202

ROGERS v. SCHNEIDER et al. (L. A. 9436.)

Supreme Court of California. Sept. 18, 1928.

1. Judgment 🔑162(4)—Plaintiff's failure to disclose knowledge of default judgment and acquiescence in subsequent deposition proceedings held sufficient to support order vacating judgment (Code Civ. Proc. §§ 473, 2021).

Plaintiff's failure to disclose his knowledge of default judgment, entered without notice to defendants' attorney before expiration of additional time, granted by latter for taking plaintiff's deposition, under Code Civ. Proc. § 2021, and acquiescence in steps subsequently taken by defendants to acquire sufficient information to prepare and file answer, *held* sufficient to support order setting aside default judgment under § 473, even if defendants' appearance were general and not limited to deposition proceeding.

2. Appeal and error 🔑957(1)—Judgment 🔑139—Setting aside default is within superior court's discretion, and will not be disturbed on appeal, unless discretion was plainly abused (Code Civ. Proc. § 473).

Exercise of authority, under Code Civ. Proc. § 473, to set aside default or relieve party from any proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, is confided to discretion of superior court, and will not be disturbed on appeal, unless such discretion plainly appears to have been abused.

3. Costs 🔑260(4)—Penalty will be imposed on plaintiff appealing from order vacating default judgment, where there was no possibility of reversal under facts (Code Civ. Proc. § 473).

Plaintiff, having persisted in taking appeal from order vacating default judgment under Code Civ. Proc. § 473, though there was not remotest possibility of reversal under facts shown, a penalty for damages because of resulting delay and expense to defendants will be imposed.

Department 1.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by J. W. Rogers against Frank Schneider and others. From an order setting aside a default judgment, plaintiff appeals. Affirmed.

D. Chase Rich, of Los Angeles, for appellant.

Fred E. Peterson, of Los Angeles, for respondents.

SEAWELL, J. This is an appeal by plaintiff from an order setting aside, upon motion of defendants, a default judgment entered in plaintiff's favor. The action was one whereby plaintiff sought to recover an unpaid balance of $10,300 alleged to be due him on a contract made with defendants for the alteration of an apartment house owned by defendants, and to foreclose a mechanic's lien on said property for said balance.

[1] The uncontroverted evidence introduced in the court below, upon the hearing of the motion to set aside the judgment obtained by default against the defendants, discloses a singular and unwarranted course of conduct pursued by appellant against his adversaries, the respondents herein. The record shows that the complaint was filed in court below on April 5, 1926. A copy of the complaint and summons was never served upon the defendants (respondents), but a copy of the complaint and summons was mailed by appellant's attorney, D. Chase Rich, to respondents' attorney, Fred E. Peterson, and received by the latter on April 6, 1926. Inclosed in the same envelope containing a copy of the complaint and summons, appellant's attorney addressed the following letter to respondents' attorney, omitting the formal parts:

> "As per my conversation with your partner yesterday, I inclose herewith summons and complaint in superior court case No. 193287, J. W. Rogers v. Frank Schneider et al. Your partner stated over the telephone that upon receipt of the summons and complaint that you would enter a formal appearance for your clients."

On April 14, 1926, said attorney for defendants (respondents) made an affidavit to obtain the examination of the plaintiff by deposition, as provided by the Code of Civil Procedure, § 2021, and for an order to inspect the original contract upon which the pending action was based, which was averred to be in the possession of plaintiff. After setting forth in the application for the order the title of the court and cause, the caption of the particular proceeding, designated "Affidavit for Subpœna Taking Deposition," appeared immediately thereunder. The first sentence of the application was in these words: "That he [defendants' attorney] is attorney for and hereby appears for defendants in the above-entitled *matter*." (Italics supplied.) The last clause of said application is, "and the defendants have appeared and do hereby appear for the purpose of obtaining an order for the taking of said deposition." It is evident that an attempt at least was made to limit the appearance of defendants to the procurement of an order to take the deposition of the plaintiff and to inspect said contract. It is further averred in said affidavit or application "that it is necessary to inspect the said contract *prior to the filing of an answer*, and defendants desire to take the deposition of the plaintiff *prior to filing said answer*." (Italics supplied.) The taking of said deposition was noticed for April 27, 1926. A subpœna duces tecum was issued and had been served on the plaintiff, commanding him to be present and produce said contract on the day last above named. Upon the coming of said day, the attorney for plaintiff telephoned a request to the attorney for defendants, that the taking of said deposition be continued to April 29, 1926. The request was granted. On the day following the granting of the continuance, to wit, April 28, the plaintiff appeared in the superior court without a suggestion being made to the attorney for the defendants that he intended to do so, and without any knowledge on defendants' part as to his intention, and procured a judgment in the sum of $10,300, together with interest and costs, to be entered against defendants. Upon the arrival of the day to which the taking of the deposition was continued, to wit, April 29, 1926, the following passed between the attorney for defendants and the attorney for plaintiff:

> "Mr. Peterson: At this time, Mr. Rich, will you stipulate that the deposition may be taken at this time instead of the time stated in the notice, which time was extended at your request out of courtesy?
>
> "Mr. Rich: I so stipulate."

The plaintiff's conduct when giving his deposition was usually contumacious. He refused to answer many pertinent questions propounded to him by opposing counsel, placing his refusal in some instances upon the advice given by his counsel not to answer certain questions. The latter's conduct was not free from censure in the conduct of the examination. Plaintiff's testimony as to the possession of the contract which he was commanded to produce, but which he did not produce, was evasive. An order to show cause why plaintiff should not be required to produce said contract and answer certain specific questions or be punished for contempt of court and pay defendants' damages as provided by law, was issued and served upon said plaintiff. He failed to appear on the day fixed by said order, and an attachment and bench warrant were placed in the hands of the sheriff of the county of Los Angeles, but he was not served, for the reason that he could not be found by the sheriff. Plaintiff's attorney did not at any time during the proceedings make known to defendants' attorney the fact that a default judgment had been entered against his clients, although he came in personal contact with him on numerous occasions during the development of said proceedings as herein outlined.

The earliest day that defendants or their attorney actually knew or learned that the foreclosure decree of April 28, 1926, had been entered against them, was June 4, 1926, whereupon defendants gave notice that on June 15, 1926, they would move the court to set aside said default and vacate the judgment entered thereon upon the grounds that said default was entered through mistake, inadvertence, and excusable neglect of their said attorney. The attorney for the moving defendants presented an affidavit in support of his motion, none of the averments of which was disputed by counter affidavit, setting out the facts herein recited. The defendants, in addition to averring the things and matters heretofore set out, which were averred as indicative of a course of bad faith on the part of plaintiff's counsel, further averred that "the said D. Chase Rich, by trick and device, as more fully appears from this affidavit, caused this affiant to extend the courtesy of continuing the taking of said deposition until after the said D. Chase Rich would have and did enter the default and obtain judgment against the said Frank Schneider and Anna Schneider." Defendants also prepared and appended to the moving papers their proposed answer to the complaint, which unquestionably contained good and sufficient grounds of defense to the complaint if found by the court to be true. The trial court upon a hearing of said motion on its merits set aside the default and vacated the judgment. Upon an inspection of the record presented, we are fully satisfied that it could have made no other order. Conceding that the appearance of defendants was general and that it was not limited to the deposition proceeding, it clearly appears from the face of the affidavit for taking the deposition of plaintiff that the purpose of taking the deposition was to enable the defendants to advisedly *answer* the complaint. Such was the averment of the affidavit and notice upon which the claim of appearance in the action is based. No service of summons or copy of the complaint was made, and only upon the force of said affidavit and notice could plaintiff's claim of appearance be predicated. Respondents doubtless were mistaken at the inception of their procedure in believing that, inasmuch as no service of summons and copy of the complaint had been made, their time to answer was extended to such time as they should file their answer or otherwise voluntarily appear in the usual manner. In their erroneous understanding of the matter, they were encouraged and aided by the active participation of appellant, who became a party to every step taken by respondents, after he had taken judgment by default, and at no time made any objection to what might ordinarily be regarded as moot proceedings. The failure to disclose his knowledge as to the true situation which he had brought about and his acquiescence in and implied consent to the steps taken by respondents in order to acquire sufficient information to enable them to accomplish an express purpose, to wit, to prepare and file their answer, would of itself furnish grounds of estoppel against the claim that the appearance made under the circumstances related should deprive the respondents of their right to answer. The participation of the appellant in said proceedings in a manner which could have had no other effect than to mislead the respondents is a sufficient reason to support the order of the trial court in setting aside the default and vacating the judgment entered thereon. The appearance of the respondents, based upon the affidavit and notice aforesaid, will, in the interests of justice, be given the construction which the conduct of appellant consistently throughout the proceedings justified. The appearance, therefore, now insisted upon, cannot be deemed, in this case, good cause for denying the motion which was seasonably made in the circumstances herein set forth.

[2] "The authority of the superior court to set aside a default, or relieve a party from any proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, is given by section 473 of the Code of Civil Procedure; and that the exercise of this authority is confided to the discretion of the court, and will not be disturbed upon appeal therefrom, unless such discretion shall plainly appear to have been abused, has been so frequently affirmed in this court that a reference to a few of the cases will be sufficient." Winchester v. Black, 134 Cal. 125, 66 P. 197.

[3] It would have been our plain duty to reverse this case, had the trial court not exercised its discretion as it did. After having done so upon the facts as herein recited, there was not the remotest possibility of a reversal of the order made, setting aside the default and vacating the judgment. Nevertheless the plaintiff has persisted in taking this appeal, thereby causing unwarranted delay and incurring expense to respondents. The appeal being wholly without merit, we deem it proper, in affirming the order, to also impose a penalty for damages against appellant for taking a frivolous appeal.

The order appealed from is affirmed, with damages in the sum of $100.

We concur: CURTIS, J.; PRESTON, J.

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205 Cal. 201

AYRES et al. v. WRIGHT et al. (S. F. 12439.)

Supreme Court of California. Sept. 17, 1928.

Appeal and error 🔑965—Venue 🔑52(1)—Change of venue for convenience of witnesses is discretionary, and denial can be reversed only for trial court's abuse of discretion.

Motion for change of venue based on convenience of witnesses is addressed to sound discretion of trial court, and order denying change cannot be reversed in absence of abuse of discretion.

Department 1.

Appeal from Superior Court, Sonoma County; Rolfe L. Thompson, Judge.

Action by Florence C. Ayres and another against C. A. Wright and another. From an order denying plaintiffs' motion for change of venue, plaintiffs appeal. Affirmed.

Raymond Perry, of San Francisco, for appellants.

Geary & Geary, of Santa Rosa, for respondents.

PER CURIAM. This is an appeal from an order denying plaintiffs' motion for a change of trial of said action, made upon the ground of the convenience of witnesses.

Plaintiffs brought the action in the county of Sonoma, the county in which the defendants reside. By their motion they sought to have the place of trial changed to the county of Alameda, in which county plaintiffs reside.

A motion for the change of venue based upon the convenience of witnesses is addressed to the sound discretion of the trial court, and an order denying the change can only be reversed for an abuse of discretion. Perky v. Perky, 190 Cal. 492, 213 P. 492; Pascoe v. Baker, 158 Cal. 232, 235, 110 P. 815; Miller & Lux v. Kern Co. Land Co., 140 Cal. 132, 136, 73 P. 836.

We have examined the several affidavits of the respective parties used by the court upon the hearing of the motion, and we find no abuse of discretion by the court in its ruling upon said motion.

The order is affirmed.

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205 Cal. 197

PISTA v. RESETAR et al. (S. F. 12441.)

Supreme Court of California. Sept. 17, 1928.

1. Appeal and error 🔑80(3)—Partition 🔑73—Interlocutory decree in partition suit is conclusive as to matters determined and is "final judgment" within appeal statute (Code Civ. Proc. § 963, subd. 3).

An interlocutory decree in action for the partition of real property, though preliminary, is conclusive as to the matters determined therein and is to all intents and purposes a "final judgment" from which an appeal may be taken under Code Civ. Proc. § 963, subd. 3.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Judgment.]

2. Partition 🔑73—Plaintiff in whose favor interlocutory decree for payment of money was rendered in partition suit held entitled to interest thereon from date of interlocutory decree (Code Civ. Proc. §§ 681 et seq., 963, subd. 3, 1035; Civ. Code, § 3302).

Plaintiff recovering interlocutory decree for payment of money in partition suit *held* entitled to interest upon award from date of entry of decree in the same manner as if judgment had been rendered in an ordinary action for the recovery of money under Code Civ. Proc. §§ 681 et seq., 1035, Civ. Code, § 3302; interlocutory decree being final as to all questions adjudicated therein under Code Civ. Proc. § 963, subd. 3.

3. Judgment ⚷218—Form of judgment is immaterial provided rights of parties may be determined therefrom.

Form of judgment is of no consequence so long as the rights of the respective parties can be ascertained therefrom, test of sufficiency being substance rather than form.

4. Partition ⚷73—Interlocutory decree which finds specified sum due, owing, and unpaid from defendant to plaintiff is sufficient to constitute valid award.

Interlocutory decree in partition suit *held* sufficient to constitute valid award as to wording of clause which finds due, owing, and unpaid from defendant to plaintiff a specified sum.

Department 1.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Action by Blas Pista against Mike Resetar and others. From an order denying execution against defendants' property to enforce payment of interest on an interlocutory decree, plaintiff appeals. Reversed.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for appellant.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for respondents.

PRESTON, J. This action was instituted for the purpose of partitioning certain ranch property and determining the respective interests of the parties in and to the growing crops thereon. Upon submission of the cause after trial and with consent of all parties expressed in open court, an interlocutory decree was entered by which said property was duly partitioned and divided, 82/100 thereof to appellant and 18/100 thereof to respondent. Said decree further adjudged and determined that there was due, owing, and unpaid from respondent to appellant, representing appellant's 82/100 of the income and proceeds of said real property, after deduction of taxes, expenses, etc., the sum of $9,840. Thereafter final decree was duly entered, partitioning said real property as aforesaid, and further adjudging that the sum of $575.13 was due from appellant to respondent, covering the value of taxes advanced and certain improvements made by respondent on appellant's portion of said land subsequent to rendition of the interlocutory decree. Said final judgment also declared:

> "Nothing herein provided or contained shall or does in any way affect the provisions of paragraph 5 of the interlocutory decree * * * wherein it is adjudged and determined that there is due, owing and unpaid from said defendant * * * to * * * plaintiff * * * $9,840, which provision, in said interlocutory decree, notwithstanding any of the provisions of this final decree, shall remain in full force and effect."

No appeal was taken either from said interlocutory decree or from said final decree, and pursuant thereto respondent duly paid to appellant said sum of $9,840, less said sum of $575.13. Appellant, however, claimed interest upon said $9,840 from the date of the filing of said interlocutory decree to date of payment to him thereof, and made demand therefor, which was refused. He thereupon made a motion for an order directing that execution issue against respondents' property to enforce payment of said interest, which motion was denied. From the order denying it this appeal is prosecuted.

The facts are undisputed. The question is whether appellant is entitled to interest upon the money award of $9,840 made by said interlocutory decree from the filing date thereof and prior to entry of any final judgment in this action. We think that he is.

[1, 2] An interlocutory decree in an action for the partition of real property, although preliminary to the final judgment of conformation, is conclusive as to the matters determined therein (Thompson v. White, 76 Cal. 383, 384, 18 P. 399; 20 Cal. Jur. § 56, p. 642–3); that is, it is final upon the questions adjudicated in it and is to all intents and purposes a final judgment from which an appeal may be taken (section 963, Code Civ. Proc. subd. 3), although it is not the last judgment entered in the action. See Sharon v. Sharon, 67 Cal. 185, 195, 196, 7 P. 456, 635; 8 P. 709, where the court had under consideration the question of whether an order for the payment of alimony and counsel fees was in the nature of a final judgment. The above subject is fully discussed there and the language of that opinion is equally applicable to an interlocutory decree of the character of the one here before us. See, also, Title Ins. & Trust Co. v. Calif., etc., Co., 159 Cal. 484, 491, 114 P. 838, and cases therein cited; Los Angeles v. Los Angeles C. Water Co., 134 Cal. 121, 122, 123, 66 P. 198, and cases therein cited. Said interlocutory decree being in the nature of a final judgment, appellant was entitled to enforce payment thereof, with interest upon the award, in the same manner as if said judgment had been rendered in an ordinary action for the recovery of a specific sum of money. See section 1035 and section 681 et seq., Code Civ. Proc.

[3, 4] Conceding the finality of said interlocutory decree, respondent nevertheless questions the sufficiency of the wording of the clause which finds due, owing, and unpaid from respondent to appellant said sum of $9,840, to constitute a valid award. It is unnecessary to set forth here the exact wording of the provision in question. In substance it decrees to appellant from respondent said

sum, and that such was its true intent and meaning is confirmed by the clause hereinabove quoted from the final judgment declaring that nothing in said final judgment shall in any way affect the adjudication made by said interlocutory decree as to said $9,840. "The form of the judgment is of no consequence so long as it may be ascertained therefrom what rights, if any, of the respective parties in the action have been determined by the court. The test of its sufficiency must rest in its substance rather than in its form. (Hentig v. Johnson, 8 Cal. App. 221 [96 P. 390]; Hoover v. Lester, 16 Cal. App. 151 [116 P. 382]; Black on Judgments, § 115; Freeman on Judgments, § 50.)" Welch v. Reese (Cal. App.) 255 P. 250. See, also, Hentig v. Johnson, 8 Cal. App. 221, 224–225, 96 P. 390.

That appellant is equitably entitled to payment of said interest cannot be doubted. Said sum of $9,840 was declared by said interlocutory decree to be then due, owing, and unpaid, and respondent had no right to its retention and use after the entry of said decree without payment of interest thereon (sec. 3302, Civ. Code; Gray v. Bekins, 186 Cal. 389, 399, 199 P. 767, and cases therein cited).

Order reversed.

We concur: SEAWELL, J.; CURTIS, J.

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205 Cal. 260

HERBERT M. BARUCH CORPORATION v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (L. A. 10917.)

Supreme Court of California. Sept. 27, 1928.

Judges ⚷25(2)—Judge, empowered to act until disposition of all matters before him during term, retained jurisdiction of cause completed by him subsequently.

Plaintiff applied for an alternative writ of mandate to compel the superior court as defendant to set for trial a cause pending in the court, on the asserted ground that the cause was at issue and had not proceeded to a valid judgment, in that the judge before whom the cause was originally tried signed and filed findings of fact and conclusions of law and judgment in favor of defendants on August 27, 1928, after losing jurisdiction of cause by expiration of his assignment on June 30, 1928, he not being reassigned until July 2, 1928, *held* that the judge, by virtue of assignment order empowering him to act until all matters heard or partially heard or submitted to him should have been completed and disposed of by him and also for the purpose of hearing and determining any motion of the case decided by him, retained jurisdiction to finally dispose of case subsequent to term in which trial was had.

In Bank.

Application for writ of mandate by the Herbert M. Baruch Corporation to be directed to the Superior Court of Los Angeles County, B. Rey Schauer, Judge, to compel setting of a cause for trial. Writ denied.

Loewenthal, Lissner, Roth & Gunther, of Los Angeles, and Albert A. Rosenshine, of San Francisco, for petitioner.

PER CURIAM. This is an application for an alternative writ of mandate to compel the respondent superior court to set for trial a cause pending in said court entitled, "Herbert M. Baruch Corporation v. Hartford Accident and Indemnity Co. et al.," on the asserted ground that the cause is at issue and has not proceeded to a valid judgment. The cause had theretofore been set for trial on March 23, 1928, and from March 27 to April 19, 1928, a trial had taken place before Hon. Stephen G. Long, sitting as judge of the superior court under assignment as such by order of the chairman of the Judicial Council. Judge Long is a judge of the municipal court of the city of Long Beach. He was originally assigned to the superior court in and for the county of Los Angeles from January 3 to March 31, 1928. By subsequent order he was assigned to said superior court from April 1 to and including June 30, 1928. He was again assigned to said superior court beginning July 2 to and including September 29, 1928. On May 15, 1928, following the conclusion of the trial of said cause and while he was presiding in one of the departments of said superior court, Judge Long made and entered an order for judgment in favor of the defendants in said cause and directed the defendants to prepare and serve proposed findings and judgment. On August 27, 1928, findings of fact and conclusions of law and judgment in favor of said defendants were signed by Judge Long and filed. It is the contention of the petitioner that the findings and judgment so signed and filed were and are a nullity by reason of the fact that there was an interval of time between, or a so-called "interregnum" in, the service of Judge Long in said superior court because of the expiration of his second assignment on June 30th and the commencement of his next assignment on July 2d, and that therefore all of the powers of said judge to act further in said cause were terminated on June 30th and were not revived by the subsequent assignment of July 2d.

Each order of the chairman of the Judicial Council assigned Judge Long "to sit as judge of the said superior court in and for the county of Los Angeles beginning [specifying the dates], and thereafter to act as such until all matters heard or partially heard or submitted to you therein shall have been completed and disposed of by you, and also for the purpose of hearing and determining any motion after judgment in a case decided by you."

It is not contended by the petitioner that Judge Long did not regularly preside at the trial and order findings and judgment in said cause. Under the foregoing form of the order Judge Long's first and second assignment continued his service for all purposes of the disposition of said cause in the superior court after the expiration of the specific date named in the order of assignment. In signing findings and judgment in said cause in August, 1928, Judge Long was acting under the authority of the orders of assignment from January 3 to June 30, 1928, and the subsequent assignment from July 2 to September 29, 1928, could have no effect upon his power to act under the prior assignments. Any other rule or method of procedure would not only be contrary to the plain import of the orders of assignment themselves, but would result in the greatest confusion in the disposition of causes by judges acting under assignment by the chairman of the Judicial Council.

There is no merit in the petition, and the application for the alternative writ is denied.

94 Cal. App. 21

JANSSEN et al. v. TATE et al. (Civ. 3551.)

District Court of Appeal, Third District, California. Sept. 17, 1928.

1. Mines and minerals ⚷55(8)—Rights of purchasers under executory contract of sale of mining property being forfeited for nonperformance, they are not entitled to reimbursement for expenditures.

All of purchasers' rights under a mining company's executory contract of sale of its mining properties having been forfeited for nonperformance, they are not entitled to reimbursement for expenditures made by them under the contract.

2. Corporations ⚷629—Stockholder of defunct corporation cannot maintain action for partition till its affairs are wound up and debts paid, in absence of showing that trustees have funds therefor.

Stockholder of defunct corporation cannot maintain action for partition till its affairs are wound up and its debts paid, in the absence of showing that the trustees have funds in their hands to pay such debts; there being no attempt in the action to have a settlement of the corporation's affairs.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by I. P. Janssen and others against Ada D. Anthony Tate and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Charles L. Brown, of El Centro, and Hamilton & Lindley, of San Diego, for appellants.

Arthur F. H. Wright and C. G. Selleck, both of San Diego, for respondents.

WEYAND, Justice pro tem. On the 20th day of August, 1924, the complaint herein was filed in the superior court of San Diego county to partition certain mining property in said county and to impress the whole of the said mining property with a lien claimed by I. P. Janssen for sums expended by him for the preservation of said property.

The plaintiffs were I. P. Janssen, individually, and I. P. Janssen as administrator of the estate of Enho Janssen, deceased, and I. P. Janssen as trustee of the Pacific Paint Products Company, a defunct corporation. The complaint avers that the paint company forfeited its charter and ceased to exist as a corporation on March 4, 1922. The only claim of ownership in plaintiff, either individually, or as administrator of the estate of Enho Janssen, or as trustee of the defunct paint company, arises out of ownership of stock in the said defunct company, or because I. P. Janssen was a director of the defunct corporation when it forfeited its charter.

The answer in the suit denies generally the allegations of ownership in the property sought to be partitioned, the expenditures by Janssen, and further pleads an estoppel in the way of a judgment rendered as against the plaintiff I. P. Janssen, and the Pacific Paint Products Company on April 15, 1921, in an action wherein the defendant herein, Ada D. Anthony Tate, and others, quieted title to the same property as against the said I. P. Janssen and the Pacific Paint Products Company. This case is reported in 183 Cal. 329, 191 P. 538.

There is no claim of plaintiffs in the present case that between the 15th day of April, 1921, and the commencement of the present action on the 20th day of August, 1924, the plaintiff individually, or the said Enho Janssen, or his estate, or the said Pacific Paint Products Company, acquired any independent interest in the said property. Judgment in the present case was for defendants, and the plaintiffs appeal.

While in the record there is presented much collateral matter, we are unable to see the relevancy of much that is attempted to be presented to this court. In the present case, the plaintiffs introduced the judgment roll in the case of Anthony et al. v. Janssen, and Pacific Paint Products Co., Intervener. From that judgment roll, in the case of Anthony v. Janssen, it appears from the findings of the court that on November 30, 1908, the Palagonite Mining Company owned the property in controversy. June 2, 1910, the trustees of that corporation entered into an executory contract of sale to one Ralph E. Pearce; August 1, 1910, Margaret Standeford, one of the trustees of the Palagonite Mining Company and a stockholder therein, sold and conveyed her interest as such stockholder to said Pearce; August 15, 1910, Pearce sold and conveyed all of his interest in the property to the Premier Investment Company. That company caused certain work to be done in the development of the mining property, for which it failed to pay. The laborers filed liens, and the property was, under a proceeding to foreclose the liens, sold to one James R. Haddock.

This judgment did not run, however, against the trustees of the Palagonite Mining Company, and they are not bound thereby.

On June 21, 1912, Haddock sold all of his interest in the said property to Janssen, and on January 30, 1914, Janssen conveyed all of his interest therein to Pacific Paint Products Company.

In 1914 all of the purchasers' rights under the Pearce contract were forfeited for nonperformance under his executory contract, but the Pacific Paint Products Company still retained whatever rights were acquired by it from Margaret Standeford as an individual stockholder.

The conclusion logically follows as found by the court in Anthony v. Janssen:

> "That the Pacific Paint Products Company, a corporation, is now the successor in interest of the rights of Margaret Standeford as an individual and a stockholder in the Palagonite Industrial Mining Company, a defunct corporation."

The decree in that case provides:

> "It is further ordered, adjudged, and decreed that the intervener, Pacific Paint Products Company, is the owner of and has succeeded to all the individual rights of Margaret Standeford as a stockholder of the Palagonite Mining Company in and to the assets of said defunct corporation."

[1] At the commencement of the present action the Pacific Paint Products Company was merely a stockholder in the Palagonite Company. Anthony v. Janssen, 183 Cal. 329, 191 P. 538. Plaintiffs were not entitled to reimbursement for expenditures made under the Pearce contract, as all of their rights under that contract were forfeited.

[2] A stockholder of a defunct corporation cannot maintain an action for partition until the affairs of the corporation are wound up and its debts paid, in the absence of a showing that the trustees have funds in their hands to pay such debts. Capuccio v. Caire, 189 Cal. 514, 209 P. 367. There was no attempt to have any settlement of the affairs of the Palagonite Company in the instant case. As before stated, the plaintiffs introduced in evidence the judgment roll in the case of Anthony v. Janssen. This judgment conclusively shows that they have no interest in the property of the Palagonite Company, except as stockholders. The evidence offered by them and rejected and the evidence stricken out having no bearing on their alleged interest, it was immaterial. The plaintiffs' own evidence conclusively shows that the judgment of nonsuit was properly entered.

The judgment in Anthony v. Janssen also fully adjudicates Janssen's claims for moneys expended in the preservation of the property, holding that he had no such claim.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

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94 Cal. App. 25

PEOPLE v. HEMMA. (Cr. 1722.)

District Court of Appeal, Second District, Division 1, California. Sept. 18, 1928.

Infants ⚷20—Man who delivered note to girl, requesting her presence at night at secluded rendezvous, held guilty of contributing to minor's delinquency (Juvenile Court Act, § 1, subd. 11; § 21).

Conviction for contributing to minor's delinquency under Juvenile Court Act (St. 1915, p. 1225) § 1, subd. 11, and section 21, *held* sustained as to defendant 42 years of age, who delivered note to young girl, in no way related to him, and without any apparently good reason, requesting her to meet him at night in remote and secluded place.

Appeal from Superior Court, Riverside County; Walter Guerin, Judge.

Harry Hemma was convicted of contributing to the delinquency of a minor, and he appeals. Affirmed.

J. L. Richardson, of Riverside, and Frank C. Scherrer, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., John D. Richer, of Los Angeles, and Albert Ford, Dist. Atty., of Riverside, for the People.

CONREY, P. J. By information, the defendant was accused of a misdemeanor committed as follows: It was charged that the defendant, on or about the 8th day of May, 1928, in the county of Riverside, committed a certain described act which "tended to cause, encourage, and contribute to one Rosalie Zilly, who was then and there a female person under the age of twenty-one years, to come within and remain a person within the provisions of section one" of the Juvenile Court Law (St. 1915, p. 1225). The particular act charged was that the defendant wrote and delivered a note to said minor, asking her to meet him at some eucalyptus trees that night between the hours of 9:30 and 11 o'clock, and that said defendant did thereby attempt to induce and entice said minor to meet him privately at said eucalyptus trees, which were

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

in a remote and secluded spot. There were further allegations showing the absence of any lawful reason or occasion for such an invitation by defendant to said minor.

At the trial, defendant waived trial by jury, and the case was presented to the court on a stipulation of facts. The note as delivered by defendant read as follows: "Tonight will wait down east Road where the Blue Gum Tree's will be there by 9/30 and will wait until 11." The defendant on the stated day wrote and delivered this note to the girl, Rosalie Zilly, who is of the age of 15 years, and the age of Mr. Hemma is 42 years. She was staying in a shop sewing when defendant came in and dropped this note in her lap. Inasmuch as the girl did not go to the suggested place of rendezvous, we agree with counsel for appellant in his contention that, if any crime was committed by defendant, the offense was completed by the delivery of the note. It is not material, although it appears to be the fact, that the defendant did not succeed in obtaining a favorable response to the suggestion contained in the note. If he has committed a crime, the offense consisted solely in the doing of an act which in its nature was such that it would tend to cause, encourage, and contribute to delinquency on the part of the minor.

The offense charged against the defendant is covered by the provisions of section 21 of the Juvenile Court Act, together with subdivision 11 of section 1 of the act. Said subdivision 11 places within the terms of the act any person under the age of 21 years who is leading or from any cause is in danger of leading an idle, dissolute, lewd, or immoral life. Section 21 reads as follows:

> "Section 21. *Penalties.* Any person who shall commit any act or omit the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of twenty-one years to come within the provisions of any of subdivisions one to thirteen inclusive of section one of this act, or which act or omission contributes thereto, or any person who shall, by any act or omission, or by threats, or commands, or persuasion, induce or endeavor to induce any such person, under the age of twenty-one years, to do or to perform any act or to follow any course of conduct, or to so live as would cause or manifestly tend to cause any such person to become or to remain a person coming within the provisions of any of subdivisions one to thirteen inclusive of section one of this act, shall be guilty of a misdemeanor."

The sole question to be decided is presented by appellant's contention that the delivery of said note by the defendant, a man of mature years, to a young girl in no way related to him, and without any apparent good reason therefor, does not carry with it any necessary implication that by said act he was seeking to persuade her to the commission of an act which would place her in danger of leading an idle, dissolute, lewd, or immoral life. We are of the opinion that this contention should not be sustained, and that, in the absence of any explanation showing an innocent purpose, the natural and reasonable tendency of the defendant's action, according to its manifest intention, was to persuade the young girl to commit an act such as this statute is intended to prevent. Our attention is not called to any decision which in its facts presents this precise question. We think, however, that the principles which should apply are fairly stated in People v. Cohen, 62 Cal. App. 521, 217 P. 78. The court, in sustaining the conviction in that case, said:

> "The purpose of the juvenile law as now framed * * * is to protect the youth of our state from those evil and designing persons who would lead them astray, and we are not disposed to in any way impair its usefulness by giving any narrow or strained construction to any of its plain and obvious provisions."

In this case we wish to make it clear that we do not hold that under all circumstances the mere delivery to a minor of a note in the terms here shown would presumptively be a criminal act. There might be conditions and relationships of such character that the note would carry no suggestion of evil. But in this case the age of the man, and the absence of any normal or reasonable excuse for the defendant's act, leads to the necessary inference that he was seeking to accomplish an illegitimate purpose.

The judgment is affirmed.

We concur: HOUSER, J., YORK, J.

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94 Cal. App. 31

EVERETT v. HAYES et al. (Civ. 3556.) ★

District Court of Appeal, Third District, California. Sept. 18, 1928.

Hearing Denied by Supreme Court Nov. 8, 1928.

1. Quieting title ⟹44(1)—It must be presumed, in purchaser's suit to quiet title after vendor's death, that consideration for transfer was reduced because of attachment lien.

In action by purchaser of property to quiet title after death of vendor against whom attachment suit had been instituted, it must be presumed that purchaser did not give full value for property, but that the consideration was less than its value because of the attachment lien.

2. Attachment ⟹272—Attachment lien continues after death of defendant unless principal action abates or statute prevents enforcement of lien.

In absence of statutory provisions preventing the enforcement of attachment liens, attachment lien should be recognized as continuing after death of defendant in the attachment suit, unless the action abates by reason of his death.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

3. Abatement and revival 🔑53—Death of defendant does not abate action on contract for recovery of money (Code Civ. Proc. § 385).

Action on contract to recover money does not abate on death of defendant under Code Civ. Proc. § 385.

4. Attachment 🔑272—Attachment lien on vendor's land held not extinguished by vendor's death (Code Civ. Proc. §§ 385, 1504, and § 542a as amended by St. 1919, p. 64).

Attachment lien on vendor's land in favor of one purchasing the property while subject to the attachment and before vendor's death *held* not extinguished by vendor's death, under Code Civ. Proc. § 542a, as amended by St. 1919, p. 64, since action did not abate under Code Civ. Proc. § 385, and no statute prevents enforcement of such lien, though section 1504 denies lien under judgments against executors.

5. Attachment 🔑272—Fact that judgment in attachment suit will not become lien because of defendant's death does not prevent enforcement of attachment lien acquired during defendant's lifetime (Code Civ. Proc. §§ 686, 1504, 1505, and § 542a as amended by St. 1919, p. 64).

Fact that judgment recovered in attachment suit will not become a lien on the land on account of defendant's death under Code Civ. Proc. §§ 686, 1504, 1505, does not prevent enforcement of attachment lien arising during defendant's lifetime under § 542a as amended by St. 1919, p. 64.

6. Attachment 🔑224—Attachment lien continuing in force after defendant's death is enforceable by appropriate suit in equity, though no judgment lien can be acquired (Code Civ. Proc. §§ 686, 1504, 1505).

Attachment lien continuing in force after death of defendant can be enforced by appropriate suit in equity, where death of defendant before entry of judgment prevents possibility of judgment lien under Code Civ. Proc. §§ 686, 1504, 1505.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by Frances A. Everett against J. Chauncy Hayes and another. Judgment for plaintiff, and defendants appeal. Reversed.

Gibson, Dunn & Crutcher, of Los Angeles, and Wright & McKee, of San Diego, for appellants.

Dana R. Weller, of Los Angeles, for respondent.

FINCH, P. J. The plaintiff brought this action December 24, 1924, to quiet her title to several parcels of land. The defendants alleged that in an action prosecuted by them against plaintiff's predecessor in interest, prior to the acquisition of title by the plaintiff, they had caused a writ of attachment to be duly levied on said lands and that such action was still pending and undetermined. They prayed "that plaintiff may take nothing by this action; that further proceedings herein may be stayed and continued until such time as the rights of the parties in said cause * * * may be determined and adjudicated;" and for other relief. The court found, in substance, that the defendants commenced an action against Mrs. L. J. H. Hastings September 28, 1923, to recover the sum of $11,000 alleged to be due them on contract; that in that action a writ of attachment was duly levied on part of the land described in the complaint herein which at that time belonged to and stood of record in the name of Mrs. Hastings; that the attachment has not been released or discharged and the action in which it was issued "has not been dismissed or terminated, but still remains pending and undetermined"; that "subsequent to the levy of said writ of attachment the said Mrs. L. J. H. Hastings conveyed to plaintiff all of her right, title, and interest in and to all of said property owned by her and upon which said writ of attachment had theretofore been levied; that subsequent to the date of said transfer, * * * on the 27th day of April, 1924, the said Mrs. L. J. H. Hastings died intestate, and that no proceedings have been taken by any person to administer upon her estate." As conclusions of law the court found that "the lien of the attachment * * * ceased to exist upon the death of the said Mrs. L. J. H. Hastings," and judgment was entered quieting the plaintiff's title against the claims of the defendants. The defendants have appealed from the judgment on the judgment roll alone.

[1-4] It was held in Myers v. Mott, 29 Cal. 359, 89 Am. Dec. 49, three of the justices joining in the decision and two dissenting, that if the defendant die after the levy of an attachment and before judgment in the action, his death destroys the lien of the attachment, and several later decisions are to the same effect. These decisions are not based upon any statute providing that the death of the defendant shall discharge the attachment, but upon the statutory provisions that, when a judgment is recovered against an executor or administrator, "no execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment." Code Civ. Proc. § 1504. In the Myers Case (page 370 of 29 Cal.) it is said:

> "Here no lien can be acquired by means of the judgment, and no execution is permitted, and the purpose of the attachment becoming impossible of accomplishment, by reason of the death of the defendant, it must of necessity, upon the happening of that event, have ceased to be a lien."

In Turner v. Fidelity & Deposit Co., 187 Cal. 76, 84, 200 P. 959, 962, it is said:

> "The right to pursue the debtor's property under attachment ends with his death, the at-

tached property falls into the estate, and the only right left the attaching creditor as against the decedent's estate is to follow it under the modes of disposition provided by the probate law."

In this case the attached property does not belong to the estate, but has passed into the hands of a third person, who has no interest in the estate growing out of the transfer. From the findings of the court it appears that the property was conveyed to the plaintiff by quitclaim deed. It must be presumed that she did not give full value for the property, but that the consideration for the transfer was greatly less than such value because of the attachment lien. If the death of Mrs. Hastings discharged the attachment lien, then, if the estate is solvent, it will be compelled to pay any judgment recovered in the attachment suit, and, if insolvent, the plaintiffs therein will be unable to realize anything on the judgment, while the plaintiff in this action will hold the land freed from the lien with which it was incumbered at the time of the transfer, without any consideration therefor and contrary to natural justice. No reason appears for applying the rule announced in the Myers Case to the facts of this case, but that rule should be limited to cases in which express statutory provisions have the effect of preventing the enforcement of attachment liens. In the absence of such statutory provisions, "there seems to be no reason why the attachment lien should not continue after the death of defendant, unless the principal action abates by reason thereof." 6 C. J. 279; 21 A. L. R. 279; Ann. Cas. 1917A, 156. It is clear that the action against Mrs. Hastings did not abate by her death. Code Civ. Proc. § 385. Section 542a of the Code of Civil Procedure, added in 1909 (Stats. 1909, p. 749), as subsequently amended (Stats. 1919, p. 64), provides:

> "The attachment * * * shall be a lien upon all real property attached for a period of three years after the date of levy unless sooner released or discharged as provided in this chapter, by dismissal of the action or by entry and docketing of judgment in the action."

This action was commenced about 15 months after the levy of the writ of attachment.

[5] The fact that any judgment recovered in the attachment suit will not become a lien on the land will not prevent the enforcement of the attachment lien. Had the plaintiffs in that action recovered judgment during the lifetime of Mrs. Hastings and subsequent to the transfer, the judgment would not have been a lien on the land. Code Civ. Proc. § 674. It would not be contended, however, that, under such circumstances, the attachment lien would have been unenforceable. It has been held in a number of cases that an attachment lien on land may continue in force, under various circumstances, after entry of a judgment which does not constitute a lien on the land. Riley v. Nance, 97 Cal. 203, 204, 31 P. 1126, 32 P. 515; Weinreich v. Hensley, 121 Cal. 647, 661, 54 P. 254; Brun v. Evans, 197 Cal. 439, 442, 241 P. 86.

[6] In the event of recovery of judgment by the plaintiffs in the attachment suit, since the attachment lien will be continued in force, the lien can be enforced by an appropriate suit in equity. In upholding the enforcement in equity of a judgment lien where there was no other adequate remedy, it was said:

> "The enforcement of liens, whether equitable or statutory, is a well-recognized function of courts of equity; and the only distinction in this respect between the different kinds of liens is, that in the case of the latter equity will interpose only where there is no other adequate remedy. * * * In this case the property in question was conveyed to her daughter by Mrs. Wallace in her lifetime, and therefore never formed part of her estate. It could not be reached, therefore, in the probate proceeding; nor could an execution be issued on the respondent's judgment. (Code Civ. Proc. §§ 686, 1505.) The respondent was therefore wholly without remedy otherwise than by resort to a court of equity. Whether there was other property in the estate out of which the claim might be paid does not appear; nor is the question material. The respondent has a specific lien on the property in question, which—so long as the debt is not satisfied—he is entitled to enforce." Hibernia, etc., Soc. v. London, etc., Ins. Co., 138 Cal. 257, 259, 71 P. 334.

The judgment is reversed.

We concur: PLUMMER, J.; HART, J.

94 Cal. App. 28

PEOPLE v. BIGELOW. (Cr. 1633.)

District Court of Appeal, Second District, Division 1, California. Sept. 18, 1928.

1. Poisons 🔑9—Evidence held to sustain conviction for unlawful possession of morphine and heroin (Poison Act).

Evidence *held* sufficient to sustain conviction of defendant for the possession of morphine and heroin in violation of Poison Act (St. 1907, p. 124, as amended).

2. Criminal law 🔑1211—Defendant who previously served 18 months in federal penitentiary for violating Harrison Narcotic Act held properly sentenced as prior offender on his conviction of unlawfully possessing narcotics (Poison Act; Pen. Code, §§ 17, 666–668; 18 USCA § 541; 26 USCA 705).

On his conviction for possession of morphine and heroin in violation of Poison Act (St. 1907, p. 124, as amended), a felony, defendant who had been previously convicted of violating Harrison Narcotic Act, for which he had served

18 months in federal penitentiary at Leavenworth, Kan., and which was a felony under 18 USCA § 541, 26 USCA § 705, was properly sentenced as one previously convicted of a felony, under Pen. Code, §§ 17, 666–668.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Virgil H. Bigelow was convicted, as former offender, of unlawfully possessing morphine and heroin in violation of State Poison Act as amended, and he appeals. Affirmed.

Cooper & Collings, and John S. Cooper, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and V. L. Ferguson, of Los Angeles, for the People.

HOUSER, J. Defendant was convicted on an information which charged him with the offense of violating the State Poison Act (Stats. 1907, p. 124, as variously amended), a felony. At the conclusion of the trial, under the provisions of section 969a of the Penal Code, added by St. 1927, p. 1064, the information against defendant was amended so that in addition to the charge contained in the original information he was charged with a "previous conviction," which latter fact was admitted by defendant. He appeals from the judgment and from an order denying his motion for a new trial.

[1] The gist of the offense alleged to have been committed by defendant was the unlawful possession by him of certain morphine and heroin. From the record it appears that when arrested defendant had a considerable quantity of each of the drugs on his person. Although the defense consisted of an attempt to show that at the time of his arrest defendant was lawfully acting in conjunction with federal officers for the purpose of entrapping and causing the arrest and conviction of certain persons suspected of being unlawful dealers in drugs, on cross-examination defendant admitted that the morphine and heroin in his possession were purchased by him and intended to be used by him personally. It is therefore clear that appellant's contention that the evidence did not support the verdict cannot be sustained.

[2] Appellant also urges the point that the trial court erred in imposing sentence upon defendant as for one who theretofore had been convicted of a felony.

By sections 666, 667, and 668 of the Penal Code, in substance it is provided that one who has been convicted of a former offense which, if committed within this state, would be punishable by imprisonment in the state prison, is punishable for any subsequent crime committed by him within this state by a punishment more severe than though theretofore he had not suffered such prior conviction. As hereinbefore stated, defendant admitted his former conviction of a felony, to wit, under the so-called Harrison Narcotic Act, for which he served a term of 18 months' imprisonment in the Leavenworth Penitentiary, at Leavenworth, state of Kansas. The penalty for violation of the federal statute (section 5460, Barnes' Fed. Code, 1919; 26 USCA § 705) is "not more than five years" imprisonment; and by section 10038 of the same Code, 18 USCA § 541, it is provided in effect that all offenses which may be punishable by imprisonment for a term exceeding one year shall be deemed felonies. It would follow that so far as the federal statutes are concerned, defendant was convicted of a felony. While the so-called State Poison Act (Stats. 1907, p. 124, as variously amended) is not the exact counterpart of the Harrison Narcotic Act, in its substance, in part, it denounces the same general conduct, and provides various penalties for the infraction thereof, ranging from fines, or imprisonment in the county jail, to imprisonment in the state prison. By section 17 of the Penal Code felonies and misdemeanors are defined as follows:

> "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison."

As is said in People v. Smith, 143 Cal. 597, 599, 77 P. 449, 450:

> "The question as to whether or not a crime is a felony depends upon the punishment. If the punishment is imprisonment in the state prison the crime is a felony."

See, also, People v. Sacramento Butchers' Ass'n, 12 Cal. App. 471, 489, 107 P. 712.

In the case of Doble v. Superior Court, 197 Cal. 556, 576, 241 P. 852, 860, it is held that a fair construction of section 17 of the Penal Code is:

> "That in prosecutions within the contemplation of that section, the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious in that event it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter."

It appearing that the former conviction of defendant was of an offense punishable by imprisonment in the state prison of this state, and that in fact for the commission of the offense of which defendant was convicted he was sentenced to, and served a term of, imprisonment in a federal penitentiary for a term of 18 months, it follows that no error was committed by the trial court in pronouncing judgment upon the defendant as for one who theretofore had been convicted of a felony.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

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94 Cal. App. 53

PEOPLE v. GIRON. (Cr. 1699.)★

District Court of Appeal, Second District, Division 1, California. Sept. 19, 1928.

Rehearing Denied Oct. 15, 1928. Hearing Denied by Supreme Court Nov. 8, 1928.

Burglary ⟹18—Information charging burglary by entering premises to commit larceny held not defective because of use of word "larceny" instead of "theft" (Pen. Code, § 484, as amended by and section 490a as added by St. 1927, p. 1046).

Information charging burglary by unlawfully entering described premises with intent to commit larceny therein *held* not defective because of use of word "larceny" instead of "theft," under Pen. Code, § 484, as amended by St. 1927, p. 1046, providing that a person guilty of any one of several offenses specified, including larceny, is guilty of theft and section 490a as added by St. 1927, p. 1046, providing that wherever any statute refers to larceny, embezzlement or stealing it shall be interpreted as if the word "theft" were substituted therefor.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Charles Giron was convicted of burglary by willfully and unlawfully entering certain described premises with the intent to commit larceny therein, and he appeals. Affirmed.

R. O. Stotter, of Long Beach, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

CONREY, J. In each case the information charged that the defendant committed the crime of burglary by willfully, unlawfully, etc., entering certain described premises "with the intent then and there and therein to commit the crime of larceny." The cases were consolidated for trial. The jury found defendant guilty in each case, and judgments were entered accordingly. He appeals from the judgments.

The sole ground of appeal is that the informations do not charge any public offenses, for the reason that under the amendments of the Penal Code, adopted in 1927, there is no longer a crime in this state by the name of larceny. Section 459 of the Penal Code, which defines burglary, provides that every person who enters any house, room, etc., "with intent to commit grand or petit larceny, or any felony is guilty of burglary." It will be noted that the informations were drawn in accordance with this language of the statute.

Prior to the amendments to the Penal Code, made in the year 1927, larceny was the name given by the Code (section 484) to the felonious stealing of personal property. The definition there given was, in substance, the common-law definition of that crime. For the purpose of consolidating larceny and certain other crimes under a common name, section 484 was so amended (St. 1927, p. 1046) that a person guilty of any one of those several offenses is declared to be guilty of theft. The acts which theretofore constituted the crime of larceny are now included in the definition of theft. At the same time there was added to the Penal Code a new section, 490a. "*'Theft' to be substituted for larceny, embezzlement or stealing.* Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." It is contended by appellant that under these amendments the crime defined by section 484 must now be read as the crime of "theft," and that therefore when the informations charged that the defendant unlawfully entered the described premises with intent to commit larceny, they merely charged the unlawful entry by defendant upon premises of another—in other words, a mere trespass, but not any crime punishable under laws of this state.

We think there is no merit in this contention. So far as the new definition of larceny is concerned, the change of name is one of form and not of substance. The amendments did not wipe out the common-law definition of larceny, nor did they destroy the universal meaning of the word wherever English is spoken, that larceny is a form of theft. To think otherwise would be to defy common sense.

The judgments are affirmed.

We concur: HOUSER, J.; YORK, J.

★Rehearing denied. Hearing denied by Supreme Court.

94 Cal. App. 798

PEOPLE of the State of California, Plaintiff and Respondent, v. Harry WARNER, Defendant and Appellant. (Cr. 1693.)

District Court of Appeal, Second District, Division 1, California. Sept. 19, 1928.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Roscoe O. Stotter, of Long Beach, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

PER CURIAM. This is an appeal from a judgment of conviction on a charge of burglary. The sole ground of appeal relied upon by appellant is identical with the contention of appellant in People v. Giron, Crim. No. 1699 (Cal. App.) 270 P. 462, opinion this day filed. On the authority of that decision, and for the reasons therein appearing, the judgment in this case is affirmed.

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94 Cal. App. 35

SMITH v. SMITH. (Civ. 3469.) ★

District Court of Appeal, Third District, California. Sept. 18, 1928.

Rehearing Denied Oct. 18, 1928. Hearing Denied by Supreme Court Nov. 10, 1928.

1. Divorce 🔑236—Wife's agreement, releasing claim for support in consideration of husband's dismissal of appeal from wife's judgment against him, held not to prevent awarding alimony in divorce suit (Civ. Code, §§ 139, 146, 147, 158–160).

Allowance of alimony in divorce suit *held* within court's jurisdiction, under Civ. Code, §§ 139, 146, 147, notwithstanding existence of agreement between spouses whereby wife released all claim to alimony or support from husband's property in return for his dismissal of appeal from judgment against him and in favor of his wife, since agreement was not a property settlement, as contemplated by Civ. Code, §§ 158–160, and court could therefore disregard it.

2. Divorce 🔑236—No consideration for wife's release of alimony was shown by husband's agreement to dismiss appeal from wife's judgment and not to seek repayment of moneys paid thereunder.

Husband's agreement not to seek repayment of moneys paid wife under judgment, and to dismiss appeal from judgment in return for wife's release of claims for her support and for custody of children, showed want of consideration on its face, since presumption necessarily attached that judgment referred to was properly entered.

3. Judgment 🔑951(1)—Judgment referred to in agreement for dismissal of appeal is presumed to have been properly entered.

Judgment referred to in husband's agreement to dismiss appeal, in return for wife's release of claim for support, is presumed to have been properly entered.

4. Divorce 🔑200—Court is not limited to community property in providing for wife's support in divorce suit (Civ. Code, § 139).

Power of court in making provision for support of wife in suit for divorce, under Civ. Code, § 139, is not limited to community property rights.

5. Divorce 🔑245(1)—Expiration of time for appeal from interlocutory judgment of divorce held not to preclude its alteration as to alimony (Civ. Code, § 139).

Fact that time for appeal from interlocutory judgment in divorce suit has expired *held* not to preclude change in decree regarding alimony, under Civ. Code, § 139.

6. Divorce 🔑245(1)—Husband and wife, executing agreement for wife's support prior to divorce, are presumed to have contracted with reference to power of trial court to modify agreement (Civ. Code, §§ 139, 158, 159, 160).

Husband and wife, in making agreement for wife's support, under Civ. Code, §§ 158–160, will be presumed to have contracted with the understanding that trial court, in suit for divorce, possesses power to change or modify award or provision as circumstances may require, under section 139.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Suit for divorce by Elaine T. Smith against Sidney V. Smith, Jr. From a final decree of divorce, in so far as it awarded alimony and counsel fees, and from an order modifying the award of alimony, defendant appeals. Affirmed in part.

See, also, 267 P. 709.

Alden Ames, of San Francisco, and Henry & Bedeau, of Sacramento, for appellant.

Charles A. Wetmore, Jr., of San Francisco, for respondent.

PLUMMER, J. On the 25th day of June, 1926, an interlocutory decree of divorce was entered in the above-entitled action, which decree is in the words and figures following, to wit:

"This cause came on regularly for trial before the court on the 24th day of June, 1926, upon the complaint of plaintiff and the answer thereto of defendant. W. H. Carlin appeared as counsel for plaintiff, and Alden Ames appeared as counsel for defendant. A trial by jury having been expressly waived by the respective parties, the cause was tried before the court without a jury; whereupon witnesses were duly sworn and examined, and they testified in said cause, and documentary evidence was introduced therein, and the stipulation of the parties concerning property rights and custody of the children was received in evidence, and the testimony was closed, and thereupon findings of fact and conclusions of law were duly waived by the respective parties by their written consent, duly made, signed, and filed with the clerk of this court; and the court having duly considered the evidence and being fully advised in the premises, and it appearing to the satisfaction

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★Rehearing denied. Hearing denied by Supreme Court.

of the court that all and singular the allegations and averments in plaintiff's complaint contained are true:

"Whereupon it is hereby adjudged, determined, and declared, that plaintiff, Elaine T. Smith, is entitled to a divorce from the defendant, Sidney V. Smith, Jr. It is further ordered, adjudged, and decreed that there is no community property whatsoever existing between plaintiff and defendant, and that plaintiff be awarded no property whatsoever; that the care, custody, and control of the two elder children of plaintiff and defendant, referred to in the complaint in this action, namely, Sidney V. Smith, Jr., and Cora B. Smith, be and hereby is awarded to their uncle, Felix T. Smith, with the right and privilege on the part of both plaintiff and defendant to visit and see said children at all proper times and proper occasions; that the custody, care, and control of the youngest child of said marriage, namely, Elaine Smith, be and the same hereby is awarded to Anna Trenberth, mother of plaintiff, and Felix T. Smith, jointly; the manual care of said child to remain with said Anna Trenberth during her lifetime and while able to attend to the same, with the right and privilege on the part of both plaintiff and defendant to visit and see said child at all proper times and on proper occasions.

"It is further ordered, adjudged, and decreed that, commencing with the 1st day of July, 1926, and on the 1st day of each and every month thereafter, continuing for a period of one year, or 12 months, defendant Sidney V. Smith, Jr., shall pay to plaintiff as alimony the sum of one hundred dollars ($100).

"It is further ordered, adjudged, and decreed that each of the parties to this action shall defray and pay his and her own costs and counsel fees.

"Done in open court this 25th day of June, 1926. Eugene P. McDaniel, Judge."

On the 20th day of June, 1927, pursuant to a notice thereof given on or about the 6th day of June, 1927, the plaintiff moved the court to amend the order or decree for alimony, and to provide that, until the further order of the court, the defendant should pay to the plaintiff the sum of $250 per month as alimony for her maintenance and support, and also for a like sum for counsel fees. A hearing was had upon this motion, which was supported by affidavits and oral testimony, taken under advisement by the court, and thereafter an order was made, changing the order or decree of the court as to the alimony to be awarded to the plaintiff, and ordering that until further change the defendant should pay to the plaintiff the sum of $175 per month, and also further specifying that the plaintiff "be allowed the further sum of $200 as and for attorney's fees in this proceeding, and her costs incurred herein." The motion for the change in the allowance of alimony was made, and, as appears from the recital contained in the order of the trial court awarding further alimony, was by reason of the physical incapacity of the plaintiff to support herself, and the further reason that she was without means and entirely dependent upon such alimony as should be allowed by the court.

The proceedings had before the trial court upon the motion for an order continuing the allowance of alimony and specifying the amount to be paid monthly show that the minor children, the issue of the marriage between the plaintiff and the defendant, had been amply provided for by the last wills and testaments of a grandfather and grandmother, being the deceased father and mother of the defendant Sidney V. Smith, Jr. The record also shows that the defendant was in possession of certain farming lands in the county of Yuba, of the value of some $40,000, and that he was also the beneficiary of a trust fund aggregating a trifle over $108,000 in value, and the amount of the income therefrom amply enabled the defendant to comply with the orders of the court. The record before us contains practically no contention to the contrary. Following the entry of the order which we have just referred to, the court, on the 24th day of October, 1927, entered a final decree of divorce, following the interlocutory decree as modified, and as to the alimony the decree reads as follows:

"It is further ordered, adjudged, and decreed that the defendant above named, Sidney V. Smith, Jr., do pay to the plaintiff above named, Elaine T. Smith, the sum of $175 per month as permanent alimony, payable monthly commencing on the date, July 1, 1927, and to continue monthly thereafter until the further order of this court."

The final decree also directed that the defendant should pay to the plaintiff the sum of $200 as and for her counsel fees. Following the entry of the final decree, the defendant appealed from the order modifying the award of alimony, and also from the final decree in so far as it awarded alimony and counsel fees. Prior to the entry of the interlocutory decree in said cause a stipulation was entered into between the plaintiff and defendant, which reads as follows:

"In the event that, upon such competent testimony as may be adduced upon the trial of the above-entitled action, an interlocutory decree of divorce should be entered in favor of plaintiff and against defendant, and concerning which this stipulation shall be silent, it is hereby agreed by and between the parties hereto as follows:

"I. The care, custody, and control of the two elder children named in the complaint herein, namely, Sidney V. Smith, Jr., and Cora B. Smith, shall be awarded to their uncle, Felix T. Smith, with the right and privilege on the part of plaintiff to visit and see said children at all proper times and on all proper occasions.

"II. The care, custody, and control of the youngest child, Elaine Smith, shall be awarded to Anna Trenberth and said Felix T. Smith, with the right and privilege on the part of both plaintiff and defendant to visit and see said child at all proper times and on all proper occasions.

"III. Defendant shall be responsible and pay for the support, maintenance, and education of said three children.

"IV. For a period of one year from and after the 1st day of July, 1926, defendant shall monthly, commencing with the 1st day of July, 1926, and on the 1st day of each and every month thereafter for a period of one year, pay to plaintiff the sum of one hundred dollars ($100.00).

"Dated this 24th day of June, 1926.

"Elaine T. Smith, Plaintiff.
"Sidney V. Smith, Jr.
"W. H. Carlin, Attorney for Plaintiff.
"Wallace & Ames, Attorneys for Defendant."

This stipulation was presented to the court, and, as appears from the recital contained in the interlocutory decree, was considered by the court prior to the entry of the decree. At about the same time another instrument in writing was signed by the respective parties reading as follows:

"This agreement, made and entered into this 24th day of June, 1926, by and between Elaine T. Smith, hereinafter called the wife, and S. V. Smith, Jr., hereinafter called the husband, witnesseth:

"That in consideration of the dismissal of the appeal heretofore taken by the husband on the judgment obtained by the wife against him in the superior court of the state of California, in and for the county of Yuba, and his agreeing not to seek repayment of any moneys heretofore paid by him to the wife under his [her] judgment, the wife hereby releases and discharges the husband from all claims and demands of every kind and nature, whether for moneys owing or to any community property or alleged community property in his possession or control, or for alimony or maintenance or support heretofore accrued or hereafter to accrue, and for said consideration the wife further agrees that the husband may have undisturbed the custody and control of the children of the parties.

"In witness whereof, the parties hereto signed their names the day and year first hereinabove written.

Elaine T. Smith.
"Sidney V. Smith.

"Witness: Alden Ames."

This agreement was not introduced in evidence at the trial of the divorce action, and was not considered by the court in the entry of the interlocutory decree. However, upon the motion interposed by the plaintiff to modify or change the terms of the interlocutory decree relative to the allowance of alimony, this instrument was introduced in evidence, and in the language of the trial court was to be considered "for whatever it was worth." Upon this appeal it is contended that the trial court was without jurisdiction to make any allowance of alimony by reason of the stipulation and the agreement which we have set forth.

It is first contended that, as the time for appealing from the interlocutory decree had expired, the trial court was without jurisdiction to change its terms. The contention, however, is not pressed with much seriousness; the stress of appellant's argument being based upon the stipulation introduced in evidence prior to the entry of the interlocutory decree, and the agreement introduced in testimony upon the hearing of the motion for a change in the order as to the allowance of alimony. Whether the stipulation and the agreement should be considered as one instrument, or as parts of one instrument, under the provisions of section 1624 of the Civil Code, does not appear to us to be material. The stipulation was only introduced in testimony and presented for consideration by the trial court prior to the entry of the interlocutory decree. As we read the stipulation, there is nothing therein which in any way tends to limit any payment on the part of the defendant to the plaintiff, or to limit the power of the court to make such further order as it might deem consistent with the necessities of one party and the ability of the other. The stipulation and order of the court did not provide for the payment of a lump sum, but merely that the particular amount specified was to be paid every month for the period of one year, leaving to the court its jurisdiction to make such further order under section 139 of the Civil Code as the circumstances of the parties might justify.

[1-3] It is contended, however, that the instrument, called the "agreement," introduced in evidence upon the hearing for the continuance or modification of the further payment of alimony, absolutely barred the plaintiff in this action from any further rights, and also inhibited the court from making any provision for her support and maintenance, irrespective of any changed circumstances or conditions affecting the necessity therefor. When carefully considered, this instrument is found to be not a property settlement, as contemplated by sections 158, 159, and 160 of the Civil Code. The instrument does not purport to be anything further or other than a release of the defendant by and on the part of the plaintiff of any claims as to any alleged community property, or for alimony or maintenance accrued or to accrue, and an agreement that the husband might have, undisturbed, the custody and control of the children; the purported consideration being the dismissal by Sidney V. Smith, the defendant in this action, of an appeal theretofore taken by him from a judgment obtained by the plaintiff against him in a previous action, and his agreeing not to seek repayment of any moneys theretofore paid by him to the plaintiff under and by virtue of the judgment in said action. This agreement was not considered by the trial court, as we have said, prior to the entry of the interlocutory decree, and it appears from the record to have been disregarded by the trial court in the entry of the order and decree from which the defendant has appealed.

Not being a property settlement, not having made any settlement upon the wife whatever of any property or making any provisions for her support and maintenance, it is evident to us that the trial court, if it had jurisdiction so to do, very properly disregarded the terms of the so-called agreement. There being nothing to the contrary in the record, the presumption necessarily attaches that the judgment referred to in the agreement was properly entered; that there was no money to the payment of which Sidney V. Smith, Jr., was entitled. This being true, the instrument upon its face shows a want of consideration. All that can be said in favor of the instrument is that it probably evidences a desire on the part of the plaintiff to get free from the bonds which had bound her to a man at whose hands the court found that she had suffered extreme cruelty sufficient to entitle her to a divorce. The stipulation which we have set forth and considered by the court in the entry of its interlocutory decree evidences a departure from the terms of the so-called agreement by both parties to the action, and also by the court.

[4] With these premises laid down, we will consider the cases relied upon by counsel, and also those which we deem decisive of this case. Appellant sets forth that all questions possible to be raised in this case are fully considered and decided in his favor in the case of Brown v. Brown (Cal. App.) 244, 256 P. 595. It requires, however, only a cursory review of the Brown Case to show that appellant's contention is untenable. The Brown Case did not involve the power of the trial court to modify or change a previous order under and in accordance with the terms of section 139 of the Civil Code. In the Brown Case the issue involved was as to whether the agreement that had been entered into between the parties pursuant to sections 158 and 159 of the Civil Code, and incorporated into the interlocutory decree of divorce, was valid or void. The question decided was whether the respective parties had the legal right to enter into such an agreement, and did not in any way involve the jurisdiction of the trial court to either adopt or disregard the property settlement that had been arranged between the parties. The trial court, however, did adopt the settlement made by the parties and set it forth as a part of the interlocutory decree.

The point urged against the agreement was that it was void, as against public policy, and in not having been entered into until after the actual separation of the parties. Nothing of that nature is involved in the controversy now before us. The holding of this court in the case of Brown v. Brown, supra, that an agreement entered into between husband and wife, making provision for the support of the wife and incorporated into the interlocutory decree of divorce, is not controlling in this case, where the agreement makes no provision for the support of the wife, settles no property upon her, and, not having been made a part of the interlocutory decree of divorce, is not an authority to the effect that the power of the court to change or modify alimony allowances under the terms of section 139, Civil Code, is in any wise limited or abridged. The circumstances involved in the Brown Case and in the case at bar are entirely dissimilar. The sections of the Civil Code considered and applied in the Brown Case are not applicable here.

In the case of McCahan v. McCahan, 47 Cal. App. 176, 190 P. 460, the court, in an opinion written by Mr. Justice Waste, had occasion to consider the power of the trial court to approve or disregard agreements between husband and wife relative to the settlement of property rights and the making of provision for the support of the contracting parties. It is there said:

> "The trial court, having jurisdiction of the divorce action, had unlimited authority to make disposition of the community property of the parties. Civ. Code, §§ 146, 147. Whenever, therefore, it was made to appear that a division of the property had been made in accordance with the terms of the separation agreement, the court necessarily had jurisdiction to consider the instrument, and to affirm it, or to disregard it, if it was found to be void. 'Such pretended agreements, if they are to have any force, must be subjected to the examination of the divorce court, and derive their sanction from a decree made by the court with a knowledge of the facts.' Loveren v. Loveren, 106 Cal. 509, 513, 39 P. 801. The court, in the instant case, in its decree made no division of the property of the parties, or provision for the support of the defendant, but did recognize and expressly reserve to her the power to assert such rights and benefits as might accrue to her under the previously executed articles of separation. This action on its part we construe to be a ratification of the agreement to that extent."

The agreement under consideration made provision for the support of the wife, and, as shown by the quotation, was adopted and approved by the trial court to that extent. True, the agreement had to do with the division of community property. But the power of the court, under section 139, Civil Code, is not limited to community property rights in making provision for the support of the wife. Again, in the McCahan Case the decree of divorce did not undertake to make any other or separate provision for the support of the wife, other than followed as a necessary imputation from a ratification of the agreement entered into between the parties. Instead of being an authority to support the appellant's contention in the case at bar, it is an authority in support of the action of the trial court. The striking force of the opinion in the McCahan Case is found in these words:

> *"Such pretended agreements, if they are to have any force, must be subjected to the examination of the divorce court, and derive their sanction from a decree made by the court with a knowledge of the facts."* (Italics ours.)

When a knowledge of all of the facts was brought home to the trial court in the case at bar, the agreement was disregarded, and modification of the previously entered decree made as demanded by the necessities of the plaintiff and the ability of the defendant to pay, as shown by the testimony set forth in the record.

In Soule v. Soule, 4 Cal. App. 97, 87 P. 205, the power of the court to modify or change an allowance of alimony previously made was very fully considered, and it was there held that whether the court, in the decree of divorce, used the word "permanent" or "temporary" alimony was wholly immaterial; that under section 139, Civil Code, the court had power to measure and fix the amount of compensation to be allowed for the support of the wife and to change the same from time to time as the necessities of the case and the circumstances of the parties required. The court further, in its opinion, stated that the burden was upon the plaintiff to show that the agreement involved was to be for life, and that such agreement was made known to the court before the decree was signed. This latter circumstance removes the case from the list of authorities relied upon in support of the defendant's appeal. The agreement was not made known to the court in either case, and there is nothing in the record in the case at bar which shows that the trial court, in making its allowance in the first instance, had anything before it to indicate that the parties intended to limit the power of the trial court to make further provision for the support of the wife, and when the agreement was subsequently brought to the attention of the court, and subjected to its inspection in the light of the facts as to the defendant's ability to pay and the plaintiff's necessities, was disregarded.

[5] The fact that the time for appealing from the interlocutory judgment had expired is of no moment. This court, in the case of Gates v. Gates, 54 Cal. App. 407, 202 P. 151, in an opinion written by Mr. Justice Burnett, hearing herein denied by the Supreme Court, held:

> "That the interlocutory judgment had become final before the modification was made does not render said section 139 [Civil Code] inapplicable."

In that case the modification was not made until after the time for appealing from the interlocutory decree had expired. The authorities cited in that case are all applicable here. In the recent case of Smith v. Superior Court, 264 P. 573, this court, in an opinion written by Mr. Justice Hart, had occasion to affirm the ruling in the Gates Case.

In the case of Mathews v. Mathews, 55 Cal. App. 661, 204 P. 27, it was held that the court had power under section 139, Civil Code, to modify an allowance of alimony and to make an award different than that agreed to by the parties. The circumstances there did not show that the stipulation was before the court or was ratified by it. It was further held that the award under section 139, Civil Code, is to be made with regard to the circumstances of the parties, respectively, and when the circumstances change, the court may in its discretion modify the award. In Hughes v. Hughes, 68 Cal. App. 195, 228 P. 675, it was held that:

> "The superior court, in an action for divorce, has jurisdiction to make, on the application of the husband, an order modifying an interlocutory decree by reducing the amount of maintenance awarded thereby, notwithstanding the fact that the parties have previously made an agreement settling their property rights wherein the husband agreed to pay to the wife a stipulated monthly sum," etc.

If this is true, where provision has been made by the agreement for the support of the wife by the husband, with stronger reasoning must the rule apply that the court has power to act under section 139, Civil Code, where no provision has been made and the circumstances equitably require such action. In the Hughes Case, as in the case at bar, it was not shown whether the court, in framing its decree, adopted, rejected or ignored the agreement, etc. In Lynch v. Lynch, 69 Cal. App. 66, 230 P. 462, the jurisdiction of the trial court to modify its orders awarding alimony is considered, the authorities collected and the rule heretofore announced exemplified and followed. In Bacigalupi v. Bacigalupi, 72 Cal. App. 654, 238 P. 93, a case was presented where the interlocutory decree had become final and did not purport in any way to award alimony. The power of the court to thereafter make provision for the wife was denied. No alimony having been allowed and no award having been made, there was nothing to modify or to change. This difference in circumstances readily distinguishes the Bacigalupi Case from the case at bar.

In Moog v. Moog, 264 P. 490, the Supreme Court having before it the question of the power of the trial court in divorce actions to make provision for the wife in the face of contracts of settlement between the parties, holds as follows:

> "With reference to ordinary contracts, the position of appellant is sound, undoubtedly; but in actions for divorce there is a very large discretion vested in the trial court in the allowance of permanent support for the wife, where she is granted a divorce, even in the face of contracts of settlement between the parties. Such contracts must be subjected to the examination of a court in the divorce action and derive their sanction from a decree made by the court with knowledge of all the facts. Loveren v. Loveren, 106 Cal. 509, 39 P. 801; McCahan v. McCahan, 47 Cal. App. 176, 190 P. 460; Roberts v. Roberts (Cal. App.) 256 P. 826. The rule stated in Corpus Juris, vol. 19, p. 218, is to the effect that where provision has been made by the husband for the wife, by separation agreement,

the wife is not entitled to temporary alimony, unless she offers to return what she has received or shows that the amount provided for in the agreement is not sufficient for her needs. The latter condition existed in the instant case. While the court found that the agreement was entered into without fraud or undue influence, it, nevertheless, found that the plaintiff had become totally blind since it was entered into and had become afflicted with tuberculosis and was in need of the services of a nurse, and that she was without means. It was this unfortunate condition, doubtless, which influenced the court in making the award of alimony in addition to what had already been received by plaintiff. Under the circumstances, we see no reason to interfere with the exercise of discretion vested in the trial court."

[6] That the general current of authority is in line with the holding of the cases which we have cited as to the power of the trial court to disregard agreements between the parties relative to provisions for support, appears from the case of Jennison v. Jennison, 136 Ga. 202, 71 S. E. 244, Ann. Cas. 1912C, 441, and the notes thereto. The holding of the cases there cited is to the effect that the order allowing alimony is subject to revision at any time. The parties, in making the agreement, will be presumed to have entered into the same with the understanding that the trial court possessed the power to change or modify the award or provision made for support, as the circumstances might require or as the justice of the case might necessitate, the distinction being drawn that in some states, there being no statute similar to our code, the power to change or modify must be reserved in the decree.

All of the cases cited by appellant are reviewed in some one of the cases which we have considered, and therefore are not particularly mentioned herein.

On the part of the respondent it is urged that practically every question presented for decision in the record now before this court was considered and disposed of in an eleborate opinion prepared by Mr. Justice Hart, of this court, in the case of Smith v. Superior Court, reported in 264 P. 573. With this contention we agree. On the part of the appellant it is contended that the issues presented upon this appeal are not all involved in the proceeding just referred to, that the proceeding there was by certiorari, here by appeal, and that the agreement which we have considered was not before the court in the record presented upon application for a writ of certiorari. Be this as it may, the opinion of this court upon certiorari fully considered the jurisdiction of the trial court, the effect of the agreement, and the power of the court to ratify or disregard the same. The agreement is now before the court, and everything which was said by this court upon the certiorari proceedings relative to the agreement and the issues involved herein are pertinent and decisive, and are hereby affirmed as being a correct statement of the law.

Respondent admits that the order allowing attorney's fees should not have been made. For this reason the power of the court in relation thereto is not considered, and the amount allowed by the trial court as attorney's fees is ordered stricken from the judgment. In all other respects the judgment is affirmed. The respondent is awarded costs on appeal.

We concur: FINCH, P. J.; HART, J.

94 Cal. App. 55

PEOPLE v. KNOCKE. (Cr. 1705; 3194.)★

District Court of Appeal, Second District, Division 2, California. Sept. 19, 1928.

Hearing Denied by Supreme Court Nov. 15, 1928.

1. Criminal law 🔑655(5)—In theft prosecution, judge's remark to defendant's attorney, that he was surprised any one passing bar examination should raise question raised, held not prejudicial misconduct.

In prosecution for grand theft, where witness was asked value of stock he turned over to defendant and another and defendant's attorney objected on ground that witness could not testify as to value, court's remark to defendant's attorney, that he was surprised that any one passing bar examination should raise question whether owner could testify regarding value of anything he possesses, *held* not prejudicial misconduct.

2. Criminal law 🔑1129(1)—In theft prosecution where court remarked to defendant's attorney cross-examining witness that he was going to insist on attorney's being fair with witness, misconduct may not be predicated on occurrence in absence of assignment.

In prosecution for grand theft where there had been considerable cross-examination concerning memorandum used by witness to refresh her recollection, and where defendant's attorney told witness she was changing her testimony, and court stated to attorney that he was going to insist on his being fair with witness and that witness had not changed her testimony, misconduct may not be predicated upon occurrence in absence of assignment.

3. Criminal law 🔑655(5)—Where district attorney objected to question as immaterial and defendant's counsel stated, "Why, I should say not," court's remarks regarding defendant's attorney's behaving himself in court held not prejudicial misconduct.

In prosecution for grand theft, where, during cross-examination of witness, deputy district attorney objected to question as immaterial and defendant's counsel stated, "Why, I should say not," court's statement to defendant's attorney: "Now wait. If you cannot behave yourself in this court, you better go and practice in the police court. Make your motion in a

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★Hearing denied by Supreme Court.

quiet manner," whereupon defendant's attorney apologized, *held* not prejudicial misconduct.

4. Criminal law 🔑655(1)—Court's admonition to accused during discussion between judge and counsel to keep quiet, or accused would be in jail for contempt of court, held not prejudicial misconduct.

In prosecution for grand theft, court's admonition to accused during discussion between judge and counsel: "Now please keep quiet. This is about the third or fourth time you have attempted to talk to me from the witness stand, and I don't like it. You are here to answer questions. If there is any more of that kind of talk, you will be in jail over Saturday and Sunday for contempt of court," *held* not prejudicial misconduct.

5. Criminal law 🔑1169(5)—Where court struck out conversations objected to as hearsay testimony, accused cannot complain regarding admission.

In prosecution for grand theft where witness testified regarding conversations which were objected to as hearsay testimony and court struck out all conversations, accused cannot complain.

6. Witnesses 🔑246(1)—Court may occasionally ask question to elucidate or make clear point which might otherwise remain in doubt.

It is not improper for trial judge occasionally to ask question for purpose of elucidating or making clear any point which might otherwise remain in doubt.

7. Criminal law 🔑696(3)—Court properly struck out testimony of character witness who had never discussed accused's reputation with any one in place where he knew him.

In prosecution for grand theft, court properly struck out testimony of character witness who testified he had known accused in Los Angeles for eight months and that he first knew him in Davenport, where witness testified he had never discussed accused's reputation with any one in Los Angeles.

8. False pretenses 🔑49(1)—In prosecution for grand theft, all circumstances connected with transaction, conduct of defendant, and declarations of others may be looked to to furnish corroborative evidence (Pen. Code, § 1110).

In prosecution for grand theft, all circumstances connected with transaction, conduct of defendant, and his declarations to other persons may be looked to to furnish necessary corroborative evidence under Pen. Code, § 1110.

9. False pretenses 🔑49(1)—Evidence held sufficient to support conviction for grand theft.

In prosecution for grand theft, evidence *held* sufficient to support conviction.

10. Criminal law 🔑829(1)—Error cannot be predicated upon refusal of instruction covered by instructions given.

Error may not be predicated upon refusal of court to give instruction covered by instructions given.

11. Criminal law 🔑829(18)—Refusing instructions on rule of reasonable doubt held not error, where court delivered instruction in words of statute on subject (Pen. Code, § 1096, and section 1096a, added by St. 1927, p. 1039).

In prosecution for grand theft, refusal of instructions dealing with rule of reasonable doubt *held* not error, where court delivered instruction in words of Pen. Code, § 1096, relating to reasonable doubt, in view of § 1096a, added by St. 1927, p. 1039, providing that when this is done no further instruction upon presumption of innocence or defining reasonable doubt need be given.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Arthur E. Knocke was convicted of grand theft, and he appeals. Affirmed.

J. W. Kearby, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

THOMPSON, J. The defendant by information was charged with five different offenses of grand theft, on all of which counts the jury returned a verdict of guilty. He appeals from the judgments pronounced thereupon and also from an order denying his motion for a new trial.

In support of the appeal, counsel assigns four grounds as follows: (1) Misconduct of the trial judge consisting of asserted prejudicial and improper remarks during the course of the trial; (2) errors in the admission and exclusion of evidence; (3) insufficient evidence to support the conviction, including the argument that there is no corroborative evidence required by section 1110 of the Penal Code; and (4) error in refusing to give certain requested instructions.

We shall follow the foregoing order in our consideration of the problems presented, and turn first to what is claimed to constitute misconduct on the part of the trial court. The Attorney General points out that not one of the ten different remarks made by the trial judge was assigned as misconduct during the course of the trial nor was any effort made at any time to correct the error, or prevent prejudicial effect upon the jury, if any there was. Appellant recognizes the general rule that a claim of misconduct on the part of the trial judge will not ordinarily be considered on appeal, unless the party who complains has given the trial court an opportunity to correct the error or false impression, but asserts that the remarks here were of such a character that their harmful effect could not have been avoided by any retraction or instruction. He also asserts that had an endeavor been made to assign the remarks as error the net result would have been a vitriolic attack upon defense counsel, who it may be stated is not the attorney now representing appellant.

[1] The record in the case will not support these claims. Selecting from the remarks those which come the nearest to being irremediable, we take first an instance occurring at a time when a witness was asked to testify concerning the value of stock of which she was the owner as follows:

> "Q. By Deputy District Attorney: What was the total value of all the stock that you turned over to Mr. Knocke and Mr. Murray?
> "Defense Counsel: Object to that, no proper foundation laid.
> "The Court: What foundation?
> "Defense Counsel: She does not know the value.
> "The Court: Why, Mr. ——, it is elementary that an owner may always testify as to value.
> "Defense Counsel: The value of stock?
> "The Court: The owner of anything may testify as to the value of anything he possesses. I am surprised that any one who has gotten by the Bar Association examination should raise that question. The objection will be overruled."

The trial judge was manifestly correct in the ruling, and while it would have been more in keeping with the decorum which should attend the trial of an action at law, and more in harmony with the judicial dignity which should characterize the pronouncements of those to whom is intrusted the delicate power of sitting in judgment not to have expressed his surprise, it is undoubtedly true that there was no serious reflection upon counsel and none which could not easily have been rectified.

[2] Again there had been considerable cross-examination concerning a memorandum used by the witness to refresh her recollection. After learning from this witness that she did not write the names on the particular memorandum at the time they were first mentioned to her, counsel returned to the subject as follows:

> "Defense Counsel: Q. Did you write them down at that time? A. No, sir.
> "Q. How did you remember them? A. I wrote them down at the time.
> "Q. Where? A. I have a little paper here; they were new names to me, and I did not want to forget them.
> "Q. Were you suspicious at that time? A. No, but he was a stranger to me. I don't think I have the casualty company name in here. No, I didn't write them down. Mr. Knocke wrote them down for me many times on a slip of paper at my home.
> "Q. Now you are changing your testimony to the effect that Mr. Knocke—
> "The Court: Oh, I am going to insist on your being fair with the witness. She has not changed her testimony and she has not so testified. She said that she wrote them down and Mr. Knocke did.
> "Defense Counsel: I apologize, your Honor; I don't mean to be unfair.
> "The Court: Probably you do not, but sometimes one does things without meaning to."

It is apparent from the testimony just quoted that the witness was referring to a piece of paper or memorandum which she thought she had about her, probably in her hand bag. We can even from the transcript visualize her as she looks for it and says: "I don't think I have the casualty company name in here." It is clear, although made more so in subsequent testimony, that she had written the memorandum used to refresh her recollection some time after the names were first written down for her by appellant. The trial judge was perfectly correct in his statement of the situation, and at least in the absence of an assignment, misconduct may not be predicated upon the occurrence. Counsel was not within his rights when he attempted to make an assertion of what the witness had done rather than to have asked a question to clear up the confusion if such actually existed in his mind.

[3] The next assignment covers the following occurring during cross-examination:

> "Defense Counsel: Do you remember lending Mr. Murray any money at any time? A. I have loaned money to Murray, yes.
> "Q. That was during the ten months that you had known him?
> "Deputy District Attorney: Objected to as immaterial.
> "Defense Counsel: Why, I should say not.
> "The Court: Now wait. If you cannot behave yourself in this court, you better go and practice in the police court. Make your motion in a quiet manner.
> "Defense Counsel: I apologize."

There then follows a discussion between court and counsel concerning its materiality, conducted, so far at least as appears from the transcript, without heat or friction. From the portion which we have quoted it is apparent that defense counsel was excited and by a display of vocal volume drew from the court a rebuke which rightly enough might have been more perfectly phrased, but which fails to exhibit any incurable error. In fact, counsel recognized his own error and made apology therefor.

[4] With one exception the remaining assignments of instances of misconduct consists of discussions between the trial judge and counsel concerning the materiality of proffered testimony. There is nothing to indicate that the court was attempting to do more than gain an understanding of the theory upon which counsel was proceeding. No request was made that the jury be excused. No attempt was made to cure the error if it was committed, and nothing to indicate that appellant is brought within the exception to the general rule, although it is earnestly insisted that the admonition of the court to the appellant during one of these discussions does so operate. The appellant was on the stand and the judge and counsel were engaged in a discussion when the judge turned to appellant and said:

"Now please keep quiet. That is about the third or fourth time you have attempted to talk to me from the witness stand, and I don't like it. You are here to answer questions. If there is any more of that kind of talk, you will be in jail over Saturday and Sunday for contempt of court."

Unquestionably the rebuke was stern, and undeniably also the appellant had transgressed. It may be that milder language would have sufficed and no doubt other words could have been chosen, more in keeping with judicial dignity and decorum, but some consideration must be given to the fact that under the strain of a trial and the repetition of an offense, even trial judges are not always able to choose their diction with the nicety of a Field or Marshall. We see no irremediable error.

[5] Under the second reason given by counsel as grounds for reversal, he assigns the reception of certain hearsay testimony. From an inspection of the record we cannot sustain this argument. The witness Aldahl, one of the people whose property was obtained, testified to efforts made by her to locate the appellant after she had failed to receive a promised dividend and also to efforts made by her to locate someone calling himself Dreyfuss, who had claimed over the telephone to be an employee of the Title Guarantee & Trust Company, and who in the same conversation over the telephone had recommended the appellant's associate, Murray, and the company with which appellant and Murray claimed to be connected. The court, however, on motion for that purpose, very properly struck out all the conversations, and counsel's complaint therefor is not supported by the record.

[6] Two of the assignments under this head seem to be based upon the theory that the trial judge has no right to interpose and ask questions of the witness. In neither instance was the witness the defendant, nor is it pointed out that the court repeatedly took the witnesses out of the hands of counsel as was the case in People v. Boggess, 194 Cal. 212, 228 P. 448. In one instance four questions were asked, and in the other three; in one it was for the purpose of endeavoring to fix a date, and in the other for the purpose of showing that the business of appellant was prominently advertised on his windows, leaving the jury to draw its inference as to whether the appellant, who had a conversation there, was acquainted with the nature of that business. While these actions are not assigned as misconduct on the part of the trial judge, we may observe the rule announced in People v. Reid, 72 Cal. App. 611, 237 P. 824, and People v. Whitaker, 68 Cal. App. 7, 228 P. 376, to the effect that it is not improper for the trial judge occasionally to ask a question for the purpose of elucidating or making clear any point which might otherwise remain in doubt.

[7] Counsel also complains because the court struck out the testimony of a character witness who testified that he had known appellant in Los Angeles for a period of eight months and that he first knew him in Davenport, Iowa. This witness testified that he had never discussed the appellant's reputation with any one in Los Angeles. It is said in People v. Cord, 157 Cal. 562, 108 P. 511:

> "The ultimate fact to be established is his actual personal character, and it is considered that the general opinion of his character held by persons who know him is of probative value as evidence of his real character. Hence the witness to such reputation must, at least, be acquainted with the prevailing impression in the community, as disclosed by actions, conduct, or conversations relating to the character in issue, although it is not necessary that the witness testifying should know that the majority of the community have that impression."

This case sufficiently disposes of appellant's claim in this particular.

We see no merit or substantiation in the remaining assertion that the court erred in excluding testimony. The record apparently does not support his assertion that the court refused to permit appellant to prove his good faith. The two objections which were sustained being related to a collateral issue, the bearing of which upon the question argued is difficult to comprehend, the rulings were correct.

[8, 9] The next assault upon the judgment is that the evidence is insufficient to support the verdict and that there is a total lack of corroboration required by section 1110 of the Penal Code. The record discloses that some time prior to July 21, 1927, discussions were had between Mr. Ridout of the Ridout Corporation and Franklyn A. Murray concerning a proposed arrangement whereby Murray would become employed by the corporation for the purpose of selling interests in buildings to be erected and sold. In a general way the method of operation was to raise as much money as possible on a mortgage, and then to sell to other persons certificates of interest for the remainder, whereupon a trust was arranged declaring the interests of the various persons who would benefit upon the sale of the property and directing the trustee to make distribution accordingly. After some discussion it was determined by the participants in the discussion that Mr. Murray would have to operate independently of the Ridout Corporation, and during the time the discussions were progressing he filed a certificate that he was doing business under the fictitious name of Finance Control Company. Mr. Ridout and Mr. Campbell of the corporation instructed their attorney to draw a proposed contract with the Finance Control Company and went ahead with other preliminary arrangements, and particularly did they prepare a report upon one of their ventures and some cards with Murray's name thereon, which cards were not, however, delivered to Murray. About July 20,

according to Mr. Campbell, the president of the Ridout Corporation, negotiations were terminated altogether and Murray was never employed. The employment of appellant by the Ridout Corporation was never in contemplation, although appellant testified that Murray stated in the presence of Campbell that he was going to employ him. This testimony of the appellant was denied by the witness Campbell. The record also discloses that during the months of August, September, and November the appellant, together with Murray, represented to Mary Donnell that they were employed by the Ridout Corporation for the purpose of selling interests in the ventures of the company; that in reply to a query by her concerning who composed the corporation the appellant said, "Mr. Walter B. Campbell, Mr. W. W. Ridout, and Mr. Murray and myself," and that appellant took them to an apartment which was under course of construction on Bonnie Brae street and told her that her money would go into that building. A witness living at the same house as Miss Donnell testified that appellant called there during August and stated in the presence of Miss Donnell and herself that he had affiliated himself with the Ridout Corporation for the purpose of selling ventures and attempted to interest her in the purchase, later suggesting that she assist in their sale and receive as her compensation a 5 per cent. commission. She was in fact paid a commission upon the first sale to Miss Donnell. The testimony of Anna Aldahl, who made two purchases during the month of October, 1927, is to the same general effect, except that appellant went so far as to represent to her that he and Mr. Murray had been associated with the Ridout Corporation for four years and that they had "sold over 60 buildings in nine months." The check given by Mrs. Aldahl on the first occasion was introduced and bears the indorsements of Franklyn A. Murray and the Acme Bonding Company, there also being testimony to fully justify the inference that the money was spent for bail bond for Murray in connection with other charges pending against him. Campbell also testified that they had no thought, until the accidental finding of a brief case containing the chronological reports and other information which led them to the home of Mary E. Donnell, that Murray or appellant were engaged in selling any ventures.

Under this state of the record, it cannot be seriously argued that the testimony of the complaining witness is lacking in corroboration, supported as it is by the testimony of an independent witness who took part in similar conversations with the appellant, and supported by all of the circumstances, such for example as the brief case containing information which led back to one of the victims, including the chronological reports prepared by the Ridout Corporation and referring directly to its method of doing business and the fact that almost identically the same false representation was used with different people. The rule of law is in this class of cases that all the circumstances connected with the transaction, the conduct of the defendant, and his declarations to other persons may be looked to, to furnish the necessary corroborative evidence. People v. Harrington (Cal. App.) 267 P. 942, and cases there cited.

The discussion on this phase of the case completely disposes of the contention that the evidence is insufficient to support the verdict, and we are thus brought to a consideration of the complaint that the court erred in refusing to give certain requested instructions.

[10] The court refused to give an instruction requested by the appellant to the effect that it is not sufficient merely to show that one is present when a theft is committed, but that it must be shown that he has guilty knowledge of the theft attempted and thereafter to aid or abet in its commission. The jury were told in an instruction that if a person "acts in good faith according to what he believes to be right, the intent to defraud being absent, he is guilty of no crime." They were also told that one who aids or abets in the commission of an offense is to be punished as a principal, but that to aid or abet meant "to knowingly and with criminal intent, aid, promote, encourage or instigate by act or counsel, or by both act and counsel, the commission of such criminal offense." It is apparent that the subject of the requested instruction was fully covered and no error may be predicated upon the refusal of the court to give it for the reason that it was covered by instructions given.

[11] Complaint is made of the court's failure to give eight requested instructions, all dealing in one form or another with the rule of reasonable doubt. A complete answer to this entire argument lies in the fact that the court delivered an instruction in the words of section 1096 of the Penal Code, it being provided in the succeeding section (1096a) that when this is done no further instruction upon the presumption of innocence or defining reasonable doubt need be given.

We have examined all of the other instructions which were requested and not given, and find that in substance they were covered by the court and that the jury were fully and fairly instructed upon all of the points of law therein suggested.

Judgment and order affirmed.

We concur: WORKS, P. J.; CRAIG, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The petition for hearing herein is denied. In denying said petition, we desire not only to approve but to emphasize the expressions of the District Court of Appeal with relation to the decorum which should attend the trial of actions at law and the degree of judicial dignity and of judicial patience and impartiality as well which should characterize the conduct and pronouncements of those to whom is intrusted the delicate power of sitting in judgment; and, while we are in agreement with the appellate tribunal that the departure of the trial judge from these ideals in the instant case may not be held to amount to such misconduct, as, in the state of the record, would suffice to justify a reversal, we have deemed this an apt cause and a timely occasion to give expression of our disapproval of this and of all similar departures from the standards of judicial decorum and dignity which should attend the trial of all causes, and particularly all criminal causes, in the courts of this state.

205 Cal. 221

ADAMS et al. v. PETROLEUM MIDWAY CO., Limited. (L. A. 9280.)

Supreme Court of California. Sept. 19, 1928.

1. Contracts ⚷176(2)—It was trial court's province in action on oil lease to resolve doubtful language therein.

In action in form of account for money had and received by defendant for use and benefit of plaintiffs, where sum sued for was claimed by plaintiffs as due and owing to them as royalty under terms of a lease of oil lands providing for one-sixth share of products obtained from operation of wells and settlement for net proceeds of sales, it was the province of the trial court to resolve doubtful language in the lease.

2. Mines and minerals ⚷79(1)—Lease providing for one-sixth share of oil products for lessor obligated lessees after sale to pay one-sixth of total net proceeds.

In action, complaint in which was in form of account for money had and received, the sum sued for being claimed by plaintiffs as due and owing to them as royalty under oil lease, which provided that plaintiff should have one-sixth share of products produced or of net proceeds of sale of products, *held* that after sale defendants' obligation was to pay one-sixth of actual net proceeds of all products sold and not merely proceeds of any one-sixth sold.

3. Appeal and error ⚷183—Defendant cannot complain on appeal because complaint was in form of count for money had and received instead of alleging breach of lease, not having objected to evidence of lease.

Where plaintiffs sued to recover money claimed by them to be due and owing them as royalty under terms of lease of oil lands, and complaint was in form of count for money had and received, instead of setting forth the breach of the express contract, and no objection was made to admissibility of evidence of the lease, but defendant joined with plaintiffs in a statement of agreed facts setting forth the execution of lease and the acts performed by it thereunder, the parties by so stipulating consented to determination of issue upon the pleadings as framed, and therefore defendant cannot complain on appeal that incorrect form of pleading was used.

Department 1.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Nancy E. Adams and others against the Petroleum Midway Company, Limited. Judgment for plaintiffs, and defendant appeals. Affirmed.

Morgrage & Stanley, of Los Angeles, for appellant.

W. C. Shelton, of Los Angeles, for respondents.

SEAWELL, J. Defendant, Petroleum Midway Company, appeals from a judgment for plaintiffs in the sum of $7,799.01 entered up-

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

on a complaint in the form of a count for money had and received by defendant for the use and benefit of plaintiffs. The case was tried upon an agreed statement of facts, from which it appears that the sum sued for was claimed by plaintiffs as due and owing to them as royalty under the terms of a lease of oil lands, situate in Huntington Beach, executed by plaintiffs as lessors to the Columbia Leasing & Developing Company as lessee, and by it assigned to defendant and appellant herein.

Before action brought, defendant had paid to plaintiffs a sum equal to one-sixth of the prevailing market price of a quantity of oil and other products equal to the entire output of the well situate upon the leased lands, instead of one-sixth of the "net proceeds" of said sales as provided by the lease contract. The plaintiffs' contention, upheld by the court below, was that the obligation of the defendant under the terms of said lease was to pay them one-sixth of the amount actually realized from the sale of the oil and other products of the well upon the leased lands, the amount sued for being the difference between one-sixth of the sum actually received from the sale of the entire output, a portion of the oil produced thereon having been sold at the rate of $2 a barrel, which was considerably higher than the prevailing market price, and one-sixth of the amount which would have been received had the entire production been sold at the market price.

The provision of the lease in question is as follows:

> "To have and to hold the same unto the said lessee, its heirs, successors and assigns, for the term of one year from and after the date hereof, and as much longer as petroleum, maltha, or gas shall be produced by said lessee from said lands; yielding and paying therefor unto the said lessors, to be shared in proportion to the acreage herein leased by each of them, one-sixth part of so much of said petroleum, maltha and gas produced and saved from said lands by the lessee * * * as shall be evidenced by written statement thereof to be rendered the lessors on or about the 15th day of each month, for the oil, maltha, or gas produced during the preceding calendar month, delivery of the quantity of oil or maltha due the lessors to be made free of expense into tanks, storage not to exceed thirty day period, or the oil, maltha or gas to be sold and settlement made with lessors for the net proceeds of such sales, on or about the 15th day of each month."

The defendant Midway Company and several other companies contracted with the Union Oil Company for the sale of a certain amount of the oil produced from wells controlled by the sellers to the Union Oil Company at the rate of $2 per barrel. The oil which is the subject of the present controversy was produced from a well on the lands leased by plaintiffs to defendant during the months of March to July, 1923. The oil and other products of the well were never divided and delivered in kind to the plaintiffs as lessors, but the entire output, with the exception of an insignificant quantity used by defendant in the operation of other wells, was sold. All oil not sold to the Union Oil Company under the contract at the rate of $2 per barrel was sold at the market prices. Before action brought defendant had paid plaintiffs one-sixth of the amount received from the sale of all oil and other products so sold at market prices, and one-sixth of the market price of the products sold to the Union Oil Company, actually marketed by appellant by authority of said lease at the much higher rate of $2 per barrel.

Appellant's contention is that the lease by implication authorizes the lessee, if it shall elect to satisfy its obligation to the lessors by a money payment, rather than by delivery of one-sixth of the output, to pay a sum equal to one-sixth of the prevailing market price of the entire output, rather than to pay one-sixth of the amount actually received upon sales. The lease certainly does not expressly provide that the prevailing market price rather than the actual sales price is to be the basis of computation, and we find no reason for implying such a term.

[1] Appellant further contends that since upon a division in kind of the oil the lessors would be entitled to receive a one-sixth thereof, it may pay to said lessors the sum actually received for any one-sixth sold, and since more than one-sixth was sold at the market price and a sum equal to the amount received for said one-sixth paid to plaintiffs, it has fully discharged its obligation. Thus, appellant would be enabled to pay to the lessors the amount received from the sale of the one-sixth part of the oil sold at the lowest price and to retain for itself the larger profits realized from the oil sold at the higher prices. The trial court interpreted the lease to mean that the lessors were entitled to one-sixth of the total amount received from the sale of the entire output. If it should be conceded that the provision of the lease is sufficiently uncertain to admit of the meaning which appellant gives it, it certainly cannot be said that the agreement, considered in the light of the facts stipulated to, is not susceptible of the interpretation placed upon it by the court. Hence we cannot disturb the decision. It was the province of the trial court to resolve doubtful language in the lease. We are further of the opinion that the construction placed upon the provisions of the lease by the trial court is more reasonable than the interpretation sought by appellant.

[2] The result must be the same whether the covenant of the lease should be construed as creating a cotenancy in the lessors and defendant in the output of the well, or is more properly interpreted as reserving to the lessors merely a right to receive a stipulated proportion of the yield as rent, with no inter-

est in the specific property until a one-sixth share should be segregated. Regardless of the nature of the relationship before a sale, thereafter the obligation of the defendant was to pay one-sixth of the actual net proceeds.

[3] Ordinarily recovery of money due by the terms of a subsisting written contract should not be sought under a count for money had and received, but the complaint should set forth the breach of the express contract. In the instant case no objection was made to the admissibility of evidence of the express contract, but instead appellant joined with respondents in a statement of agreed facts setting forth the execution of the contract of lease and the acts performed by appellant thereunder. By their stipulation the parties made the question of the interpretation of the sale provision of the lease virtually the sole issue in the case and consented to the determination of said issue by the court under the pleadings as framed. Under these circumstances, if it be conceded that a different form of pleading would have been more appropriate, appellant cannot now be heard to complain. It has suffered no prejudice.

Judgment affirmed.

We concur: CURTIS, J.; PRESTON, J.

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205 Cal. 360

In re BROPHY'S ESTATE.

BROPHY et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

(S. F. 13105.)

Supreme Court of California. Oct. 2, 1928.

1. Wills 🔑271—Order denying motion to dismiss will contest held not error for want of authority of affiant opposing motion conceded to be working for contestant's attorney.

Order denying motion to dismiss will contest relieving contestants of default and directing issuance of new citation *held* not erroneous on ground that contestants were not properly before court because affiant in affidavit opposing motion to dismiss was stranger to proceeding and not attorney of record nor entitled to represent contestants, where affiant purported to be acting for attorney of record for contestants and was treated as having so acted both by court and parties.

2. Wills 🔑270—Where will contests were timely filed and, citations applied for, superior court acquired jurisdiction to hear will contests (Code Civ. Proc. § 1328).

Where it was conceded that will contests were filed within one year from date of admission of last will and testament to probate, and that citation was duly applied for and issued within year after probate, as required by Code Civ. Proc. § 1328, superior court acquired jurisdiction to hear contests and to make such orders with relation to service of citation or issuance of supplemental or alias citations as it might deem necessary to bringing of parties before it in order that contests might be heard on merits.

3. Wills 🔑270—Application to be relieved from defaults in serving citations in will contest held within six-month statutory period (Code Civ. Proc. § 473).

Where citations issued on behalf of contestants of will were returnable November 10 and 25, 1927, and default, if any, in making service of citation, could not have antedated return dates, application for relief from defaults, if any, filed May 2, 1928, was within six-month period provided in Code Civ. Proc. § 473.

4. Wills 🔑270—Application by will contestants for relief from default in serving citations held for superior court, not Supreme Court (Code Civ. Proc. § 473).

Merits of will contestants' application to be relieved from defaults in serving citations *held* for superior court within exercise of jurisdiction under Code Civ. Proc. § 473, and not for Supreme Court.

In Bank.

Application for writ of certiorari by Isabelle Brophy and another, as executrices of the last will and testament of John T. Brophy, deceased, and others, against the Superior Court of the City and County of San Francisco and others, to review a certain action and orders of said court. Writ denied.

Jeremiah V. Coffey and Edward I. Coffey, both of San Francisco, for petitioners.

Harry I. Stafford, of San Francisco, for respondents.

RICHARDS, J. The petitioners herein applied for a writ of review to be directed to the superior court in and for the city and county of San Francisco, requiring said court to certify the record and proceedings thereof in the matter of the estate of John T. Brophy, deceased, pending in said court, with a view to having it determined whether or not the action and orders of said court in certain matters and proceedings in the matter of said estate were taken and made within its jurisdiction. Pursuant to said writ issued herein, the original records and proceedings in the matter of said estate have been transmitted to this court for the purpose of such review.

The particular facts which require, for such purpose, our consideration, as shown by such record, are these: John T. Brophy died testate in the city and county of San Francisco on the 15th day of August, 1926, being at said time a resident of said city and county. The last will and testament of said decedent was by an order of the said superior court made and entered on October 7, 1926, duly admitted to probate, and letters testamentary thereon were issued to Isabelle Brophy and Honora Ellen Ford, as executrices of the last will and testament of said deceased, and they have ever since been and now are duly qualified and acting executrices of said will. On October 15, 1927, a contest of said will was filed by Leonard Brophy and Russell Brophy, who were represented by Harry I. Stafford as attorney for said contestants. Thereupon the said superior court made an order directing citation to issue upon such contest, returnable November 10, 1927. Such citation was issued, but no service or return thereof appears to have been made. On October 6, 1927, another will contest was filed by Thomas F. Brophy, Aileen Muldon, Virginia Brophy, and Edith Brophy Dersch, wherein Harry I. Stafford also appeared as attorney for said contestants, and in such latter contest an order directing citation to issue was made, returnable on November 25, 1927, and such citation was thereupon issued, but, so far as the record herein shows, no service thereof or return thereon was ever made. On April 12, 1928, the petitioners herein made a special appearance in said court in said proceeding and filed therein notices of motion to dismiss the aforesaid contests, and each of them, upon the ground that the several contestants named therein had failed to serve upon said petitioners, or any of them, said citation, and had failed to obtain alias or supplemental or other citation or citations, and had failed to request said superior court to be relieved of their respective defaults in that regard, and had not otherwise diligently prosecuted their said contests. The notices of said motions thus filed were served upon Harry I. Stafford as the attorney of record of said contestants. Thereafter and on May 2, 1928, an affidavit in opposition to the aforesaid motions to dismiss said contests was filed in said court. This affidavit was made and sworn to by one Dean Cunha, who stated therein that he was at all times mentioned therein in the employ of Harry I. Stafford, attorney of record for the contestants, and as such had at all times been in full charge of the filing of said contests and petitions for the revocation of the will of said decedent, and had been in personal charge of the matter of the issuing and service of the citations issued therein and of whatever proceedings had been taken in said court with relation to the issuance and service or lack of service of said citations.

The affiant then proceeds to set forth certain facts which he offered as an excuse for the failure to serve said citations and as reasons why said court should deny the applications of the petitioners herein for the dismissal of said contests and should permit the contestants under the provisions of section 473 of the Code of Civil Procedure to have issued new and supplemental citations in furtherance of their said contests. To the aforesaid affidavit of Cunha the respondents and petitioners herein filed and caused to be served upon Harry I. Stafford, as attorney of record of the contestants, a counter affidavit, wherein it was undertaken to dispute certain of the facts set forth in the affidavit of Cunha, but wherein no statement or objection was made to the filing or consideration of the affidavit of Cunha upon any ground. When the matter came on for hearing before said court, it was submitted on briefs to be filed by the respective parties, and thereafter a number of said briefs were filed. In the briefs of respondents it was suggested that Mr. Cunha was a stranger to the record, but apparently the purpose of such suggestion was to urge upon the court that no affidavit of merits had been made either by him or by the contestants, and that for that reason the contestants were not entitled to the relief sought under section 473 of the Code of Civil Procedure. To this suggestion the contestants, through their regular attorney of record, presented a reply brief, wherein it was set forth that said Cunha was at all times acting for and on behalf of said attorney of record of said contestants. To this brief the respondents in due course presented a reply, wherein the objection that Cunha was a stranger to the record was apparently abandoned and the question of the relief to be granted or denied in the premises was fully discussed. Thereafter, and on June 25, 1928, the several matters having been submitted for decision, the trial court made and entered its order denying the respondents' motion to dismiss said contests, finding that the contestants had regularly appeared in said several matters by their attorney of record, Harry I. Stafford, and furthermore finding that the contestants were entitled to be relieved from any default they had suffered in their failure to serve the aforesaid citations, and upon such findings made and entered its order denying the motions of the respondents to dismiss said contests, and directing the clerk of the court to issue new and supplemental citations, returnable before said court on August 15, 1928. Thereafter and on July 23, 1928, a petition for a writ of review was filed herein.

The contention of the petitioners for said writ is that the said superior court had no jurisdiction to make the order last above referred to, or to make or enter any other order in the premises than an order dismissing said contests. It is primarily urged in support of said contention that the contestants were not properly before the court at or prior to the making of said order, by reason of the fact that the said Dean Cunha was a stranger to said proceeding and was not the attorney of record of nor entitled to represent the contestants in any proceeding before said court.

[1] We are satisfied from the recital of the foregoing facts that there is no merit in this contention, since in filing his affidavit in opposition to the respondents' motions to dis-

miss said contests Cunha not only purported to be acting for and on behalf of his employer, the attorney of record for said contestants, but was treated as having so acted both by said court and by the respondents herein in the proceedings before said court which preceded the making of its aforesaid order.

[2-4] We are thus brought to a consideration of the main question in the case, which is as to whether the superior court had jurisdiction to make and enter its order refusing to dismiss said contests and purporting to relieve the contestants from whatever might have been their default in the failure to make service of the two citations which had been regularly issued in support of their contests theretofore regularly filed. It is conceded herein that said contests and each of them were filed within the period of one year from the date of the admission of the last will and testament of John T. Brophy, deceased, to probate, and that in each of said contests a citation was duly applied for and issued within one year after such probate, in conformity with the requirements of section 1328 of the Code of Civil Procedure. This being so, the court acquired jurisdiction to hear and determine said contests and to make and enter such orders with relation to the service of such citations, or with relation to the issuance and service of such supplemental or alias citations as it might deem necessary and expedient to the bringing of the parties before it in order that such contests might be heard upon their merits. This question was fully presented to and considered by this court in Estate of Logan, 171 Cal. 357, 363, 153 P. 388, and it was therein held not only that the failure of a contestant to make service of a citation within the year, under the aforesaid section of the Code of Civil Procedure, was not fatal to such contest, but that the court having jurisdiction of the proceeding was also possessed of power to relieve a party contestant from any failure or default in the matter of the service of such citation and to cause further and supplemental or alias citation to issue as would afford such relief, citing Estate of Simmons, 168 Cal. 391, 143 P. 697, as authority for this conclusion. The return dates of the citations issued on behalf of the contestants herein were, respectively, November 10 and 25, 1927. The default, if any, of the contestants in making service of said citations could not have antedated the return dates thereof, and it follows that, since the application for relief from said defaults, if any, was filed upon May 2, 1928, it was within the six months' period provided in section 473 of the Code of Civil Procedure. Whatever may or may not have been the merits of the contestants' application to be relieved from such defaults, if any, was a matter for the superior court within the exercise of the jurisdiction given it by said section of the Code to determine, and with such determination or the merits thereof we have in this proceeding no concern, for the reason that the sole question before us in this proceeding is the question of jurisdiction.

It is our conclusion, therefore, that the application of the petitioners for the relief sought herein should be, and the same is hereby, denied.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

205 Cal. 252

SIMONTON et al. v. LOS ANGELES TRUST & SAVINGS BANK et al. (L. A. 8916.)

Supreme Court of California. Sept. 27, 1928.

1. Husband and wife 🔑264—That stocks stood in wife's name ever since acquisition and during coverture is evidence of her separate ownership thereof.

That shares of stock on which plaintiffs sought to impress a trust as heirs of deceased husband of defendant's testatrix had stood in her name ever since their acquisition and during coverture is entitled to some weight as evidence of her separate ownership thereof.

2. Fraud 🔑50—Fraud is never presumed, but must be affirmatively proved.

The general rule in both civil and criminal cases is that fraud, which is criminal in its essence and involves moral turpitude at least, is never presumed, but must be affirmatively proved.

3. Evidence 🔑596(2)—Fraud 🔑58(1)—Party charging fraud or criminal act must overcome legal presumption of innocence.

To establish fraud or criminal act of party in civil action, other party must overcome by at least a fair balance of evidence, not only evidence introduced by party charged, but legal presumption of innocence which exists in every case.

4. Husband and wife 🔑274(1)—As to heirs, property does not lose status as community by change in form.

As respects rights of heirs, property does not lose its character or status as separate or community property by a change in form or identity.

5. Husband and wife 🔑264—Evidence held to sustain finding that stock, claimed by testatrix's deceased husband's descendents, was her separate property (Civ. Code, § 1386, subd. 8).

In suit by deceased husband's descendants to impress trust on shares of stock, claimed by them, under Civ. Code, § 1386, subd. 8, in proceeding for distribution of widow's estate, as her heirs at law, to whom she bequeathed residue, evidence *held* sufficient to sustain finding that stock was her separate property.

6. Evidence 🔑87—Uncontroverted presumptions are binding on court or jury, but direct or indirect controverting evidence raises fact issue for determination.

While disputable inferences or presumptions are allowed to stand, not against, but in lieu of, proved facts, court or jury is bound thereby when not controverted, but, when controverted by other evidence, direct or indirect, an issue of fact is raised which must be determined as in other cases.

7. Appeal and error 🔑1010(1)—Trial court's conclusion on fact issue, raised by evidence controverting presumption, is conclusive, unless manifestly without sufficient evidentiary support.

Trial court's conclusion on issue of fact, raised by evidence controverting disputable presumption, is conclusive on appellate court, unless manifestly without sufficient support in evidence.

8. Evidence 🔑89—Quantum of evidence necessary to overcome presumption depends on character or circumstances of particular case.

The quantum of evidence necessary to overcome or dispute a disputable presumption depends on the character or circumstances of the particular case.

9. Husband and wife 🔑264—"Proof to a reasonable certainty" is sufficient to overcome presumption that property acquired during coverture is community property (Civ. Code, § 164; Code Civ. Proc. § 1826).

To overcome presumption, under Civ. Code, § 164, that property acquired during coverture is community property, proof beyond reasonable doubt, or that which produces demonstration, is not required, but "proof to a reasonable certainty," which means such proof as would so convince mind of ordinary man that he would be willing to act on it in business affairs of life, is sufficient under Code Civ. Proc. § 1826.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proof to Reasonable Certainty.]

10. Appeal and error 🔑1010(1)—Sufficiency of evidence of fact, required to be clearly proved, is primarily for trial court, whose finding, supported by any substantial evidence, is not reviewable.

Sufficiency of evidence to establish fact, proof of which law requires to be clear and convincing, is primarily for trial court, whose finding is not reviewable on appeal, if supported by any substantial evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Suit by J. G. Simonton and others against the Los Angeles Trust & Savings Bank, a corporation, as executor of the last will of Jane Simonton, deceased, and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Superseding opinion 265 P. 929.

Stewart & Stewart, of Los Angeles, for appellants.

Overton, Lyman & Plumb, and George W. Prince, Jr., all of Los Angeles, for respondents.

TYLER, Justice pro tem. Suit to impress a trust upon personal property, consisting of shares of stock in various companies, distributed to respondents in an estate. Certain phases of this matter have been before this court on former appeals. Estate of Simonton, 183 Cal. 53, 190 P. 442; Simonton v. Los Angeles Trust & Savings Bank, 192 Cal. 658, 221 P. 368. The essential facts are not in dispute, and are as follows:

George W. Simonton and Jane Simonton were husband and wife. The husband died testate in Los Angeles in the year 1904. He had been previously married and left children by such former marriage, but he left no issue of himself and Jane Simonton. Jane Simonton was one of two executors of his will, and the same was probated in Los Angeles county, and, by its terms, so far as this action is concerned, Jane Simonton took a life estate in the property owned by deceased, and the remainder was left to those of his children and grandchildren who should survive his wife. In the probate of the estate certain property was disclosed which was claimed and found by the court to be community property, and it was accounted for as such, and distributed one half to Jane Simonton as surviving widow as her share of the community, the other half to her for life with remainder over to the children and grandchildren of her husband who should survive the wife, as provided for under the terms of the will. Plaintiffs, appellants herein, are among those children and grandchildren. Some 13 years after the death of her husband, and on February 25, 1917, Jane Simonton died testate at Los Angeles. The provisions of her will amounted to intestacy in so far as affects the property here in question, for, after making certain specific bequests, it provided that the residue of the estate should go to her heirs at law as provided by the laws of succession of this state. Defendants, respondents herein, other than Josephine Fosdick and the bank, who was the executor of the estate of Jane Simonton, are the blood relations, and next of kin of Jane Simonton; they being her brothers and sisters and the children of deceased brothers.

After the death of Jane Simonton, appellants learned that she held shares of stock in various corporations which were issued to her in her own name, but which she had acquired and held prior to the death of her husband and during the period of her marriage. These shares of stock had not been inventoried by her in the estate of her husband. Upon presentation of the petition for distribution in the estate of Jane Simonton, plaintiffs, appellants herein, appeared and claimed the property in question as legatees and devisees under Mrs. Simonton's will as her statutory heirs, under subdivision 8 of section 1386 of the Civil Code, the residuary portion of her will, as above stated, having devised and bequeathed such portion of her estate to her heirs at law as determined by the laws of succession of this state. That section provides, in substance, that, when a widow dies intestate and without issue, such of her estate as was formerly either the community property of herself and husband or his separate property shall go to the descendants of her husband. The matter was set for hearing, and it was determined that the property here in question was the separate property of Mrs. Simonton at the time of her husband's death and that appellants had no interest therein. Other property was held to be community in character, and it was distributed to appellants. A decree was entered pursuant to such findings, from which decree appellants appealed to this court. The decree was affirmed. Estate of Jane Simonton, 183 Cal. 53, 190 P. 442.

Subsequent to this final judgment, appellants brought the present action to declare a trust in their favor in the property involved. The complaint charges, in substance, that Jane Simonton, as the executrix of the last will and testament of her predeceased husband, fraudulently and designedly concealed the property in question from the notice of the probate court in the administration of her husband's estate, and that the same was fraudulently and wrongfully appropriated by her to her own personal use and benefit in violation of her trust and to the prejudice of the plaintiffs, children and descendants of her deceased husband. Lack of knowledge of the existence of the fact until after the filing of the inventory in the widow's estate is alleged, and by way of a second cause of action it is further alleged that the omission was due to a mistake on the part of Mrs. Simonton. A demurrer was interposed to the complaint and sustained. Plaintiffs failed to amend, and judgment was rendered by the trial court in favor of the defendants. An appeal was taken to this court from the judgment, and the same was reversed. Simonton v. Los Angeles T. & S. Bank, 192 Cal. 651, 221 P. 368. Thereafter defendants by answer denied that any portion of the claimed property was community in character or that it was wrongfully or by mistake omitted from the inventory of the estate of George W. Simonton, and they alleged it was at all times the separate property of Jane Simonton and decreed to be such in the estate of Mrs. Simonton and defendants were therefore estopped by such decree from claiming to be entitled to any of the property in question, it being res adjudicata upon the fact that all the property herein sued for and upon which a trust is sought to be declared was at the date of the death of George W. Simonton the separate property of Jane Simonton. The trial court found, in substance, that the property was not wrongfully omitted from the estate of Geo. W. Simonton, but that it was in fact at all times the separate property of Jane Simonton. It further found that it had been determined to be such in a proper proceeding had in her estate for the purpose of determining the persons entitled thereto under the residuary clause of her will; that the determination of what portion of the property of her estate was, on the one hand, the separate property of Geo. W. Simonton at the time of his death or was community property of the spouses, or, on the other, what portion was the separate property of Jane Simonton at such time was necessary in order to properly make distribution in the estate of Jane Simonton; that a decree was entered in said estate as to all the property upon which plaintiffs here seek to impress a trust in favor of defendants; and that such decree became final by its affirmance in this court. Estate of Simonton, 183 Cal. 53, 190 P. 442. It further found that plaintiffs having elected to claim the property as heirs and devisees of Jane Simonton under her will were estopped from laying claim to such property in this action. Judgment followed that paintiffs take nothing by their action.

[1-5] It is here claimed that the evidence is insufficient to support the finding that the property in question was the separate property of Jane Simonton, as it is not of that clear and convincing character which the law requires. To sustain their allegations of fraud and mistake, plaintiffs relied mainly, if not wholly, upon the naked presumption raised by section 164 of the Civil Code, since changed by the Legislature, that property acquired during coverture is presumed to be community in character. To destroy or overcome this statutory presumption respondents proved that the Simontons were married between the years of 1875 and 1880; that prior to her marriage Mrs. Simonton worked as a teacher, seamstress, and dressmaker, and was economical in her expenditures, and probably had saved and possessed money at the time of her marriage. That subsequent to her marriage and between the years 1877 and 1882, she had received over $2,500 from her father's estate. Her brother testified that he was of the opinion that his sister had invested this sum in stocks of corporations, either in Los Angeles or San Jose, and it appeared that all the corporate stock here sued for, with the exception of eight shares of Bank of St. Helena stock, consisted of stock of corporations situated in those places. It further appeared that Mrs. Simonton received an additional inheritance of between $100 and $300 from a sister. All of this testimony was not disputed. In addition thereto it appeared that the shares of stocks in question had, ever since their acquisition, and during her cover-

ture, stood in the name of Mrs. Simonton, a fact which is entitled to some weight as evidence of ownership. Hale v. Kennedy, 42 Cal. App. 398, 183 P. 723. Then, again, defendants were aided in their proof by the very fact that the property was omitted from the inventory of the husband's estate. The general rule is that fraud which is criminal in its essence and involves moral turpitude, at least, is never presumed, but must be affirmatively proved. 27 Corp. Jur. p. 44; Drown v. New Amsterdam Casualty Co., 175 Cal. 21, 165 P. 5. To have fraudulently omitted the property would have been a crime. The law presumes a person is innocent thereof, which presumption is applicable to civil and criminal cases alike. Where, therefore, in a civil action a question arises the determination of which involves the establishment of a fact that a party has been guilty of fraud or criminal act, the other party, in order to obtain a determination of such question in his favor, must overcome, by at least a fair balance of evidence, not only the evidence introduced by a party so charged, but also the legal presumption of innocence which exists in every case. Again, property does not lose its character or status as separate or community property by a change in form or identity (Estate of Brady, 171 Cal. 1, 151 P. 275), and plaintiffs made no effort to show that the character of the property as fixed by its manner of acquisition was at any period ever destroyed or impaired by commingling it with community funds, and the fact that it was not so commingled is indicated by the permanent character of the investments, which at all times stood in the name of Mrs. Simonton. Nor was any evidence introduced to show that the original funds received by Mrs. Simonton in the manner indicated, or which she may have acquired prior to her marriage by reason of the fact that she had an earning power and was industrious and economical, were ever expended by her. The burden of her support rested upon her husband, and he was fully able to maintain his obligation in this respect.

[6, 7] Considering the fact that the stock here sued for was appraised in Mrs. Simonton's estate as being of the value of only $8,805, it is not unreasonable to presume that it was the result of accumulation or advance in value through the many years of her ownership. Taking all the facts and circumstances as above narrated into consideration, it would be a strange departure on our part, to say the least, from the well-established rule, to hold that there is insufficient evidence in the record to sustain the finding that the property in question was the separate property of Mrs. Simonton. Disputable inferences or presumptions, such as appellants here rely upon, have been said to be the weakest and least satisfactory character of evidence. Sav. & Loan Soc. v. Burnett, 106 Cal. 514, 39 P. 922. They are allowed to stand, not against the facts they represent, but in lieu of proof of them. When not controverted, however, the court or jury is bound to find according to the presumption. When controverted by other evidence, whether direct or indirect, an issue of fact is raised which it is the duty of the court to determine as in other cases, and its conclusion is conclusive upon an appellate court unless it be manifestly without sufficient support in the evidence. Fanning v. Green, 156 Cal. 279, 104 P. 308.

[8, 9] It is difficult if not impossible to state just what quantum of evidence is necessary to overcome or dispute such presumption; practically the whole question depends upon the character or circumstances of the particular case. If the rights of a creditor are involved, the court may, and indeed generally does, look with a watchful eye upon all transactions between husband and wife. Where, however, the issue arises between husband and wife, or, as here, between the heirs or devisees of either, the court might be content with a quantum of proof that might be deemed insufficient in other cases. No hard and fast rule can be laid down upon the subject. Proof of separate ownership reasonably certain in view of all the circumstances is all the law requires. Proof beyond a reasonable doubt, or that which produces demonstration, is not required, and, indeed, in actual practice, degree of proof means very little. Proof to a reasonable certainty means such proof as would so convince the mind of the ordinary man that he would be willing to act upon it in the business affairs of life. This is all that well-considered cases require. See section 1826, Code Civ. Proc. Just how the courts handle these questions can better be shown by illustration than rule. In discussing the character and quantum of evidence necessary to rebut the presumption relied upon by appellants, Mr. Justice Richards in the recent case of Estate of Nickson, 187 Cal. 603, 203 P. 106, in speaking for the entire court said:

> "We are of the opinion that it is incumbent on the party seeking to overcome the presumption of community property to do no more than to produce such legal evidence as, under all the circumstances of the particular case, would ordinarily produce conviction to an unprejudiced mind, and that in the face of such evidence the naked presumption, unsupported by any testimony, must fall."

[10] The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily, as in other cases, a question for the trial court to determine, and, if there is substantial evidence to support the conclusion reached below, the finding is not open to review on appeal. Steinberger v. Young, 175 Cal. 81, 165 P. 432; Couts v. Winston, 153 Cal. 686, 96 P. 357. Here, in our opinion, there is such substantial evidence. This conclusion renders unnecessary a discussion of the finding as to the effect of the final decree in the estate of Jane Simonton, deceased, establishing the property in question to be the separate property of Jane Simonton, which appellants here assail, as plaintiffs have been given full opportunity herein to prove their charges. The same may be said as to the further question of estoppel raised by respondents to the effect that appellants, having elected to claim the property herein sued for in such estate under her will, are concluded from again laying claim to such property in this action.

From what we have said it follows that the judgment should be and it is hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.

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205 Cal. 262

NEWSOM et al. v. BOARD OF SUP'RS OF CONTRA COSTA COUNTY et al.

(S. F. 12273.)

Supreme Court of California. Sept. 27, 1928.

1. **Bridges 🔑15—Right to take tolls for use of bridge is "franchise," subject to public regulation by state and subordinate governmental agencies.**

Right to take tolls from users of bridge is a "franchise," and as such is a privilege of public concern, the exercise whereof is subject to such public regulation, control, and administration as may be prescribed by the state or by its subordinate governmental agencies thereunto duly authorized.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Franchise.]

2. **Counties 🔑55—Initiative law held inapplicable to application for tollbridge franchise (Const. art. 12, §§ 22, 23; Pol. Code, §§ 2843 et seq., 2870 et seq., 4058).**

Under Const. art. 12, §§ 22, 23, as amended in 1911 and 1914, regulating tollbridge franchises, and Pol. Code, § 2843 et seq. and § 2870 et seq., requiring precedent findings of fact by county board of supervisors, hearing and determination of protests and asserted prior rights on application for franchise, functions of supervisors are so intermingled with their administrative and quasi judicial functions as to render operation of such statutes entirely inconsistent with initiative law under section 4058.

In Bank.

Application by Fred S. Newsom and another for mandamus to be directed to the Board of Supervisors of Contra Costa County and W. J. Buchanan and others in their official capacity as members of said board, requiring them to pass as an ordinance or submit to a vote of the electors of said county a proposed initiative ordinance granting a tollbridge franchise. Writ denied.

Superseding opinion in 261 P. 990.

Pierce & Carlson and Wilbur S. Pierce, all of Richmond, for petitioners.

Archibald B. Tinning, Dist. Atty., of Martinez, for respondents.

J. E. Rodgers and A. F. Bray, both of Martinez (for American Toll Bridge Co.), Pillsbury, Madison & Sutro, Dudley D. Sales, Jesse G. Benson, McCutchen, Olney, Mannon & Greene, Warren Olney, Jr., James M. Hanley, Eells & Orrick, and Chickering & Gregory, all of San Francisco, amici curiæ.

SHENK, J. This is a second application to this court for a writ of mandate to compel the board of supervisors of Contra Costa county to submit to the electors of said county, pursuant to the initiative provisions of the Constitution and section 4058 of the Political Code, a proposed ordinance, the purpose of which is to grant to the Northern California Development Company, a corporation, a franchise to construct and maintain a tollbridge across the Straits of Carquinez, which forms the boundary between the county of Contra Costa and the county of Solano. On the first application the writ was denied. Galvin v. Board of Supervisors, 195 Cal. 686, 235 P. 450. In the determination of that matter the doctrine was announced that an ordinance proposed by the electors of a county under the initiative law must constitute such legislation only as the board of supervisors has power to enact under the Constitution and laws of the state granting, defining, and limiting the powers of that body. See, also, Myers v. Stringham, 195 Cal. 672, 235 P. 448. It was held in the Galvin Case that the board of supervisors was without the power to enact the ordinance presented to it for adoption, for the reason that the notices of the application for the franchise had not been given as required by section 2870 of the Political Code, that a hearing on the application had not been had as required by section 2871 of the Political Code, and that the state engineer had not been notified of the desire of the board of supervisors to grant such a franchise as required by section 4 of the Act of March 14, 1881 (Stats. 1881, p. 76).

After the decision on the first application, and commencing on June 18, 1926, the petitioner, Northern California Development Company, published notices of its application for leave to erect a tollbridge in purported compliance with the statute. Thereafter, on July 19, 1926, there was presented to the county clerk of Contra Costa county a petition to submit to a vote of the electors of said county an ordinance granting to the Northern California Development Company a franchise to construct and maintain a tollbridge over the Straits of Carquinez. A copy of the proposed ordinance was attached to the petition, designating therein the location of the proposed bridge, fixing the amount of the statutory penal bond, fixing the amount of the license tax to be paid by the person or corporation taking tolls on said bridge, fixing the rate of tolls for crossing said bridge, fixing the terms of the franchise, requiring the bridge to be constructed within a certain time and to be of a certain width, character, description, and material, and providing for the purchase of said bridge by the counties of Contra Costa and Solano and for the acquisition of said bridge by the state of California upon the expiration of said franchise. This initiative petition also notified the board of supervisors that the signers thereof had by separate petition requested the state engineer to designate to said board the draw (if any) to be made in the proposed bridge and also the length of the span thereof necessary to permit the free flow of water. The initiative petition was checked by the county clerk as to the number of signatures thereon, and was found by him to be sufficient in that respect.

The petition to the state engineer referred to in the initiative petition was addressed to the state engineer, and was signed by the same number of electors who had signed the initiative petition addressed to the board of supervisors. Pursuant to the petition to him, the state engineer, under date of July 20, 1926, addressed to the board of supervisors a communication designating the matters and things requested by said petition to be designated by him. In said communication the state engineer did not, however, designate the width of the draw to be made in the bridge as required by section 4 of the Act of March 14, 1881 (Stats. 1881, p. 76), nor did he decide or declare therein that no draw was necessary. It appears from the petition herein that the petition to the state engineer was presented to that official after the board of supervisors had refused to make the request.

The initiative petition, together with the proposed ordinance, was presented to the respondent board of supervisors at the regular meeting of the board on August 2, 1926. Hearing on the application for the franchise was set for August 9, 1926, at 10 o'clock a. m., at which time protests were filed with said board against the granting of the franchise. At the hearing, oral and documentary evidence was produced before and received by said board both for and against the application. At the conclusion of the hearing, the board made an order denying the application and denying the request and demand of the Northern California Development Company that the communication from the state engineer hereinbefore referred to be spread upon the minutes of the board. Whereupon demand was made upon the board of supervisors that it pass the proposed ordinance without alteration within 10 days after August 2, 1926, or proceed forthwith to call a special election at which said ordinance should be submitted to a vote of the electors of Contra Costa county. The demand was refused by formal order of the board, and thereafter, on October 19, 1926, this petition for a writ of mandate was filed.

In response to the petition, the respondents filed an answer admitting certain allegations of the petition, denying others, and alleging certain matters of affirmative defense. The position of the respondents is that there is no duty resting upon them to enact said ordinance pursuant to the demand of the petitioner corporation to enact the same and no duty resting upon them to submit said proposed ordinance to a vote of the electors of the county of Contra Costa. It is insisted that the proposed ordinance, if enacted, would be in contravention of general laws of the state in numerous particulars set out in the answer and in the briefs. Numerous briefs have been filed by amici curiæ stressing the same points from different angles and additional points, to the effect that no duty rests upon the board of supervisors to submit said ordinance to a vote of the electors of said county. It would serve no useful purpose and would unduly prolong this opinion to discuss them all. One of the contentions of the respondents and certain of amici curiæ would seem to require first attention. That contention is that the constitutional and statutory provisions relating to the initiative are inapplicable to the process of granting a tollbridge franchise under existing law, because of the discretionary power vested in the board of supervisors and the fact-finding preliminary steps necessary to the lawful granting of such a franchise.

[1, 2] It should first be observed that the right to take tolls which the petitioner corporation seeks to acquire is a franchise and as such is a privilege of public concern, the exercise whereof is subject to such public regulation, control, and administration as may be prescribed by the state itself or by its subordinate governmental agencies thereunto duly authorized. "The theory upon which such rights are granted is to promote the public good and convenience, the advancement of commerce, and the more ready intercourse of the people. * * * " Fortain v. Smith, 114 Cal. 494, 46 P. 381. The Legislature of this state assumed control of the granting of tollbridge franchises and the regulation of operations thereunder as early as 1854, when "An act concerning public ferries and tollbridges" was adopted. Stats. 1854, p. 123. It is worthy of note that in the amendment of section 22 of article 12 of the Constitution in 1911 and of section 23 of the same article in 1911 and 1914, and in the statutes since enacted relating to public utilities, the laws of the state relating to the granting and regulations of tollbridge franchises has remained unchanged thereby. In other words, tollbridge regulations have been from the early

history of the state and now are in a class by themselves. Through the years they have remained subject to legislative control. In the act of 1854, the court of sessions was granted authority to establish tollbridges whenever deemed necessary except across navigable waters. It was provided therein that the permission to operate a tollbridge should be in the discretion of the court, and that no license should be issued unless it should first be made to appear that such tollbridge was necessary for the accommodation of the public. An elaborate procedure was provided governing the granting of the application for the right to take the tolls, including publication of notice of the application, the manner of construction and the materials to be used, the fixing of the tolls, and the duties of the tollbridge keeper. These regulations have continued in the same or a modified or amplified form by subsequent legislation. The act of April 28, 1855 (Stats. 1855, p. 183), transferred the discretionary power to grant tollbridge franchises and to regulate the operations thereunder, subject to statutory regulations, to the boards of supervisors of the several counties, and that discretion has remained in such boards under subsequent legislation to the present time.

The law now governing the application and granting of tollbridge franchises and the public regulation of the grantee's rights thereunder is found in the Act of March 14, 1881, and enactments incorporated mainly in the Political Code. Section 2870 of that code provides that every applicant for authority to construct a tollbridge must publish notices of the time when the application will be made to the board of supervisors for such authority. Section 2871 provides that, on the hearing of the application, any person may appear and be heard. At such hearing the board of supervisors may take testimony, or authorize it to be taken by any judicial officer of the county, and the hearing may be continued from time to time. Section 2872 provides that, if the board be of the opinion that the public interest will be promoted thereby, it may, by the assent of a majority of its members, grant the application by an order entered in its minutes, particularly designating the bridge. By section 2873 the board is granted power to require that the bridge be constructed within a certain time, be of a certain width, character, or description, and be constructed of certain materials. Section 2875 provides that all bridges constructed over navigable streams must have a draw or swing of sufficient space or span to permit the safe, convenient, and expeditious passage at all times of any water craft which may navigate the water bridged. Section 2876 vests in the board the power to regulate the number of animals that may be driven over the bridge at any one time and to provide rules for the government of the draws or swings and attendance of the same. Section 2878 provides that, when the bridge is completed and a certificate that it is completed and is safe and convenient for public use is signed by the commissioner of highways or president of the board of supervisors and filed in the office of the county clerk, the owner may erect a toll gate and require the payment of such tolls as the board of supervisors has fixed and may from time to time prescribe. Section 2843 provides that, when authority to construct a tollbridge over waters dividing two counties is desired, application must be made to the board of supervisors of that county situated on the left bank descending. Section 2845 provides that the board of supervisors in granting such authority must at the same time (1) fix the amount of the penal bond to be given by the operator of the bridge and provide for the annual renewal thereof; (2) fix the amount of the license tax to be paid by such operator; (3) fix the rate of tolls collected for crossing the bridge which may raise annually an income not exceeding 15 per cent. on the actual cost of construction of the bridge, and such additional income as will provide for the annual cost of operation, maintenance, amortization of and taxes on the bridge; (4) fix the term for the operation of such bridge, which shall not exceed 50 years; and (5) make all necessary orders relative to the construction, erection, and business of licensed tollbridges which they have by law the power to make. Section 2846 provides that the license tax and rate of toll fixed as provided in the preceding section must not be increased or diminished during the term of 20 years, unless it is shown to the satisfaction of the board of supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge, and that the license tax fixed by the board must not exceed 10 per cent. of the tolls annually collected. Section 2847 provides that every owner or keeper of a tollbridge must report annually to the board of supervisors the several items of costs, expenses, and revenue specifically set forth in the section. The obvious purpose of this report is to provide additional information not available to the board in fixing the license tax and tolls in the original franchise and to enable the board of supervisors to act intelligently and lawfully with reference to the amount of the license tax and tolls to be thereafter fixed. Section 2848 provides that, whenever the board of supervisors is about to fix the license tax and rate of tolls, inquiry must be made of the items which are in the section made necessary for consideration and may for that purpose examine under oath the owner or keeper of the bridge and other witnesses, and that, if the valuations as fixed by the board are not agreed to by the owner or keeper of the bridge, the same shall be fixed by three commissioners, one to be appointed by the board, one by the owner, and the third by the county judge, who must hear testimony and fix such value and cost according to the facts, and report the same to the board of supervisors under oath. Section 2849 provides that, when the amounts are ascertained as prescribed by the preceding section, the board of supervisors must fix the rates of tolls and license tax and the amount of the penal bond. Section 2851 provides that when, as in the present case, the bridge connects two counties, the license tax must be paid to the two counties in equal proportions. Section 2854 provides that the owner of land on either side of the waters to be crossed, and the owner of the land on the left bank descending over the owner of the land on the right bank, is entitled to preference in procuring authority to construct the bridge, but, if such owner fails or neglects to apply for such authority within a reasonable time after the necessity therefor arises, the board of supervisors may grant such authority to another.

Section 4 of the Act of March 14, 1881, provides that, whenever the board of supervisors of any county desires to grant the privilege of erecting and maintaining a tollbridge to any individual or corporation across a navigable stream, said board "shall notify the state engineer of such purpose, and of the precise point where such bridge is proposed to be located. The state engineer shall, within ten days of the receipt of such notice, designate the width of the draw to be made in such bridge, and also the length of the span necessary to permit the free flow of water."

When the foregoing general law of the state is borne in mind, it is at once observed how inappropriate and impossible of operation would be the application of the initiative to the granting of a tollbridge franchise thereunder. It has been recognized from an early date in the history of the state that, in the exercise of their functions under particular statutes, "the board of supervisors is a special tribunal, with mixed powers, administrative, legislative and judicial," and that in the discharge of its duties under the tollbridge statute of 1855 (Stats. 1855, p. 183), which is the predecessor in the main of the present statutory law on this subject, the board exercised such mixed powers. Waugh v. Chauncey, 13 Cal. 11. Likewise, under present law the board of supervisors in the consideration of an application for and in the granting of a tollbridge franchise is called upon to exercise such mixed powers. It is required by the statute that a time be set for a public hearing on the application for the franchise. Protests against the granting thereof may be filed. Priorities may be asserted. The board is authorized to take testimony at such hearing or provide for the taking of testimony before any judicial officer of the county. The board is authorized to grant the franchise if it be "of the opinion that the public interests will be promoted thereby." Section 2872, Pol. Code. In arriving at this conclusion or the opposite conclusion, the board is vested with broad discretionary power in the exercise of which the rights of the applicant, the rights of the protestants, if any, and the public interests must be taken into consideration. From the denial of the application in this case, it is obvious that the board, after the hearing, concluded that the protests should be sustained, or that the public interest did not demand the granting of a franchise in such proximity to a recently constructed tollbridge by another applicant and grantee of a franchise. Both reasons may have actuated the board in denying the application involved in this proceeding.

The general laws of the state and the Political Code provisions above referred to vest in the board of supervisors broad discretionary powers. In the event it decides that the franchise should be granted, the board is required to fix the rate of tolls which may be collected for crossing the bridge. In fixing these tolls the board is required to take into consideration the cost of construction, operation, and maintenance of the bridge, and permit an annual income from the tolls so fixed sufficient to raise not exceeding 15 per cent. on the actual cost of construction and such additional income as will provide for the annual cost of operation, maintenance, amortization of, and taxes on the bridge. The facts upon which to base proper toll charges, which in the proposed ordinance involved herein constitute not less than thirty-three different classifications of tolls, must be found by the board of supervisors in order that the grantee of the franchise receive just returns on the investment and thus satisfy the constitutional requirement that private property be not taken for public use without just compensation. These considerations requiring necessary and precedent findings of fact by the board, together with the further statutory requirement of a hearing and a determination on protests and asserted prior rights, compel the conclusion that it was not intended, either by the provision of the Constitution or by section 4058 of the Political Code, that the initiative should be applicable to the granting of a tollbridge franchise under present law. In what has been said we have in mind the declarations of this court that the act of granting a franchise is legislative in character. People v. Board of Supervisors, 122 Cal. 421, 55 P. 131, and cases therein cited; 12 Cal. Jur. 682. It is concluded, however, that, under the law as it now stands, the legislative functions of the board of supervisors in considering and acting upon an application for a tollbridge franchise are so intermingled with the administrative and quasi judicial functions of said board as to render the operation of such law entirely inconsistent and unworkable with the initiative law. When the proposed initiative measure is presented to the board, it must, under the law, be adopted without alteration, and there is no discretion vested in the board to make its provisions with reference to license tax and tolls conform to the facts required to be found as a condition precedent to the granting of a valid franchise.

A determination that direct legislation was not intended to apply to all actions of subordinate governmental bodies involving in part the exercise of the legislative function is not new in this state. It has been said generally that "by the enactment of initiative and referendum laws the people have simply withdrawn from the legislative body and reserved to themselves the right to exercise a part of their inherent legislative power." Dwyer v. City Council, 200 Cal. 505, 513, 253 P. 932, 935. The passage of ordinances relating to the improvement of streets under certain street laws has been held not to be subject to control by the initiative because of discretionary power vested in the city council. Hyde v. Wilde, 51 Cal. App. 82, 196 P. 118. In Chase v. Kalber, 28 Cal. App. 561, 153 P. 397, it was held that, notwithstanding the fact that the action of a city council in adopting a resolution of intention to improve streets is legislative in character, none of the precedent steps necessary to be taken for the improvement of streets was intended to come within either the power of the initiative or of the referendum, and that the operation of direct legislation and the system provided by the Legislature for the improvement of streets cannot coexist as to such matters. To the same effect is Starbuck v. City of Fullerton, 34 Cal. App. 683, 168 P. 583. So, here, if the initiative be applicable to the granting of a tollbridge franchise, the provisions of the state law vesting administrative and discretionary powers in the board of supervisors are to that extent repealed, a result which should not be declared except by a clear and unmistakable intention to that effect on the part of the legislative branch.

As affecting the limitations on the power of the Legislature to establish a uniform system of county government under sections 4 and 5 of article 11 of the Constitution, it was said in Galvin v. Board of Supervisors, supra, at page 693 (235 P. 452):

> "This grant of power to the Legislature to enact general and uniform laws relating to the matters referred to in the foregoing clauses of the Constitution constitutes in itself a limitation upon the power of counties, whether acting through their regularly constituted legislative bodies or attempting to act directly through initiative legislation, to adopt ordinances or regulations which would have the effect of destroying the uniformity in regard to such matters which the state legislature by the enactment of general and uniform laws was required to create and maintain."

After quoting extensively from the Political Code sections hereinabove referred to and from other general laws of the state, it was further said in that case at page 696 (235 P. 454):

> "The foregoing provisions of the Political Code and of the general law above quoted define and limit the powers of the board of supervisors of the county of Contra Costa in the matter of enacting legislation granting franchises for the erection and maintenance of tollbridges across the navigable waters which form the boundary line between said county and the county of Solano, and provide expressly and exclusively for the procedure which must precede such grant."

The court was there discussing in the main the requirement of the law that the proposed ordinance, even if adopted under the initiative, must be accompanied by the same statutory precedent steps as to notices of the hearing on the application for the franchise and the request by the board of supervisors to the state engineer as were required in the case of the granting of the franchise by act of the board of supervisors itself. It was not decided in that case that the initiative law would not apply to the granting of a tollbridge franchise. It was rather assumed that, if the proposed ordinance were adopted under the initiative, it would yet be invalid for noncompliance with the general tollbridge franchise law. The statement in that case, however, to the effect that such general law provides "expressly and exclusively for the procedure which must precede such grant," was prophetic of the present determination that such procedure must be followed in the granting of a tollbridge franchise to the exclusion of the general law relating to the initiative.

Other points are made by the respondents. It is insisted that, although the proposed initiative ordinance provides in section 9 thereof that the rate of tolls fixed therein shall remain unchanged for a period of 20 years unless the receipts from tolls in any one year be shown to be disproportionate to the cost of construction of the bridge or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge, there is no similar provision for a change in the license tax fixed by section 7 of the proposed ordinance within said period of 20 years as provided in section 2846 of the Political Code. It is also insisted that there is no provision in law for the substitution of the petition of 20 per cent. of the electors of the county to the state engineer for his report in lieu of such a request by the board of supervisors, as required by section 4 of the Act of March 14, 1881. The Galvin Case is relied upon in this contention, to the effect that the procedure laid down by the tollbridge franchise law must be followed and no substitutions are legally permissible. It is also contended by certain amici curiæ that the building of a tollbridge across waters forming the boundary line between two counties is a matter of general state concern, or at least is of more than the concern of the one county on the left bank of the waterway descending, and that therefore the electors of but one of the counties should not be given the power to decide the question of granting the franchise. This is but another reason advanced indicating that the initiative as applied to the electors of one county should not be made to apply to the granting of such a franchise in which the two counties are interested. It is deemed unnecessary to discuss these and other contentions of the parties and amici curiæ, however meritorious they may appear to be, for the reason that our decision on the main point is decisive of the controversy.

From what has been said, it is not to be inferred that the final act of the board of supervisors in granting a tollbridge franchise might not be held to be subject to the referendum. When all of the required precedent steps of a discretionary and fact-finding nature have been taken by the board and the franchise has been regularly granted, a proper construction of the Constitution and statutory law relating to the referendum might lead to the conclusion that the referendum would apply. That question is not involved in this proceeding, and we express no opinion thereon.

The peremptory writ is denied.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

SEAWELL, J. I concur in the reasoning and conclusion of the main opinion, which, in substance, is to the effect that the general law of the state prescribing the procedure for the granting of licenses to erect and maintain tollbridges across navigable waters of the state is inappropriate and practically impossible of operation in its application to the initiative method of enacting ordinances as the system is prescribed by section 4058, Political Code. In so doing I do not recede from the views expressed at length in the opinion filed in this cause November 27, 1927, 261 P. 990.

My investigation of the subject upon the previous hearing of the cause inclined me to the view expressed in the main opinion as to the inapplicability of the initiative method of adopting an ordinance such as described herein. However, I then thought, and still think, that the conclusion herein arrived at can be as well, if not better, placed upon the ground that under the provisions of sections 528 to 530, inclusive, Civil Code, as those sections read at the time said initiative ordinance was presented to the board of supervisors for adoption, the authority to construct and operate the tollbridge could be granted only to such corporations as were formed for the exclusive purposes of constructing and maintaining a particular designated tollbridge. The corporation in the instant case is not such a corporation, but was formed to conduct a large variety of enterprises and businesses, but nowhere in its articles of incorporation declared its intention to construct a tollbridge across Carquinez Straits. There seems to be no loophole by which the statutory requirements as they formerly existed may be evaded. All of the statutes by which the right to a grant of franchise to construct a tollbridge is authorized and all statutes germane thereto, whether of regulatory or administrative character, as specifically pointed out in the opinion rendered in the cause formerly before us, require that the corporation so applying must be formed for the specific purpose of constructing and maintaining said tollbridge at a designated place. The many duties imposed upon said corporation and the penalties and forfeitures prescribed for a failure or neglect to conform with the many requirements of the statute, including strict accountability to the board of supervisors as to the amount of its capital stock, the amount paid in and annually expended, the amount received for tolls, the amount of dividends, and numerous other matters specified by statute respecting the business of the corporation, make it clear that the Legislature did not intend to permit revenue derived from the operation of tollbridges in which the public had an interest to become intermixed or confused with private funds derived from private enterprises.

Reading the several statutes together, and keeping in mind the fact that the Legislature was more concerned with the public interest which it was endeavoring to conserve than it was in broadening the scope of private corporations organized for profit, there seems to be no substantial ground upon which petitioners may rest their demand.

The fact that private corporations have habitually omitted or refused to conform to the provisions of the statutes as written cannot have the force of repealing statutes.

205 Cal. 366

SHANNON v. CITY OF LOS ANGELES et al.
(L. A. 10743.)

Supreme Court of California. Oct. 3, 1928.

1. Municipal corporations 🔑218(8)—City civil service employee, orally discharged and not served with written notice personally or by leaving copy at his home, held unlawfully discharged (Los Angeles City Charter, art. 9, § 112[a]).

City civil service employee, orally informed of his discharge and not served with written notice thereof either personally or by leaving copy at his place of residence, as required by Los Angeles City Charter, art. 9, § 112(a), *held* not lawfully discharged.

2. Municipal corporations 🔑218(8)—Oral discharge of city employee held ineffectual under charter requiring formal notice (Los Angeles City Charter, art. 9, § 112 [a]).

Oral statement by superintendent of buildings to clerk in city building department that he was discharged *held* ineffectual for any purpose, since mere knowledge of fact, of which formal notice is specifically required, as by Los Angeles City Charter, art. 9, § 112 (a), cannot be held substitute for such service.

3. Municipal corporations 🔑218(8)—Transmission of written notice of employee's discharge to civil service commissioners, without attaching certificate showing service on person discharged, is ineffectual (Los Angeles City Charter, art. 9, § 112 [a]).

Building superintendent's transmission of written notice of clerk's discharge to board of civil service commissioners, as required by Los Angeles City Charter, art. 9, § 112 (a), without attaching certificate showing required service of such notice on person discharged, is ineffectual.

4. Mandamus 🔑165—Averments of application for mandamus must be taken as true on demurrer.

Averments of application for writ of mandate to compel petitioner's restoration to position as city civil service employee must be taken to be true on demurrer.

5. Mandamus 🔑13—Civil service employee, unlawfully discharged, could invoke writ of mandate for restoration without first applying to civil service commissioners for investigation (Los Angeles Charter, art. 9, § 112 [a]).

Civil service employee, never lawfully discharged because of failure to serve written notice of discharge in manner required by Los Angeles Charter, art. 9, § 112 (a), could invoke writ of mandate to compel his restoration to such position without first applying to board of civil service commissioners for investigation of grounds of removal, as required of lawfully discharged employees.

6. Mandamus 🔑151(1)—City held proper party to mandamus proceedings against building superintendent for reinstatement as clerk in building department.

City *held* a proper, if not necessary, party to proceedings by unlawfully discharged civil service employee for writ of mandate to compel superintendent of buildings to restore him to position as clerk in department of building and safety; such department being merely a subordinate department, and superintendent a subordinate official, of city.

7. Municipal corporations 🔑220(6)—Petitioner not alleging compliance with charter provisions, nor making proper city departments and officials parties to mandamus proceeding for reinstatement, as civil service employee, held not entitled to salary from date of unlawful discharge (Los Angeles City Charter, art. 28, § 360 et seq.).

Unlawfully discharged civil service employee, not alleging compliance with provisions of Los Angeles City Charter, art. 28, § 360 et seq., regulating procedure for allowance and payment of salaries, nor making city departments and officials charged with duty of complying therewith parties to proceeding for writ of mandate to compel his restoration to position, *held* not entitled to allowance and payment of salary from date of discharge to issuance of writ.

In Bank.

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Proceeding by William A. Shannon for a writ of mandate to the City of Los Angeles and J. J. Backus, as Superintendent of Building of the Department of Building and Safety, of said city. Judgment for defendants, and plaintiff appeals. Affirmed as to defendant city, and reversed as to defendant Superintendent, with direction.

Superseding opinion, 268 P. 399.

G. F. Boreman, of Los Angeles (Anthony Jurich, of Los Angeles, of counsel), for appellant.

Jess E. Stephens, City Atty., and Herman Mohr and Jerrell Babb, Deputy City Attys., all of Los Angeles, for respondents.

RICHARDS, J. The plaintiff instituted this proceeding in the superior court in and for the county of Los Angeles, seeking the issuance of a writ of mandate directed to the department of building and safety of the city of Los Angeles, through the superintendent of said department, named with the said city of Los Angeles as the respondents in his petition for said writ, to compel said respondents to restore him to his position as a clerk in said department, and to permit him to resume and continue to discharge his duties in said position and to replace his name upon the pay roll of said department, in order to enable him to draw and be paid his salary for his services as such clerk therein. The petitioner also sought the issuance of said writ to be directed to the city of Los Angeles, ordering the payment of his said salary during the period of his alleged debarment from his said position. In support of his application, the petitioner alleged that for some time prior to the 8th day of February, 1926, he had held and was then holding the position of general clerk in the electrical division of the department of building and safety of said city of Los Angeles, which position was one under the classified civil service of said city under and by virtue of article 9 of the charter thereof; that on said 8th day of February, 1926, when the petitioner presented himself for duty at his place of employment in the aforesaid division of said department, he was not permitted by the superintendent of said department to resume or enter upon or further discharge his said duties, but was excluded therefrom by said official, and was then and there informed that he had been discharged from his said position; that from that time thenceforth his name was removed and omitted from the pay roll of said department, and he was refused payment of his salary as an employee of said city; that on February 13, 1926, the following notice, together with the certificate appended thereto, was transmitted by the said superintendent of said department to the board of civil service commissioners of the city of Los Angeles, to wit:

> "Los Angeles, Cal., February 13, 1926.
>
> "To the Honorable the Board of Civil Service Commissioners, Normal Hill Center, Los Angeles, Cal.—Gentlemen:
>
> "You are hereby notified that I have this day discharged W. A. Shannon from his position as general clerk (2353 M–C) in the Electrical Division Dept. of Building & Safety Department of the city for the following causes, to wit:
>
> "Violation of rule 10, section 1.
>
> "Absence from duty without leave. (Second offense.)
>
> "Note.—Mr. Shannon was given a thirty-day suspension on October 5th, 1925, with a notice that recurrence of this offense would mean his dismissal, on January 28th, 1926, he failed to report and was absent until Feb. 8th, 1926, and when asked to resign, refused to do so.
>
> "This discharge effective as of January 28th, 1926.
>
> "Respectfully yours,
> "[Signature] J. J. Backus.
> "[Title] Supt. of Building.
>
> "I hereby certify that a copy of the foregoing statement was mailed to the last-known address of W. A. Shannon on 13th day of February, 1926, at 11 o'clock a. m.
> "[Signature] C. E. Gartman."

The petitioner further avers in his petition that no copy of the aforesaid notice or statement was ever served upon him personally nor by leaving the same at petitioner's place of residence, which he avers at all of said times to have been "Room 16, Pembroke Hotel, 339 South Hill street," in said city of Los Angeles, nor was any copy of said notice ever mailed to petitioner at his said place of residence, which he avers at all of said times to have been his post office address as shown upon the records of said division where he was so employed; that instead thereof a copy of said notice was by said superintendent of said department, on or about said date, addressed to said petitioner and mailed to "307½ West 2nd street, Los Angeles, California," which was not and had never been his place of residence. For the foregoing reasons the petitioner avers that he was unlawfully discharged from his aforesaid civil service position and is entitled to a writ of mandate directing his reinstatement therein.

The respondents demurred to the said petition upon several grounds, chief of which is that the said petition did not state facts sufficient to entitle the petitioner to the relief prayed for therein. The trial court, upon the hearing upon said demurrer, sustained the same generally, with leave to amend, which, the petitioner declining to do, the court directed judgment to be given, made, and entered in the respondents' favor and for their costs. It is from such judgment that this appeal has been taken.

[1-4] Directing our consideration first to the aforesaid general ground of demurrer, we are of the opinion that the trial court was in error in sustaining the same. The provisions of the Los Angeles Charter having relation to the removal or discharge of persons in the classified civil service of said city are embodied in section 112 (a) of article 9 thereof, which, at the time of the petitioner's discharge, read as follows:

> "Any board or officer having the power of appointment of officers, members and employees in any department of the government of the city, shall have the power to remove, discharge or suspend any officer, member or employee of such department; but no person in the classified civil service of the city, other than an unskilled laborer employed by the day, shall be removed, discharged or suspended except for cause, which shall be stated in writing by the board or officer having the power to make such removal, discharge or suspension, and filed with the board of civil service commissioners, with certification that a copy of such statement has been served upon the person so removed, discharged or suspended, personally, or by leaving a copy thereof at his last known place of residence if he cannot be found.
>
> "Upon such filing such removal, discharge or suspension shall take effect."

It is apparent that the requirements of the foregoing provision of the city charter were neither actually nor substantially complied with in the petitioner's case. That he was entitled to have the rules and regulations of the city charter, safeguarding him in his civil service position, fairly invoked and applied before his discharge from such position could become effectual was held by this court in the case of Garvin v. Chambers, 195 Cal. 212, 225, 232 P. 696. The oral statement made to the petitioner by the respondent Backus to the effect that he was discharged was ineffectual for any purpose, since mere knowledge of a fact regarding which formal notice is expressly required cannot be held to be a substitute for such service. Chaplin v. Superior Court, 81 Cal. App. 367, 253 P. 954. Neither would the transmission by said Backus to the board of civil service commissioners of the written notice of the petitioner's discharge, however regular in the form of such notice, become effectual to accomplish such discharge unless and until the further provision of the charter requiring service of such notice and designating the form and method of such service should have been complied with. A vital and inseparable portion of the written notice provided for in section 112 (a) of article 9 of the city charter is the certification to be attached thereto showing the required service thereof upon the person affected by the discharge; and it is only upon the transmission of such notice with its appended certification that the discharge or suspension of a civil service employee provided for in said section becomes effectual for any purpose. According to the averments of the petitioner's application, which upon demurrer must be taken to be true, the said notice or statement of the petitioner's discharge was neither served upon him personally nor by the substituted method of "leaving a copy thereof at his last known place of residence, if he cannot be found." The only pretense of a compliance with these requirements of said section consists in a certification that "a copy of the foregoing statement was mailed to last-known address of W. A. Shannon on 13th day of February, 1926, at 11 o'clock a. m." Service by mail of the notice or statement in question is not provided for in said section (see Blalock v. Ridgway et al. [Cal. App.] 267 P. 713); but, even if permissible, such service as is thus certified to would be ineffective in the light of the affirmative allegations of the petitioner that such mailing was not made to his place of residence at all, but to an address where he had not resided; and this when it was shown by the records of said department where he actually resided at the time of such attempted service.

[5] Upon the face of his petition it thus fairly appears that the petitioner was not served with the notice or statement of his said discharge by either of the methods provided for in said section, nor, in fact, at all. This being so, it must be concluded that the petitioner was never properly nor lawfully discharged from his position, and, not having been thus discharged, it was neither his duty nor his right to make application to the board of civil service commissioners for an investigation of the grounds of his removal or discharge, in accordance with the procedure provided for, in the case of discharged employees, in said section of the charter. It is the contention of the respondents herein that the petitioner is not entitled to the issuance of a writ of mandate herein in so far as his reinstatement would be effected thereby, for the reason that the foregoing provision of said section of the charter afforded the petitioner a plain, speedy, and adequate remedy, viz. that of an appeal to the board of civil service commissioners as provided therein. The fallacy underlying this contention consists in the fact that it is only such civil service employees as have been actually and lawfully discharged through the procedure theretofore specified in said section who are either required or entitled to apply to said board of civil service commissioners for a hearing upon the facts relied upon as grounds for the discharge. Not having been thus lawfully discharged, the petitioner was entitled to stand upon his statutory right to his position and to invoke the writ of mandate to compel his admission to and continuance therein until such time as the law relating to the procedure for his removal had been obeyed.

[6] There are several special grounds of demurrer upon which the respondents herein relied at the hearing thereon and still rely. Most of these consist in mere amplifications of the general ground of demurrer which has already been disposed of. There is one of these special grounds of demurrer which requires notice. It is the ground of misjoinder of parties respondent; the claim being that the city of Los Angeles has been improperly made a party to this proceeding. We deem this ground of special demurrer, however, to be without merit, for the reason that the city of Los Angeles is the municipality of which the department of building and safety is merely a subordinate department, and its superintendent, Backus, a subordinate official, and whose action is, after all, but the action of the municipality itself. It would therefore be a proper, though perhaps not a necessary, party to proceedings of this character, wherein the action of its subordinate officials is sought to be compelled as a duty arising out of their particular office or department. There was therefore no demurrable misjoinder of parties respondent in this proceeding.

[7] A more serious question, however, arises when we come to consider the extent and scope of the remedy sought by the petitioner herein, since he seeks not only to compel restoration to his position at the hands of the particular department which has sought to effect his discharge, but he is also seeking to compel by the city of Los Angeles itself the allowance and payment of the accumulated amount of his salary from the date of his purported discharge to the date of issuance of this writ. To this relief the petitioner is clearly not entitled upon the averments of his petition in the present proceeding, for the obvious reason that he has not alleged compliance with those provisions of the charter of said city which regulate the procedure for the allowance and payment of salaries and of claims and demands generally against said

municipality (see section 360 et seq., art. 28, of said charter); nor has he made the several departments and officials of said city, whose duty it might become to comply successively with the last-named charter provision, parties to this proceeding. The special demurrer of the city of Los Angeles was therefore properly sustained, and, the petitioner declining to amend, it follows that the judgment herein as to the city of Los Angeles must be affirmed.

Our conclusion, therefore, is that, as to the respondent city of Los Angeles, the judgment is affirmed, but as to the respondent Backus the judgment herein should be and is hereby reversed, with direction to the trial court to set aside its order generally sustaining the demurrer of the respondent Backus herein, and to overrule the demurrer of the said respondent, with leave to answer within the time allowed by law or by the order of said court.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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205 Cal. 380

CAMP v. OAKLAND MORTGAGE & FINANCE CO. (S. F. 12905.)

Supreme Court of California. Oct. 5, 1928.

Appeal and error 🔑78(2), 870(2)—Order substituting adverse claimants of fund in defendant's hands as parties defendant is not appealable, but reviewable only on appeal from judgment (Code Civ. Proc. §§ 386, 963, subds. 1–3; § 956).

An order substituting adverse claimants of fund in defendant's hands as parties defendant, under Code Civ. Proc. § 386, is not appealable under section 963, subd. 2 or 3, nor under subdivision 1 as "final judgment," but may be reviewed only on appeal from judgment under section 956.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Judgment.]

In Bank.

Action by M. A. Camp against the Oakland Mortgage & Finance Company. From an order granting defendant's motion to dismiss it and substitute others as parties defendant, plaintiff appeals. On motions to dismiss the appeal. Appeal dismissed.

Soren X. Christensen and J. C. Wood, both of San Francisco, for appellant.

Dunn, White & Aiken and W. M. Nold, all of Oakland, for respondent Oakland Mortgage & Finance Co.

Melville C. McDonough, of Oakland, for respondents Fidelity & Casualty Co. of New York and M. M. Friedman.

PER CURIAM. Plaintiff instituted this action to recover the residue or balance of a loan fund remaining in defendant's hands; the loan having been theretofore arranged for and negotiated by one George Phillips and wife to meet progress payments on certain improvement work undertaken by them. Plaintiff's claim to this balance is founded upon what is described in the complaint as a "draft" drawn by Phillips and wife to the plaintiff's order. It appears, however, that several other persons, including the assignee of Phillips and wife, had also made demand upon defendant for the $2,000 in controversy. Being unable to determine to whom it should pay this money, the defendant, in accordance with the requirements of section 386 of the Code of Civil Procedure, moved the court below, before answer filed, for an order discharging it from liability and dismissing it from the action, upon payment into court of the sum in dispute, and substituting as parties defendant in its place and stead all of the adverse claimants. From the order granting this motion, the plaintiff appealed. This proceeding presents two motions, one by the original defendant and the other by one of the substituted defendants, looking to the dismissal of said appeal.

The moving parties urge, among other things, that an order substituting parties defendant, as contemplated by section 386, supra, is not an appealable order. In this we believe there is merit. Such an order is not appealable under subdivisions 2 or 3 of section 963 of the Code of Civil Procedure, wherein are enumerated all of the orders from which an appeal lies. Nor do we think the order is appealable under subdivision 1 of said section as a "final judgment." State ex rel. Weinstein v. District Court, 28 Mont. 445, 72 P. 867, 868. From the cited case it appears that section 588 of the Code of Civil Procedure of Montana is identical, so far as material here, with our section 386, supra, in that it provides for a substitution of defendants under certain circumstances and for the discharge and dismissal from the action of the original defendant upon his depositing in court the money or other personal property in dispute. Subdivision 1 of section 1722 of the Montana Code, as it read at the time of said decision, is identical with subdivision 1 of our section 963, supra, for it authorized an appeal "from *a final judgment* entered in an action, or special proceeding. * * *" (Italics added.) In determining that an order of substitution made under the former section was not a "final judgment" within the meaning of subdivision 1 of the latter section so as to be appealable thereunder, the Montana court declared:

> "The defendant contends that the order is a final judgment, and is appealable under the provisions of subdivision 1 of section 1722. * * * This contention rests upon the assumption that

it is a final determination of the rights of the parties so far as concerns the relator and Travis. With this view we do not agree. The order has none of the essential characteristics of a final judgment. It is not to be executed by a writ or other process; nor is any act required of any of the parties by the doing of which he will be injured in the meantime, in the sense, at least, that he will be finally deprived of any substantial personal or property right, or suffer an invasion thereof, unless he can prosecute an appeal directly from the order itself. From this point of view it does not fall within the principle of the case of State ex rel. Heinze v. District Court, 28 Mont. 227, 72 P. 613, but is merely an interlocutory or intermediate order, and falls within the class of orders which may be reviewed upon appeal from the final judgment in the case, upon exception reserved; * * * otherwise, this and all similar orders, incidentally determinative of some right of a party to an action, must be held to be final judgments, within the definition of that term as laid down in section 1000 of the Code of Civil Procedure. Therefore no direct appeal lies under section 1722, supra."

In Cassidy v. Norton, 25 Cal. App. 433, 435, 143 P. 1057, 1058, it was sought by certiorari to review an order of substitution made under section 386, supra, and the court held that, if the order was improperly and erroneously made, "the error could not be corrected on certiorari, *but must be reached by an appeal from the final judgment* in the case." (Italics ours.) The very brief opinion filed in the early case of Beck v. City of San Francisco, 4 Cal. 375, declares that:

> "An appeal does not lie from an order of the chancellor making a new party defendant. It may be revised on error, when the whole case is properly brought up."

We are satisfied that the order herein attempted to be appealed from is not a "final judgment" within the meaning of subdivision 1 of section 963, supra, as interpreted by our decisions, for such order did not in any manner purport to dispose of the merits of the controversy or to adjudicate the rights of the parties in and to the subject-matter of the action. It is our conclusion, therefore, that such order may be reviewed only on appeal from the judgment. Section 956 of the Code of Civil Procedure provides, in part, that:

> "Upon an appeal from a judgment the court may review the verdict or decision, and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment, or which substantially affects the rights of a party. * * *"

Research discloses that an appeal was taken in Youtz v. Farmers', etc., Bank, 31 Cal. App. 370, 160 P. 855, from an order such as is herein involved. No question was therein raised, however, as to the propriety of the appeal.

For the foregoing reasons, the appeal is dismissed.

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94 Cal. App. 185

ATTKISSON v. REYNOLDS. (Civ. 3678.)

District Court of Appeal, Third District, California. Sept. 28, 1928.

1. Appeal and error 🔑799—Conclusion in clerk's certificate that time for presenting and filing transcript and bill of exceptions had passed was not statement of the facts required by statute (Civ. Proc. § 953d, added by St. 1927, p. 86).

Conclusion in county clerk's certificate that time for presenting and filing transcript and bill of exceptions had long since passed was not statement of the facts required to be set forth by Code Civ. Proc. § 953d, added by St. 1927, p. 86.

2. Appeal and error 🔑799—Appellee not having shown that time within which transcript might be prepared had expired, appeal will not be dismissed (Civ. Proc. § 953a, and section 953d, added by St. 1927, p. 86, Supreme and District Courts of Appeal Rule 6).

Where appellee did not show by clerk's certificate or by affidavit whether or not time within which transcript on appeal might be prepared under Code Civ. Proc. § 953a, had expired, since clerk's certificate did not show that notice required by last sentence of section 953a was given, or that notice of entry of judgment was given under section 953d, added by St. 1927, p. 86, motion to dismiss appeal must be denied under rule 6 of Supreme and District Courts of Appeal.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by W. B. Attkisson against Thomas E. Reynolds. From the judgment, defendant appeals. On motion to dismiss. Motion denied.

Thomas E. Reynolds, of Vacaville, for appellant.

W. U. Goodman, of Fairfield, for respondent.

PLUMMER, J. [1, 2] This cause is before us upon motion of the plaintiff and respondent to dismiss the defendant's appeal. The motion is based upon the county clerk's certificate setting forth the following specifications, to wit:

> "That said defendant and appellant has filed no request to the clerk to prepare a transcript; that no proceedings are pending for the settlement of a bill of exceptions and no bill of exceptions has been prepared or filed and the time for presenting and filing same has long since passed.
>
> "That no proceedings for the preparation of a transcript, under section 953a of the Civil Code of Procedure, are pending and no such proceeding was ever instituted and the time to institute same has long since expired.
>
> "That no motion for a new trial was ever made and that the time for making such motion for a new trial has long since expired."

As authority for the motion, attention is called to rules 5 and 6 of rules governing practice in the Supreme Court and District Courts of Appeal of the state of California, in effect on and after September 1, 1928. By reason of the omission of the clerk's certificate, as hereinafter pointed out, it is only necessary to consider the application of the last sentence of rule 6, which reads:

> "It shall be incumbent upon the party moving to dismiss to show by such certificate or by affidavit, that no proceeding for a bill of exceptions or transcript under section 953a, is pending in the trial court, and if no such proceeding was ever instituted, that the time to institute the same has expired."

The first paragraph of section 953a of the Code of Civil Procedure, after providing for the filing of a notice with the clerk specifying the particular matters which the applicant desires to have set forth in a transcript on appeal, fixes the time for giving the notice to the clerk in these words:

> "Said notice must be filed within ten days after notice of entry of the judgment, order or decree, or if a proceeding on motion for new trial be pending, within ten days after notice of decision denying said motion, or of other termination thereof."

From the time of the adoption of this paragraph of section 953a, Code of Civil Procedure, until the year 1927, the question of whether notice to the clerk to prepare a transcript on appeal had or had not been given in time, was being presented to appellate courts and the determination of whether the notice required by the section to prepare a transcript had been given on time was always clouded with the uncertainty as to whether the appellant had or had not given notice or whether notice was waived of the entry of the judgment, order or decree from which the appeal was being taken. In order to settle this vexed question, the Legislature, by an act approved April 4, 1927 (St. 1927, p. 86), added a new section to the Code of Civil Procedure, to be known as section 953d, which reads as follows:

> "Any notice of entry of judgment, or of order granting or denying a motion for a new trial, required by the provisions of section 650, section 659 or section 953a of this Code, must be given in writing, unless written notice thereof be waived in writing or by oral stipulation made in open court and entered in the minutes."

By this section of the Code of Civil Procedure all the motions heretofore decided on the presumption that the appellant had had notice of the entry of judgment or of the order appealed from are rendered inapplicable. A definite method is now provided by which appellate courts are to be governed in ascertaining whether a moving party has placed himself in position to terminate the litigation by having the appeal of the opposite party summarily dismissed. In order to fix the time within which the notice to prepare the transcript, as provided in section 953a of the Code of Civil Procedure, the successful party in the trial court must comply with section 953d of the same Code and see to it that all uncertainty in this particular has been removed. The last sentence of rule 6 governing this court to which attention has been called requires that the moving party shall present to us proof that the time to give notice to prepare a transcript on appeal has expired. This brings us to a consideration of the three paragraphs set forth in the clerk's transcript, made the basis of the appellant's motion. There is nothing in the clerk's certificate showing that the notice required to be given by the last sentence of section 953a of the Code of Civil Procedure has been given, nor it there anything in the clerk's certificate showing that the provisions of section 953d of the Code of Civil Procedure have been complied with. The certificate does not show that any notice has been given in writing, nor does it show the entry of any oral stipulation made in open court and entered in the minutes thereof, or otherwise, as required by said section. The conclusion in the first paragraph of the clerk's certificate that "the time for presenting and filing same has long since passed" is not a statement of the facts required to be set forth by section 953d, Code of Civil Procedure. It is merely the conclusion of the certifying clerk, whose attention may not have been called to the recent act of the Legislature. Whether the time has or has not expired within which the transcript on appeal may be prepared in this case has not been made to appear either by the clerk's certificate or by any affidavit, and not having been made to appear, as required by the rules of this court and the sections of the Code to which we have referred, it follows that the respondent's motion to dismiss the appeal herein must be denied, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

94 Cal. App. 88

OLDHAM v. MOODIE. (Civ. 3552.)

District Court of Appeal, Third District, California. Sept. 21, 1928.

1. Action 🔑6—Complaint for declaratory judgment, alleging controversy over rights of parties and praying they be adjudged, sufficiently stated cause of action (Code Civ. Proc. § 1060 et seq.).

Though complaint alleged some matters unnecessary to action for declaratory judgment seeking determination of rights of parties in certain bonuses and royalties accruing under agreement, where the prayer therein asked that rights be adjudged, it sufficiently stated cause of action, in view of Code Civ. Proc. § 1060 et seq., and hence there was no prejudicial error in overruling defendant's demurrer.

2. Assignments 🔑92—Assignee of proportionate interest in matter being litigated by signing compromise, under which assignor took less than entitled to, ratified it.

Where plaintiff, during prior litigation of certain rights under a prospecting permit, assigned a one-eighth interest of his claimed right to defendant and the parties to the prior litigation compromised by plaintiff taking a lesser interest in prospecting permit than he was entitled to, defendant in subsequent action to determine controverted interests therein *held* to have ratified compromise by signing it.

3. Assignments 🔑92—Assignment of part interest in matter of litigation implied right of compromise, requiring only that plaintiff act in good faith towards assignee.

Where plaintiff, in action to obtain declaratory judgment determining his right in and to certain bonuses and royalties accruing under agreement, assigned to defendant a one-eighth interest in his right to prospecting permit during prior litigation with another party, and in concluding prior suit compromised so that his interest therein was decreased by one-eighth, the assignment to plaintiff during litigation implied the right of compromise on the part of plaintiff, requiring only that he act in good faith towards assignee.

4. Assignments 🔑92—Assignee of proportionate interest in prospecting permit, assigned during its litigation subsequently to another assignment, having signed compromise, cannot complain that assignor had no right to make prior assignment.

In action to determine controverted interest of plaintiff and defendant in prospecting permit, where, during prior litigation, plaintiff assigned to a third party a one-half interest in whatever right he had to it and then subsequently assigned to defendant a one-eighth interest in whatever interest he had, *held*, that defendant by signing compromise ending prior litigation, under which plaintiff took a lesser interest than he was entitled to, thereby approved the final arrangement and cannot complain that at time of first assignment plaintiff had no interest in subject-matter of litigation for reason that he had not received assignment from party granted original permit, as provided by Department of Interior Oil and Gas Regulations, § 12½.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by S. C. Oldham against A. R. Moodie. Judgment for plaintiff, and defendant appeals. Affirmed.

Rowen Irwin, Rollin Laird, and Wiley & Harvey, all of Bakersfield, for appellant.

Siemon & Garber, of Bakersfield, for respondent.

WEYAND, Justice pro tem. The plaintiff brought this action under sections 1060 et seq., Code of Civil Procedure, to obtain a declaratory judgment, determining his rights in and to certain bonuses and royalties accruing under an agreement entered into between Matie G. Jones and others, and the Federal Drilling Company, a corporation.

[1] A controversy had arisen between the plaintiff herein, S. C. Oldham, and A. R. Moodie, the defendant in this action, as to the share each should have in said bonuses and royalties. The controversy between the said parties grew out of certain dealings solely between the parties to this action, and did not involve other owners in the venture.

Judgment was rendered by the superior court of Kern county declaring that plaintiff owned a 21/128 interest in said profits, and that defendant owned a 3/128 interest therein. From this judgment the defendant appeals.

Appellant argues to some extent that the trial court erred in overruling the demurrer of defendant. While the complaint alleges some matters perhaps unnecessary to an action for declaratory relief, yet as we understand section 1060 et seq., Code of Civil Procedure, sufficient facts are stated to show that an "actual controversy relating to the legal rights and duties of the respective parties" exists between the parties, and growing out of "written instruments." The prayer asks that these rights be adjudged by the court. That is all that is really essential to be averred in such a proceeding. We believe no prejudicial error was committed by the trial court in overruling defendant's demurrer.

[2] The evidence discloses that on or about April 6, 1923, the plaintiff herein was involved in a controversy with one Mrs. Matie G. Jones, as to his rights in a prospecting permit issued by the United States government covering a section of government land near Taft, in Kern county, Cal. This permit was being held in the name of Mrs. Jones or one W. L. Hopkins, and plaintiff herein, Oldham, claimed a one-half interest therein. At or about the last-named date said Oldham had instituted suit against Mrs. Jones to obtain legal recognition of his rights in the prospecting permit.

On April 6, 1923, said Oldham gave to Kaye and Siemon, his then attorneys, an assignment of a one-half interest in and to any interest he then had in and to the said permit. As the litigation with Mrs. Jones progressed, Oldham needed funds to press the same, and on the 27th day of November, 1923, Oldham obtained from the defendant herein the sum of $500, and gave to the defendant herein an assignment of a one-eighth interest in any interest Oldham had in the land covered by the permit.

This controversy between Oldham and Mrs. Jones terminated in a judgment being rendered by the superior court of Kern county adjudging that the plaintiff herein, Oldham, was the owner of a one-half interest in the permit aforesaid. Matie G. Jones, being dissatisfied with that judgment, appealed to the Supreme Court of this state. While that appeal was pending, a compromise was effected whereby it was stipulated that the judgment rendered was to be disregarded; Oldham was to be conveyed by Mrs. Jones a three-eighths interest in the permit. The lands involved were to be leased to the Federal Drilling Company, and they were to prospect the same for oil, gas, and like products. This compromise was effected on September 8, 1924, and the agreement with the Federal Drilling Company was dated on the same day.

On September 30, 1924, plaintiff Oldham gave to Kaye and Siemon another assignment of one-half of the three-eighths interest he received from Mrs. Jones. This assignment recited that the settlement was had with Mrs. Jones, and by said settlement the plaintiff herein had received a three-eighths interest in and to the prospecting permit from Mrs. Jones, and it further made the Oldham-Jones agreement a part of said assignment, by definite reference thereto. Plaintiff Oldham was permitted to testify that this assignment was simply to confirm the assignment of April 6, 1923. The assignment given by plaintiff herein to Kaye and Siemon on April 6, 1923, was not recorded. The dispute between the parties herein hinges upon the meaning of the several assignments, and as to whether or not the defendant knew of the existence of the April 6th assignment to the attorneys of Oldham. The trial court held that defendant Moodie well knew at the time he took an assignment from Oldham on November 27, 1923, that said Oldham had, prior to the execution of the Moodie assignment, made a transfer of one-half of his interest to said attorneys. Plaintiff Oldham when on the stand as a witness testified to the effect that he told Moodie, before making the assignment to Moodie, that he had already given to his attorneys an agreement "on a fifty-fifty proposition," and that he had signed "an ordinary agreement to that effect." Oldham further testified that he told Moodie as to his claims then in litigation with Mrs. Jones. While the answer of defendant Moodie denies knowledge on his part of the existence of the prior assignment to the attorneys, neither Moodie nor any other person testified as to this want of knowledge. It may be well in this connection to observe that the answer of Moodie also denies that he was ever consulted as to the terms of the settlement between Oldham and Mrs. Jones. As to that denial we can but say that Moodie was in error in such part of his answer. The fact was proven, and in no way contradicted, that upon the execution of the Jones et al.-Federal Drilling Company contract, the written consent was had of Moodie and all other owners to its execution. The said drilling company contract recited on its face the fact that litigation had been pending between Oldham and Mrs. Jones; that judgment was rendered in favor of Oldham, adjudging that he owned a one-half interest in the permit; that an appeal had been taken; and that pending the appeal a compromise was effected whereby Oldham was to receive a three-eighths interest in the permit. The consent agreement was worded as follows:

> "Agreement of Consent. For and in consideration of the sum of one ($1.00) dollar, receipt whereof is hereby acknowledged, we the undersigned, hereby consent to and agree to be bound by the terms and conditions of that certain agreement dated the 8th day of September, 1924, by and between Matie G. Jones et al., as first parties, and Federal Drilling Company, as second party, a copy of which is attached hereto.
> "[Signed by] W. W. Kaye.
> "Alfred Siemon.
> "George Appell.
> "F. H. Kaufman.
> "A. R. Moodie.
> "Pierson M. Hall."

Defendant Moodie, by his answer, made a plea of estoppel as against Oldham, in that as Oldham effected a compromise of the litigation between himself and Matie G. Jones without the consent of defendant, and thereby received three-eighths of the property involved instead of one-half thereof, that plaintiff is debarred from now asserting that his interest is less than one-half of the property. In other words, appellant contends that if respondent Oldham compromised by accepting one-eighth thereof less than he was entitled that this reduction should be taken from the ultimate share coming to said Oldham.

The trial court expressly found that defendant was not abridged or limited by any compromise or settlement made by Oldham, without the knowledge or consent of Moodie, but that defendant Moodie ratified and consented to the said compromise.

We believe the trial court decided correctly upon the theory that appellant consented to that compromise, but we also believe that upon the whole situation there present the decision was the only proper one for the trial court.

[3] The interests transferred by the assign-

ment of April 6, 1923, and by the assignment of November 27, 1923, were well understood by the several assignees to be interests in litigation. The nature of the transactions clearly so indicated. It is a most common transaction for one in charge of such litigation to make compromise thereof. The assignment of such rights implies a right of compromise on the part of the claimant of such rights. All that is required of the one prosecuting the claim is that he act in good faith towards his assignee. Here no fraud or bad faith was claimed as against respondent Oldham.

[4] Appellant Moodie also makes the contention that because the agreement of Matie G. Jones, S. C. Oldham, et al., with the Federal Drilling Company, and dated September 8, 1924, recites as a fact that one W. F. Hopkins was owner of the prospecting permit, and that not until June 21, 1923, was his transfer to Mrs. Jones approved by the proper officers of the Interior Department of the United States, therefore on April 6, 1923, the plaintiff herein had no interest in the permit or the land covered thereby to transfer.

Appellant cites section 12½ of the oil and gas regulations issued by the Department of the Interior in support of this claim that on April 6, 1923, Oldham had no interest in the permit that he was privileged to assign. This section provides as follows:

> "12½ Assignment of Permits—Permits, after being awarded, may be assigned to qualified persons or corporations upon first obtaining consent of the Secretary of the Interior. Mere rights to receive permits are not assignable."

It must be very plain that although the prospecting permit was on April 6, 1923, in the name of W. F. Hopkins, and on June 21, 1923, consent was given for a transfer to the name of Matie G. Jones, yet during all that time the actual equitable ownership of the property well might have been in Mrs. Jones and Oldham, in equal shares.

The court in Oldham v. Jones adjudicated all those questions; the judgment rendered in said case was only changed as to the amount of interest Oldham was finally to receive, and appellant by his signature to the consent agreement approved that final arrangement.

We cannot, therefore, agree with appellant's contention. As above noted, the trial court decided that Oldham did own a one-half interest. Long before that judgment was rendered said Hopkins had transferred to Mrs. Jones. The compromise based on that judgment was fully set forth in the drilling company agreement, and defendant consented thereto. There is nowhere any showing that Oldham could not, or did not, receive an assignment of an interest in the prospecting permit. Indeed, in the suit of Oldham v. Jones it might well have been a contention of Oldham that by fraud or mistake his name was improperly omitted from the application for the permit, although he was rightfully to have been named as an applicant for such permit, and to have a legal interest therein. The judgment in Oldham v. Jones puts to rest all such questions.

We see no necessity to cite authority in support of our views.

The judgment of the lower court will be affirmed.

We concur: FINCH, P. J.; HART, J.

WELSBACH CO. v. STATE et al.★

(Civ. 6099.)

District Court of Appeal, First District, Division 1, California. Sept. 25, 1928.

Rehearing Denied Oct. 25, 1928. Hearing Granted by Supreme Court Nov. 22, 1928.

1. States ⟹191(1)—Corporation's action to recover license tax held not one on "claim on contract" which statute authorizes to be brought against state (Corporate License Act, § 3; St. 1893, p. 57; Const. art. 20, § 6).

Action by foreign corporation to recover license taxes paid to state under protest pursuant to Corporate License Act, § 3, and amendments and supplements thereto (Deering's Gen. Laws 1923, Act 1743), which statute was held unconstitutional, *held* not action on a "claim on contract" within St. 1893, p. 57, enacted pursuant to Const. art. 20, § 6, authorizing actions against state by persons having claims on contract.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Claim on Contract.]

2. Contracts ⟹5—There is clear distinction between "genuine" or "true contracts" or "contracts implied in fact," and "quasi" or "constructive contracts" or "contracts implied in law."

There is a distinction between "genuine" or "true contracts" or "contracts implied in fact," which are considered in and founded upon intention and will of parties to be bound thereby, and so-called "quasi" or "constructive contracts" or "contracts implied in law," which are in no sense contracts and have none of fundamental elements thereof, but on contrary are mere fictions of law depending for their legal existence not upon the assent of parties sought to be bound but alone upon equitable principles out of which law fashions an obligation and imposes the same upon a party irrespective of fact that he has not assented to it and in most cases has expressly dissented therefrom.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Genuine Contract; True Contract; Contracts Implied in Fact; Quasi Contract; Constructive Contract; Contracts Implied in Law.]

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

★Superseded by opinion of Supreme Court, 275 P. 436.

Action by the Welsbach Company against the State and others to recover taxes. Judgment of dismissal, and plaintiff appeals. Affirmed.

A. A. Sanderson, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for respondents.

Gaylord & Smith, of San Francisco, amici curiæ.

David Livingston, of San Francisco, amici curiæ in behalf of appellant.

KNIGHT, Acting P. J. During the years 1926 and 1927 appellant, a foreign corporation organized and existing under the laws of New Jersey, paid license taxes to the state of California, under protest, which were imposed and collected pursuant to the provisions of section 3 of the Corporate License Act of California, enacted in the year 1915, and the several subsequent acts amendatory and supplementary thereto. Deering's General Laws 1923, Act 1743, p. 548. Subsequently, in March, 1927, the Supreme Court of this state, in conformity with certain decisions of the Supreme Court of the United States construing similar acts of other states, declared those portions of the California Corporate License Act under the authority of which said taxes had been imposed and collected to be unconstitutional, it being held that the same were violative of the commerce clause of and the Fourteenth Amendment to the Constitution of the United States. Perkins Manufacturing Co. v. Jordan, 200 Cal. 667, 254 P. 551. Thereupon appellant brought this action against the state of California, its secretary of state, and state treasurer to recover the taxes so paid, amounting to $1,100. The complaint contained three counts. In two of them appellant set forth the particular circumstances under which said taxes were paid; and the third was a common count in assumpsit for money had and received. Respondents interposed a demurrer to the complaint and to each cause of action set forth therein upon the grounds that the same did not state facts sufficient to constitute a cause of action and that the court had no jurisdiction of the parties or the subject of the action. The demurrer was sustained with leave to amend, but appellant declined to amend and judgment of dismissal was entered, from which judgment this appeal has been taken.

[1, 2] The basic legal principle that a state, being deemed in law a sovereign, cannot be sued without its consent, has been modified in this state by the Constitution wherein it provides that suits may be brought against the state in such manner and in such courts as may be directed by law (section 6, art. 20, Const. of Cal.); and pursuant to the authority thus granted the Legislature of this state in 1893 enacted a statute providing in part as follows:

> "All persons who have, or shall hereafter have, *claims on contract* or for negligence against the state not allowed by the State Board of Examiners, are hereby authorized, on the terms and conditions herein contained, to bring suit thereon against the state in any of the courts of this state of competent jurisdiction, and prosecute the same to final judgment." Stats. 1893, p. 57. (Italics ours.)

The substance of appellant's contention here is that the demand it is suing upon constitutes a claim on contract within the meaning of said statute, and therefore is one upon which recovery may be had thereunder. In a previous case involving the construction of said statute it was held that when an action is brought against the state thereunder "the allegations of the complaint should aver such facts as show distinctly *an authorized* contract." Melvin v. State, 121 Cal. 16, 53 P. 416. (Italics ours.) Nowhere in the complaint in the present action is it alleged nor does appellant claim that the state ever entered into any contractual relationship with reference to a refund of said taxes; nor is it contended that there is any legislative act imposing upon the state an obligation to surrender money collected under a statute subsequently declared unconstitutional; but appellant argues that the term "claims on contract" as employed in the act of 1893 should be construed to include any equitable demand enforceable as an implied contract, and that since the action herein is one to recover taxes paid to the state under protest pursuant to the provisions of void statute, it is in effect an action based upon an implied contract, and therefore may be maintained against the state on a common count in assumpsit for money had and received.

The right of a foreign corporation to recover from the state corporate taxes involuntarily paid pursuant to the Corporate License Act preceding the act of 1915, and which was also declared unconstitutional, was the question considered in the case of McClellan v. State of California, 35 Cal. App. 605, 170 P. 662; and it was there held that without the consent of the state to bring such an action it could not be maintained, the court saying:

> "There is not now, nor has there ever been, any statute of this state authorizing any one to institute against the state, or any of its officers, an action for the recovery of any fee or sum of money of the character here involved."

But, continuing, the court said:

> "The only statute permitting the institution of such suits is the act of February 28, 1893 (Stats. 1893, p. 57). This statute authorizes actions against the state by 'all persons who have, or shall hereafter have, claims on contract or for negligence against the state not allowed by the state board of examiners.' This action

is admittedly neither an action on contract nor because of negligence, but counsel for appellant claims his right of action has foundation irrespective of any permissive act," etc.

Respondents assert that the decision in that case is determinative of this action, but appellant contends that notwithstanding the action there was similar in its nature to the one here, the language of the decision shows that the case was tried and decided on a theory foreign to the issue of the application of the provisions of the statute in 1893, and that therefore the decision in that case is not conclusive of the present action.

Aside, however, from the question as to whether the decision in that case is determinative of the present action, we are of the opinion that the nature of the demand here sued upon does not come within the purview of the statute of 1893, because obviously there is no contractual relationship involved in the transactions pleaded in the complaint, which we believe must exist before the remedy granted by the statute may be invoked. It may be stated generally in this connection that the law of contracts makes a clear distinction between "genuine" or "true" contracts, or "contracts implied in fact" as they are sometimes called, that is, engagements which are conceived in and founded upon the intention and will of the parties to be bound thereby, and so-called "quasi" or "constructive" contracts, or "contracts implied in law," as they are sometimes referred to, which, as will appear from the authorities hereinafter cited, are in no sense contracts and have none of the fundamental elements thereof, but, on the contrary, are mere fictions of law depending for their legal existence, not upon the assent of the party sought to be bound, but alone upon equitable principles out of which the law fashions an obligation and imposes the same upon a party irrespective of the fact that he has not assented to it and in most cases has expressly dissented therefrom. Admittedly, appellant's demand belongs to the latter class, and, therefore, being entirely destitute of any contractual element, cannot be said to constitute such a "claim on contract," as was contemplated by the Legislature in the enactment of said statute.

The distinction above mentioned is clearly pointed out by Professor Keener in his work on Quasi Contracts, wherein he states that the treatment of quasi contracts in the same class with express contracts and contracts implied in fact "is not only unscientific, and therefore theoretically wrong, but is also destructive of clear thinking, and therefore vicious in practice." Continuing, he says:

> "It needs no argument to establish the proposition that it is not scientific to treat as one and the same thing, an obligation that exists in every case because of the assent of the defendant, and an obligation that not only does not depend in any case upon his assent, but in many cases exists notwithstanding his dissent. And yet with this wide difference between simple contracts and quasi contracts, the latter are generally treated today as a species of simple contract. * * * A true contract * * * exists as an obligation, because the contracting party has *willed*, in circumstances to which the law attaches the sanction of an obligation, that he shall be bound. Had he not so willed, he would not be under a contractual obligation. This statement is as true of a contract implied in fact as of an express contract. Indeed the division of simple contracts into 'express contracts' and 'contracts implied in fact' does not involve a consideration of the principles of contracts at all. In the case of a contract implied in fact, as much as in the case of an express contract, the plaintiff must prove that the defendant either made or accepted an offer which resulted in a promise on the defendant's part, and that the promise was not only in fact made, but that a sufficient consideration was given therefor. If the defendant gave in words a promise containing all the terms of the contract which the plaintiff claims that he made, for a consideration expressly requested in words by him, in exchange therefor, then the contract is an express contract. * * * The terms, 'express contracts' and 'contracts implied in fact,' are used, then, to indicate not a distinction in the principles of contract, but a difference in the character of the evidence by which a simple contract is proved. The source of the obligation in each case is the intention of the parties. The term 'contract implied in law' is used, however, to denote, not the nature of the evidence by which the claim of the plaintiff is to be estabished, but the source of the obligation itself. It is a term used to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent."

The learned author then quotes from Maine on "Ancient Law," wherein it is said that:

> It is an error to identify quasi contracts with implied contracts, "for implied contracts are true contracts which quasi contracts are not. In implied contracts, acts and circumstances are the symbols of the same ingredients which are symbolized, in express contracts, by words; and whether a man employs one set of symbols or the other must be a matter of indifference so far as concerns the theory of agreement. But a quasi contract is not a contract at all. The commonest sample of this class is the relation subsisting between two persons, one of whom has paid money to the other through mistake. The law, consulting the interests of morality, imposes an obligation on the receiver to refund; but the very nature of the transaction indicates that it is not a contract, inasmuch as the convention, the most essential ingredient of contract is wanting." Keener on Quasi Contracts, pp. 3 to 5.

In a later treatise on the subject of quasi contracts, Professor Woodward asserts that the persistent refusal to observe the essential dissimilarity of the two obligations "has resulted in confusion and error, and in many cases has wrought serious injustice"; and, continuing, he says:

> "It cannot be too strongly emphasized, therefore, that quasi contracts are in no sense genuine contracts. The contractor's obligation is one that he has voluntarily assumed. He is bound because he has made a promise or undertaking that the law will enforce. And the only difference between an express contract and a contract implied in fact is that in the former the promise or undertaking is verbal, while in the latter it is an implication of the promisor's conduct. But quasi contractual obligations are imposed without reference to the obligor's assent. He is bound, not because he has promised to make restitution—it may be that he has explicitly refused to promise—but because he has received a benefit the retention of which would be inequitable." Woodward on Law of Quasi Contracts, sec. 4.

One of the earlier cases supporting the text above quoted is Hertzog v. Hertzog, 29 Pa. 465, cited in County of San Luis Obispo v. Gage, 139 Cal. 398, 73 P. 174, which will be hereinafter more particularly referred to. There the Supreme Court of Pennsylvania, speaking through Mr. Justice Lowrie, said:

> "There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed, from circumstances as really existing, and then the contract, thus ascertained, is called an implied one."

And then, after referring to that class of obligations created by law, not by act of the parties, the decision continues:

> "The latter class are merely *constructive* contracts, while the former are truly implied ones. In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty."

The distinction is also noted in People ex rel. Dusenbury v. Speir, 77 N. Y. 144, wherein the court says:

> "There is a class of cases where the law prescribes the rights and liabilities of persons who have not in reality entered into any contract at all with one another, but between whom circumstances have arisen which make it just that one should have a right, and the other should be subject to a liability similar to the rights and liabilities in certain cases of express contract. Thus, if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass, such money may be recovered back, for the law implies a promise from the wrongdoer to restore it to the rightful owner, although it is obvious that this is the very opposite of his intention. Implied or constructive contracts of this nature are similar to the constructive trusts of courts of equity, and in fact are not contracts at all."

Bearing in mind, therefore, the well-established principle of jurisprudence heretofore referred to that a state may not be sued without its consent, it becomes evident, we think, that when the Legislature in 1893, by statute, relaxed said principle by consenting that the state be sued upon "claims on contract," it contemplated giving its consent to be sued only on that class of contracts to which the state had consented to become a party, and, so far as this phase of the statute is concerned, intended to restrict the remedy granted therein to claims arising out of genuine or true contracts; in other words, to conventions which the state had voluntarily entered into with the intention of being bound thereby.

It is of course conceded that, as applying to individuals, the doctrine of the enforcement of quasi or constructive contracts has received recognition in this state, as in others; but we are of the opinion that until the Legislature by statute expressly declares that as against a sovereign a recovery may be had on that class of demand, the character of action here instituted cannot be maintained. The state of Indiana has such a statute. It reads as follows: "That any person or persons having or claiming to have a money demand against the state of Indiana, arising at law or in equity, out of contract express or implied, * * * may bring suit against the state therefor. * * *" Burns' Ann. St. 1908, § 1485. And consequently in the case of State v. New York Mutual Life Ins. Co. (175 Ind. 59) 93 N. E. 213, 42 L. R. A. (N. S.) 256, it was held that the terms of that act included quasi contracts or contracts implied in law of the kind here sued upon. But a comparison of the terms of the Indiana statute with those of our own clearly demonstrates that if the Legislature of this state had intended to extend the operation of its statute to cover not only such contracts as the state itself might make, but also those which the courts, by fiction of law, might make for it, the language of our statute, like that of the statute in Indiana, would surely have been made broad enough to indicate such intention; and the fact that a statute of limited meaning was adopted may be taken, we think, as a clear manifestation of a purpose to exclude from its operation the class of demands here sued upon.

Moreover, whenever the statute of 1893 has been brought before the Supreme Court for interpretation in relation to transactions different from the one now under consideration, the language employed by the court in dealing with the subject fairly indicates, we believe, that the construction we have placed upon the statute is the proper one. For instance, in the case of County of San Luis Obispo v. Gage, supra, which was an action instituted by the county against the state to recover money paid by the county for the maintenance of orphans, half orphans, and abandoned children pursuant to the terms of a statute enacted in 1880 (Stats. 1880, p. 13), the decision in favor of the county was placed upon the ground that the state, by virtue of the terms of said act, had "in effect promised to each county in the state that if it should thereafter maintain and support persons of a class mentioned in the act, the state would appropriate and pay to such county the sums of money therein stated. This," the Supreme Court said, "was the equivalent of an offer upon condition, and upon the performance of the condition by any county the offer became a promise, and binding as such upon the state"; and therefore it was held that the liability sued upon was contractual, the court saying, "Contracts may be made or evidenced by a statute, and by conduct ensuing thereupon, as well as by other means or evidence," and that money accruing under such contracts was recoverable in actions in assumpsit unless some other remedy was expressly provided. It will be observed, therefore, that the case was decided upon the theory of a genuine contract having been entered into by the state, that is, one having its source in the consent of the state, expressed through the medium of a statute, to be bound thereby. But in so deciding the court was careful to differentiate genuine contracts from so-called quasi contracts or contracts implied in law such as we have here, for with respect to the latter the court said:

> "It is not necessary to decide, and we do not wish to be understood to hold, that the act of 1893 is to be construed to mean that an action may be maintained against the state in every case where an action of assumpsit would lie at common law. There were many cases where assumpsit was allowed, although there was in fact no contract made, nor any dealings whatever between the parties, the law implying a contract out of necessity, and because without such fictitious creation none of the legal forms of action would apply and the party would be remediless. There is a clear distinction between such a case and one where the making of a contract or agreement is implied, as a matter of evidence. Hertzog v. Hertzog, 29 Pa. 465. *There might be strong reasons in favor of the proposition that the Legislature, in referring to 'claims on contract,' meant real contracts, not fictitious ones.* Melvin v. State, 121 Cal. 23 (53 P. 416)."

Again, in the case of Melvin v. State, supra, wherein the court declined to apply the provisions of the statute of 1893 to a case of negligence, it was said with reference to their applicability to cases of contracts:

> "* * * The allegations of the complaint should aver such facts as show distinctly an *authorized* contract." (All italics ours.)

The only inference which can be reasonably drawn from the word "authorized" as there used is that the court meant such contracts as had their inception in the will of the state to be bound thereby.

The case of Chapman v. State, 104 Cal. 690, 38 P. 457, 43 Am. St. Rep. 158, upon which appellant seems to rely to sustain its position, is not in conflict with the two foregoing cases, nor is it out of harmony with the interpretation we have given the statute. There the state, through its board of harbor commissioners, acting under the express authority of statute, engaged in the business of a wharfinger, and as such entered into a contract of bailment with plaintiff's assignor. The personal property which was the subject of the contract of bailment was destroyed as the result of the alleged negligence on the part of the state's agents, and an action was brought against the state to recover the value of the property. It was held, first, that under the law of bailments a wharfinger was bound by his contract to return or deliver the goods, and that for a negligent loss of the same he was liable for a breach of contract, enforceable at common law by an action in assumpsit and under our practice by the owner or the consignee in an action upon the contract for damages sustained by reason of such negligence; secondly, that since the state had voluntarily engaged in the business of a wharfinger under the authority of law and as such had entered into a contract of bailment "it was bound thereby to the same extent as a private person engaged in conducting the business of a wharfinger would be under a similar contract." It will be seen, therefore, that in that case the liability thus fastened upon the state arose out of a genuine or true contract voluntarily entered into by the state for the bailment of the private personal property, and that such liability was in no manner identified with the class of obligation here involved. And in the case of County of Alameda v. Chambers, 35 Cal. App. 537, 170 P. 432, the court, in giving its interpretation of the effect of the decisions in Chapman v. State, supra, and Melvin v. State, supra, said, with reference to the point at issue here, that the principle that the state is bound by the same rules as an individual in measuring its liability on a contract "necessarily presupposes a valid contract with the state."

The recent cases of Great Northern Ry. Co. v. State of Washington (Wash.) 267 P. 506, and Badger v. Crockett (Utah) 259 P. 921, cited to us by amicus curiæ in support of appellant's theory herein, do not touch the point at issue here. Both involved only the constitutionality of the corporate license acts of those states, and the question of the right to sue the state for a return of the taxes was not raised in either case, presumably for the reason that the plain terms of the remedial acts of those states, which are far broader and much more comprehensive than those of our statute of 1893, placed that question beyond doubt.

Under the ruling in Hartford Fire Ins. Co. v. Jordan, 168 Cal. 270, 142 P. 839, the cause of action attempted to be stated against the secretary of state and state treasurer will not lie. As to them, also, therefore, the demurrer was properly sustained.

The judgment is affirmed.

We concur: CASHIN, J.; PARKER, Justice pro tem.

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94 Cal. App. 94

NEW YORK CLOAK & SUIT HOUSE OF LOS ANGELES v. COSTON.

(Civ. 3562.)

District Court of Appeal, Third District, California. Sept. 21, 1928.

1. Interest ⟹10—Interest held properly allowed on money loaned, where court found amounts and dates of several loans (Civ. Code, § 1914).

In action for money loaned, in which court found amounts and dates of several loans, interest was properly allowed, under Civ. Code, § 1914, as against contention that account was not stated.

2. Interest ⟹12—In action for money embezzled, plaintiff held entitled to interest on each amount from date of its conversion (Civ. Code, § 3336).

In action for money embezzled by defendant, in which court found amount of each embezzlement and date thereof, plaintiff *held* entitled to interest on each amount from date of its conversion, under Civ. Code, § 3336, as against contention that account was not stated.

3. Parties ⟹11—Plaintiff, suing for moneys which defendant collected and failed to deliver, held trustee of other corporations having same stockholders and officers, authorizing it to maintain action for money due them (Code Civ. Proc. § 369).

In action for money collected by defendant, which he failed to deliver to plaintiff, plaintiff *held* to be trustee of other corporations having same stockholders and officers and operated and managed in connection with plaintiff and from plaintiff's place of business, so as to be entitled to maintain action for moneys due such other corporations from defendant, under Code Civ. Proc. § 369.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action for money had and received by the New York Cloak & Suit House of Los Angeles against John R. Coston. Judgment for plaintiff, and defendant appeals. Affirmed.

John B. Haas and John D. Home, both of Los Angeles, for appellant.

H. W. Kidd and W. O. Schell, both of Los Angeles, for respondent.

FINCH, P. J. The court found that the defendant was indebted to the plaintiff in the sum of $600, with interest thereon, for money loaned to him by the plaintiff, and in the further sum of $1,498, and interest thereon, on account of moneys collected by him for the plaintiff and which he failed to deliver to the plaintiff. Judgment was entered accordingly and the defendant has appealed.

The evidence fully supports these findings and the appellant makes no contention to the contrary. The defendant was an employee of the plaintiff and, among other things, it was his duty to deliver merchandise to purchasers and collect the price thereof. He signed a written statement reading in part as follows:

"During the term of my employment with the New York Cloak & Suit House, I, with the intent to defraud, did withhold and fraudulently keep, for my own use, certain sums of money which were paid to me for and on behalf of the New York Cloak & Suit House, by customers for merchandise purchased and delivered to them. * * * I further confess that the total sum of money involved in such defalcation is an amount as to the exact total of which I have no definite knowledge, and I am willing to confess said total to be whatever amount may be determined by the proper authorities and auditors after investigation covering the period of my employment at the New York Cloak & Suit House."

[1, 2] Appellant first contends that the court erred in allowing interest on the money loaned to him and that embezzled by him on the ground that "neither of the accounts were stated." The court found the amounts and dates of the several loans and, nothing to the contrary appearing, it is presumed that the loans were made upon interest. Civ. Code, § 1914. The court also found the amount of each embezzlement and the date thereof. The plaintiff is entitled to interest on each such amount from the date of its conversion. Civ. Code, § 3336.

[3] The evidence shows that the Paris Cloak & Suit House and the Palais de Mode, corporations, have the same stockholders and officers as the plaintiff and are operated and managed in connection with the plaintiff and from the plaintiff's place of business. The defendant had no direct transactions with these corporations, but some of the collections for which he failed to account were for merchandise sold by them. The defendant was not employed by them, but by the plaintiff, which acted for itself as well as for the other corporations. All packages from those corporations were taken to the plaintiff's store and "entered on a general sheet" and then

delivered by its employees to the Coston Delivery Service, operated by the defendant. All collections for sales accounted for by the defendant were turned in to the plaintiff's cashier and were then credited on its books to the respective corporations which had made the sales. The court found that the plaintiff acted as a trustee for the other corporations and was to hold the moneys collected for them as their trustee. Appellant contends that the foregoing facts do not show that the plaintiff was such trustee and that therefore the plaintiff cannot maintain this action in so far as it involves moneys due the other corporations. There is no merit in the contention. Code Civ. Proc. § 369; Harris v. Clayton, 186 Cal. 445, 449, 199 P. 776.

The answer alleges that, prior to the commencement of this action, the defendant conveyed certain property to an agent of the plaintiff to secure payment of the moneys sued for herein and that the plaintiff's only cause of action is a suit to foreclose his interest in the property so conveyed. The court found on sufficient evidence "that said conveyance was to secure * * * certain indebtedness of the defendant to the plaintiff and to said other persons, but that said conveyance had no connection with the indebtedness * * * sued upon in this action, and was to secure a different and distinct indebtedness, which said indebtedness is not involved in this action."

The judgment is affirmed.

We concur: PLUMMER, J.; HART, J.

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94 Cal. App. 109

LUNDQUIST et ux. v. LUNDSTROM et al.
(Civ. 6288.)

District Court of Appeal, First District, Division 1, California. Sept. 24, 1928.

1. Statutes ⚷=212—Presumption of change of legislative purpose arises from material change in wording of statute.

A material change in wording of a statute raises the presumption of a change of legislative purpose.

2. Statutes ⚷=212—Legislature is presumed to know meaning of language.

The Legislature is presumed to know the meaning of language.

3. Automobiles ⚷=197(5)—Mother signing license application of minor son held not liable for injury while automobile was driven by another also having license (Motor Vehicle Act 1923, §§ 58, 62[b]).

Since Motor Vehicle Act 1923 (St. 1923, p. 532) § 62(b) providing that negligence of minor licensed in "driving" motor vehicle shall be imputed to person signing application of minor for license, omitted the word "operating," contained in prior statutes, *held* that mother signing application of minor son is not liable for injuries caused while automobile was being driven by another who held a license to drive motor vehicle, as it will not be presumed that he was driving in violation of section 58, but that he was acting under authority of his own license.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by K. E. Lundquist and wife against Mrs. W. N. Lundstrom and others. A judgment was rendered for plaintiffs against all defendants except defendant named, in whose favor a judgment of nonsuit was entered, and plaintiffs appeal. Affirmed.

Culver & Nourse, of Los Angeles, for appellants.

Robert Young, of Los Angeles, for respondent.

BEAUMONT, Justice pro tem. This is an appeal from a judgment of nonsuit. The action was for damages resulting from the alleged negligent operation by defendants of an automobile in the city of Los Angeles on May 14, 1925. There are four defendants: (1) Marcus Lundstrom, a minor; (2) his mother, Mrs. W. N. Lundstrom, who signed his application for a driver's license; (3) Gilbert Talbot, a minor; and (4) his mother, Alma Talbot, who signed her son's application for an operator's license. Marcus Lundstrom owned the automobile, but at the time of injury to plaintiff Mrs. Lundquist defendant Gilbert Talbot was driving. This was with the consent of the owner, who was seated in the machine. As the automobile approached a street intersection, Mrs. Lundquist and her daughter were attempting to cross the street in the course of the approaching machine. They were coming toward the path of the automobile from the right. The driver, Talbot, according to his own statement, did not see them. The daughter, observing the approaching machine, returned to a place of safety on the curb. Marcus Lundstrom, observing Mrs. Lundquist in a position of danger, shouted, "Look out, there is a lady!" Talbot, the driver, thinking she was coming from the left, turned the machine to the right and struck the plaintiff, Mrs. Lundquist. Each of the above-mentioned minors held a state operator's license. Upon the resting of plaintiff's case, motion for nonsuit was made on behalf of Mrs. Lundstrom on the ground that, as she had been made a defendant solely because she had made application for a driver's license for her son, and the evidence showed conclusively that her son was not driving the automobile at the time the injury occurred, no liability attached to her. The motion was granted. A verdict was rendered for plaintiff against all defendants except Mrs. Lundstrom, in whose favor a judgment of nonsuit was entered.

In Bosse v. Marye, 80 Cal. App. 109, 250 P. 693, Claudine Spreckels, a minor, had been issued, upon the written request of her father, a license to operate a motor vehicle. She invited Helen Marye, also a minor, to drive her automobile. While Miss Marye, who did not hold an operator's license, was driving, the machine collided with and injured Louis Bosse, the plaintiff. In an action for damages, plaintiff alleged negligent operation of said automobile. A verdict was rendered against said Rudolph Spreckels. The court made a distinction upon appeal by Spreckels between "operating" and "driving" an automobile, saying:

> "The liability of a parent under the statute mentioned is not limited, however, to negligent acts of the minor resulting from 'driving' an automobile, the statute employing the broader term 'operating or driving,' showing a clear intention to include within such liability any negligent act which is the direct result of the privilege extended by the statute to said minor under his or her operator's license *to operate* an automobile upon a public highway. [Italics ours.] 'To drive' is defined as meaning, 'to impel the motion and quicken'; whereas 'to operate' means, 'to direct or superintend.' Century Dictionary."

The liability of the parent in Bosse v. Marye was determined upon construction of the statutes of 1919. St. 1919, pp. 223–225, § 14, amending section 24 of Motor Vehicle Act. The Motor Vehicle Act then provided that:

> "Any negligence of a minor, so licensed, in operating or driving a motor vehicle upon the public highway, whether as chauffeur or operator, shall be imputed to the person or persons who shall have signed the application of such minor for such license, which person or persons shall be jointly and severally liable with such minor for any damages caused by such negligence."

The Motor Vehicle Act of 1923, upon which the claim of liability of the parent in the present case is based, has been materially changed from that of 1919. The 1923 act (Stats. 1923, p. 531, § 58) declares that it shall be unlawful for any person to drive any motor vehicle upon any public highway unless licensed or exempt under the act. Section 62 (a) provides for the granting of the application. Section 62 (b) of the same act is as follows:

> "Any negligence of a minor so licensed in *driving* [italics ours] a motor vehicle upon a public highway shall be imputed to the person or persons who shall have signed the application of such minor for said license, which person or persons shall be jointly and severally liable with such minor for any damages caused by such negligence."

[1, 2] A change of legislative purpose is to be presumed from a material change in the wording of a statute. McCarthy v. Board of Fire Commissioners, 37 Cal. App. 495, 174 P. 402; Thomas v. Joplin, 14 Cal. App. 662, 112 P. 729. That there is a difference in the meaning of the words "drive" and "operate" is clearly pointed out in Bosse v. Marye, supra. It is elementary that the Legislature is presumed to know the meaning of language. We must assume, therefore, that it was the intention of the Legislature to limit the imputation of negligence, as provided by this act (Motor Vehicle Act of 1923) to that resulting from the actual *driving*, for the more comprehensive word "operating" is eliminated, leaving only the word "driving," instead of "operating or driving."

[3] The claim against respondent in this case is grounded on the statute. Motor Vehicle Act 1923. No liability could attach to her unless it is shown that the car which caused the injury to appellant was being driven under authority of the license of Marcus Lundstrom. The signing of the application, the issuance of the license, and the alleged driving of the motor vehicle under the authority of the license are the basis of the action against Mrs. Lundstrom, coupled, of course, with the alleged negligence and resultant injuries. It cannot be successfully claimed that the automobile was being driven under the authority of Marcus Lundstrom's license. The evidence shows that at the very time of the accident the driver himself, Gilbert Talbot, held a state license to drive a motor vehicle. It will not be presumed that he was driving in violation of the provisions of section 58 of the Motor Vehicle Act, but, on the other hand, that as a licensee of the state, he was acting under authority of his own license. We are convinced that the action of the trial court in granting the motion for nonsuit was without error. The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

BUTLER v. WILLIAMS, County Auditor.★
(Civ. 3607.)

District Court of Appeal, Third District, California. Sept. 21, 1928.

Rehearing Denied Oct. 20, 1928. Hearing Granted by Supreme Court Nov. 19, 1928.

1. Counties 🔑24—Legislature determines exclusively what county offices are required, and laws providing for additional offices are presumed to have been required by legislative determination of public convenience (Const. art. 11, § 5).

Legislature has exclusive right to determine whether public convenience demands provisions for election or appointment of county officers, and, where Legislature has provided for additional county officers, presumption is that Legislature found such offices were required by "public convenience" under Const. art. 11, § 5.

★Rehearing denied. Hearing granted. 279 P. 992.

2. Counties 🔑24—Legislative regulation of compensation of county surveyors is subject to constitutional requirement that compensation be determined in proportion to duties (Const. art. 11, § 5; Pol. Code, § 4013).

Office of county surveyor, though not specifically mentioned by Const. art. 11, § 5, is subject to requirement of such constitutional provision for reasonable remuneration for services in proportion to duties, since it is presumed that the office of county surveyor, created in each of the counties of the state under Pol. Code, § 4013, was required by public convenience, which, under constitutional provision, is ground for creation of additional offices.

3. Counties 🔑69(1)—Compensation of county officers must be reasonably commensurate with with nature and extent of labor required in proper discharge of their duties; "in proportion to duties" (Const. art. 11, § 5).

Const. art. 11, § 5, authorizing Legislature to regulate compensation of county officers "in proportion to duties," requires return to officers in sum reasonably commensurate with nature and extent of labor which they are compelled in the proper discharge of their duties to perform.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, In Proportion to Duties.]

4. Counties 🔑69(1)—To be "adequately compensated," county officers must receive reasonably substantial remuneration, not necessarily based on compensation in private employments (Const. art. 11, § 5).

To be "adequately compensated" under Const. art. 11, § 5, county officers need not be paid upon same basis as persons in private employment, but compensation must be reasonably substantial, even though it may be insufficient compared with compensation paid for services of same general character in private employment.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Adequately Compensated.]

5. Constitutional law 🔑70(1)—Legislature's determination of compensation of county officers is binding on courts, unless salary provided is utterly disproportionate to duties (Const. art. 11, § 5).

Matter of fixing and adjusting compensation of county officers under Const. art. 11, § 5, authorizing Legislature to provide for public offices and regulate compensation in proportion to duties, is exclusively the function of the Legislature, and its action in that particular is binding upon the courts unless it appears that the salary provided for any county officer is so small and so clearly disproportionate to duties as practically to amount to no compensation at all.

6. Counties 🔑69(2)—Court must find statute fixing compensation of county officers unconstitutional, where compensation is so disproportionate to duties imposed as practically to amount to no compensation (Const. art. 11, § 5).

Where compensation of county officer fixed by Legislature is so disproportionate to duties imposed as practically to amount to no compensation at all within the meaning of Const. art. 11, § 5, requiring compensation in proportion to duties, court must declare as matter of law that compensation has not been fixed in obedience to constitutional requirement.

7. Evidence 🔑29—Court takes judicial notice of fact that county surveyor's duties were not reduced prior to or contemporaneously with amendment radically reducing surveyor's salary (Pol. Code, §§ 3629, 3634, 4214–4220, and § 4236k as amended by St. 1925, p. 811; St. 1905, p. 102; St. 1907, p. 411; St. 1913, p. 514).

Court takes judicial notice of fact that duties prescribed for county surveyors by Pol. Code, §§ 3629, 3634, 4214–4220, St. 1905, p. 102, St. 1907, p. 411, and St. 1913, p. 514, were not in any respect diminished in counties of seventh class prior to or contemporaneously with 1925 amendment to Pol. Code, § 4236k (St. 1925, p. 811), by which salary of county surveyor in such counties was reduced from $2,400 per annum to $120.

8. Counties 🔑74(5)—Amendment reducing county surveyors' salaries in counties of seventh class from $2,400 to $120 per annum held void (Pol. Code, §§ 3629, 3634, 4214–4220, and § 4236k, amended by St. 1925, p. 811; Const. art. 11, § 5; St. 1905, p. 102; St. 1907, p. 411; St. 1913, p. 514).

1925 Amendment (St. 1925, p. 811) to Pol. Code, § 4236k, by providing for reduction of salary of county surveyors in counties of seventh class from $2,400 to $120 per annum, *held* to violate Const. art. 11, § 5, requiring Legislature to regulate compensation of county officers in proportion to duties, since duties of county surveyor prescribed by Pol. Code §§ 3629, 3634, 4214–4220, and St. 1905, p. 102, St. 1907, p. 411, St. 1913, p. 514, are important and burdensome and were not reduced at time of amendment.

9. Counties 🔑61—Amendment radically reducing salary of county surveyors in counties of seventh class held ineffectual to abolish office of county surveyor in particular county (Pol. Code, § 4013, and § 4236k amended by St. 1925, p. 811; Const. art. 11, §§ 4, 5).

1925 Amendment (St. 1925, p. 811) of Pol. Code, § 4236k, providing for reduction of salaries of county surveyors in counties of seventh class from $2,400 to $120 per annum, *held* ineffective and void as attempt to abolish office of county surveyor in Sacramento county, because in violation of requirement of Const. art. 11, §§ 4, 5, that system of county government established by Legislature shall be uniform throughout the state; office of county surveyor being created by Pol. Code, § 4013.

10. Counties 🔑20½—Uniform system of county government cannot be impaired by legislation authorizing difference in functions in different counties (Const. art. 11, §§ 4, 5).

Const. art. 11, §§ 4, 5, authorizing Legislature to provide for county offices and enjoining duty of establishing system of county government uniform throughout the state, requires that Legislature must establish and maintain uniform system of county government, which may not be impaired by any subsequent legislation authorizing material difference in manner of performing governmental functions in different counties.

11. Counties 🔑113(6)—County supervisors held without authority to employ private persons to perform duties of county surveyor, irrespective of county surveyor's professional capacity (Pol. Code, §§ 4013–4220; Const. art. 11, § 5).

County board of supervisors *held* without authority to transfer duties of county surveyor or to employ private persons to perform his duties, since office is created by Legislature, Pol. Code, § 4013, pursuant to Const. art. 11, § 5, and duties are prescribed by sections 4014–4220; county surveyor's professional capacity being immaterial on this point.

12. Officers 🔑77—Salaried public offices created by Legislature are not held by contract, and are subject to full legislative control, in absence of constitutional restrictions.

Salaried public offices created by Legislature are not held by contract, but, in absence of constitutional restrictions, are subject to full legislative control, and may be abolished, and duties thereof increased or salaries reduced.

13. Estoppel 🔑90(5)—One who sought election to office of county surveyor after passage of amendment reducing salary was not precluded, on ground of estoppel, from asserting unconstitutionality of amendment (Pol. Code, § 4013, and § 4236k amended by St. 1925, p. 811; Const. art. 11, § 5).

One who sought election to office of county surveyor, with knowledge that 1925 Amendment (St. 1925, p. 811) of Pol. Code, § 4236k, called for reduction of salary, was not precluded on ground of contract or estoppel from asserting that amendment reducing salary was in violation of Const. art. 11, § 5, requiring compensation in proportion to duties, since office of county surveyor is legislative office under Pol. Code, § 4013, and doctrine of estoppel is inapplicable.

14. Counties 🔑74(5)—Original statute fixing county surveyors' salaries held not repealed by invalid amendment attempting salary reduction (Pol. Code, § 4236k amended by St. 1925, p. 811).

Pol. Code, § 4236k, fixing salary of county surveyors at $2,400 per annum, was not repealed by 1925 Amendment (St. 1925, p. 811), reducing salary to $120 per annum, and original act continued to determine salary of county surveyor on account of invalidity of amendment.

Application by Drury Butler for writ of mandate to be directed to L. P. Williams, as County Auditor of Sacramento County. Writ granted.

Butler, Van Dyke & Desmond, of Sacramento, for petitioner.

Neil R. McAllister, Dist. Atty., and Alex J. Ashen, Deputy Dist. Atty., both of Sacramento, for respondent.

HART, J. This is an original application by the petitioner for a writ of mandate to compel the respondent, as auditor of the county of Sacramento, to draw his warrant in favor of the petitioner upon the county treasurer of said county for the payment to the petitioner of the sum of $3,200, the aggregate sum alleged to be due the latter from said county as and for his salary as county surveyor thereof for the period of 16 months, beginning with the 3d day of January, 1927, at the monthly salary of $200.

The petition states that the petitioner is, and at all times herein mentioned, since the 3d day of January, 1927, has been, the duly elected, qualified, and acting county surveyor of the county of Sacramento and is now entitled to receive a salary in the sum of $200 per month. It is further therein alleged that the respondent is, and has been at all the times mentioned herein, the county auditor of Sacramento county, and that that officer has refused and still refuses to draw his warrant on the treasurer of said county, directing the latter to pay the petitioner the aggregate sum above mentioned, notwithstanding (as the petition further alleges) that there are sufficient funds in the treasury with which said sum may be paid.

The return to the petition consists of an answer thereto, in which a number of defenses are set up, all involving questions of law. The respondent also filed a demurrer to the petition upon both general and special grounds.

The controversy involved in this proceeding is the outcome of the amendment by the Legislature of 1925 of so much of the County Government Act as affects the salary of the county surveyor of the county of Sacramento.

For many years down to the session of the Legislature of the year just named, the yearly salary of the county surveyor of counties of the seventh class (Sacramento being the only county in the state embraced within that class) was the sum of $2,400, payable monthly in equal amounts. At the time mentioned, or down to the legislative session of 1925, section 4236k of the Political Code (originally adopted into the County Government Act, in so far as that act applies to counties of the seventh class), provided:

> "Sacramento. Surveyor. In counties of the seventh class, the county surveyor shall receive a salary of two thousand four hundred dollars per annum; and in addition thereto all necessary expenses for work performed in the office and all necessary expenses and transportation for work performed in the field."

At the legislative session of 1925 (see Stats. 1925, pp. 811, 812) the above section was so amended as to read as follows:

> "In counties of the seventh class, the county surveyor shall receive a salary of two thousand four hundred dollars per annum; and in addition thereto all necessary expenses for work performed in the office and all necessary expens-

es and transportation for work performed in the field; provided, however, commencing January 3, 1927. in counties of the seventh class the county surveyor shall receive a salary of one hundred twenty dollars per annum, and in addition thereto all necessary expenses for work performed in the office and all necessary expenses and transportation for work performed in the field."

As pertinent to a certain proposition which, in view of the conclusion at which we have arrived upon the ultimate question involved herein, must be determined herein, it is important to bear in mind that the Legislature, as will readily be observed, re-enacted the section as it was originally introduced into the County Government Act; the amendment being merely in adding thereto the proviso which purports to reduce the salary of the surveyor to the sum of $120 per year or $10 per month.

The question presented by this proceeding is whether the compensation of the county surveyor of Sacramento county, as reduced by the amendment of section 4236k of the Political Code by the Legislature of 1925, amounts to such compensation as is contemplated by section 5 of article 11 of the Constitution. Said section, in so far as it is important in the present consideration, reads as follows:

> "The Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township, and municipal officers as public convenience may require, and shall prescribe their duties and fix their term of office. It shall regulate the compensation of all such officers, in proportion to duties, * * * and for this purpose may classify the counties by population."

[1-3] It will be noted that the only officers whose election or appointment said section expressly enjoins upon the Legislature are "boards of supervisors, sheriffs, county clerks, and district attorneys"; but it will also be noted that by the same section the Legislature is vested with the power and discretion of providing for the election of "such other county * * * officers as public convenience may require." Under the last clause of said section, the Legislature, at a very early date in the history of our state government, not only provided, as it was its bounden duty to do, for the election of those officers specifically enumerated in said section and prescribed their duties, but, in the exercise of the power or authority vested in it by said section, also provided for the election and the fixing of the duties of certain county officers not embraced within the enumerated officers for whose election or appointment such provision is so required to be made. Among these is the office of county surveyor in each of the counties of the state. Pol. Code, § 4013. The only limitation upon the exercise of that power or authority by the Legislature is that provision for the election or appointment of county officers other than those specifically named in the said section of the Constitution must be made in response only to the requirements of "public convenience." And whether, in any such case, "public convenience" demands that provision for the election or appointment of a county officer be made, is a matter entirely or solely with the Legislature to determine. It is also true that when the Legislature has made provision for the election of a county officer other than those provided for by the Constitution itself, the presumption is that the lawmaking body, upon due deliberation and consideration, found that "public convenience"—that is, the proper administration of the governmental affairs of the counties—required that such provision should be made. In consideration of the ultimate question to be determined herein, we are therefore to proceed upon the established hypothesis that "public convenience," or, in other words, the necessity for the convenient, or proper, administration of the public affairs of the counties of the state, requires that, among other officers, each of said counties shall have a county surveyor, and that such officer is no less a county officer than is any of those officers for whose election or appointment the Constitution specifically declares the Legislature shall make provision. The meaning of the language of section 5 of article 11 of the Constitution is not open to controversy, so far as is concerned the duty imposed by said section upon the Legislature to fix and adjust the compensation of county officers of the several counties of the state. It plainly means that the Legislature must fix such compensation of the several county officers of each of the counties of the state in accord with what the Legislature might find would be a reasonable remuneration for the quantum and character of the services which the duties imposed upon such officers by law would or may require, and for that purpose, since the duties of such officers may be more onerous or less onerous in some counties than in others, may classify the counties according to the population thereof. In other words, the "compensation" referred to in said section means such return or reward to such officers in consideration of the rendition of the services exacted by the duties which the law enjoins upon them in a sum reasonably commensurate with the nature and extent of the labor they are compelled, in the proper discharge of those duties, to perform. Anything materially short of such compensation in such cases would be in plain defiance of the obvious intent and purpose of section 5, article 11, of the Constitution. Gwynn v. McKinley, 30 Cal. App. 381, 389, 158 P. 1059, was a case in which the Legislature of 1913, undoubtedly through inadvertence, omitted to provide in the County Government Act, then

before the Legislature for amendment, for the payment of any compensation to justices of the peace of Placer county, or the counties of the class to which that county belonged. In 1915, the Legislature made provision for such compensation, but opposition to the payment of compensation to such officers under the act of 1915 was interposed on the ground that such payment would amount to an increase in the compensation of justices of the peace of said county after their election and during their terms of office, contrary to the terms of section 9, article 11, of the Constitution. This court held that, since the justices of the peace of said county were then allowed no compensation whatever, there could not be, within the meaning of the provision of the Constitution referred to, any "increase" by reason of the compensation provided for them by the County Government Act of 1915; that there was nothing to "increase" or add to or enlarge, as the word "increase" signifies. Among other things, it was said in the opinion:

> "The constitutional provision in question is founded in good sense and justice, but it cannot justly be so construed as to prevent the legislature from supplying a manifest ellipsis in the law—to correct an obvious inadvertence whose result, if permitted to remain uncorrected, must be to hamper in no inconsiderable degree the proper administration of public affairs under a system established by the people themselves through their Constitution. There is nothing in the Constitution implying that persons performing public services shall not be compensated and adequately compensated therefor. On the contrary, that instrument contemplates that all public servants shall be justly compensated for their public services."

[4-6] By "adequately compensated," as that phrase is used in the above excerpt, it is not to be understood that it is meant that such compensation is to be allowed county or other public officers upon the same basis or standard as that by or according to which the matter of compensation in private employments is governed or regulated, since compensation in the latter instances, for obvious reasons, might reasonably be much higher, or, in some cases, much lower, than is allowed for services of the same general kind rendered by county officers. Compensation of county officers is adequate only when it may be said to be reasonably substantial, although it may not be sufficient, considering the nature and the extent of the duties to be performed in comparison with the compensation paid for services of the same general character prevailing and regarded as reasonable in private employments. But, at any rate, it is the duty of the Legislature, under section 5, article 11, of the Constitution, to provide for a proper compensation of the county officers of the several counties of the state, based upon the nature and the volume of the duties imposed upon them by law. It is true that the matter of fixing and adjusting the compensation of such officers, "in proportion to duties," is exclusively the function of the Legislature, and its action in that particular is binding upon the courts (Longan v. Solano County, 65 Cal. 122, 125, 3 P. 463; Green v. County of Fresno, 95 Cal. 329, 332, 30 P. 544; Dougherty v. Austin, 94 Cal. 601, 28 P. 834, 29 P. 1092, 16 L. R. A. 161), unless it appears that the salary provided for any county officer is so small in amount and, therefore, so clearly disproportionate to the duties imposed upon such officer as practically to amount to no compensation at all, within the meaning and intent of section 5 of article 11 of the Constitution, in which case the courts may and, indeed, would be required to declare, as a matter of law, that the Legislature had not fixed such compensation in obedience to the requirement of section 5 of article 11 of the Constitution. In the beginning, it is well enough to say that our opinion is that the compensation provided by the Legislature in 1925 for the county surveyor of counties of the seventh class is so small, when compared to the duties which the law requires him to perform, as to reduce the action of the Legislature in so fixing such compensation to a palpable absurdity.

Let us now see what duties the law requires a county surveyor to perform in all the counties of the state. In the first place, it is to be said that a surveyor of a county must be a licensed land surveyor of the state (Pol. Code, § 4214), and he must make such surveys of county roads and perform such other engineering work as the board of supervisors may direct (Pol. Code, § 4219), from which requirements it is plainly evident that only such persons are deemed by the law eligible to hold that office as are skilled in technical work of a surveyor and that of an engineer. Under said section (4214) it is his duty to "make any survey that may be required by order of court or of the board of supervisors, or upon application of any person; keep a correct and fair record of all surveys made by him, number them in the order made, and preserve a copy of the field notes and calculations of each survey, and indorse thereon its proper number; a copy of the same, and a fair and accurate plat, together with a certificate of survey, must, upon application, be furnished by him to any person, upon payment of the fees allowed by law."

Under the section secondly named (4219) he is required to file in his office all maps and field notes of surveys made by him, and all such maps and field notes "shall thereafter be and remain the property of the county."

Section 4215 of the same Code provides:

> "Any person owning or claiming lands which are divided by county lines, and wishing to have the same surveyed, may apply to the surveyor of any county in which any part of such land is situated, and on such application being

made the surveyor must make the survey, which is as valid as though the lands were situated entirely within the county."

By section 4216, where the title to land in dispute before any court is divided by a county line, such court may require and direct the surveyor of any county in which any part of the land is situated to make a survey thereof.

Section 4217 makes it the duty of a county surveyor, when required, to aid and assist the surveyor general of the state in making surveys within the county for which he (the county surveyor) has been elected and is acting as such.

Section 4220 provides:

> "Each surveyor, immediately after making any survey, except surveys of city or town lots, must make out a copy of the field notes and plat, and transmit the same to the surveyor general, indicating plainly upon the plat at what point of any line any river or stream or county line is touched or crossed. He must communicate to the surveyor general such information concerning surveys made by him, and other matters connected with the duties of his office, as may be required."

Section 4218 requires the county surveyor to "copy, plat, or trace all maps filed for record in the office of the recorder of the county for which he shall be elected, * * * provided, however, that all maps or plats filed by a licensed land surveyor, and such other maps and plats as are filed and are thereby made a record, are exempt from the provisions of this section. The surveyor shall plat, trace, blueprint or otherwise make all county, township, road, district, and all other maps, and all assessors' block-books, for the county of which he is surveyor"

Section 3634 provides that where the county assessor is not provided by the owner with such a description of certain land as is necessary for its assessment according to law (Pol. Code, § 3629), that officer may cite such owner or owners before the superior court of the county in which such land is situated, and if such court, after due investigation, finds "that the land has not been surveyed or divided into subdivisions of six hundred and forty acres, or less, so that each part or parcel may be described by metes and bounds, then the court shall, by order duly entered in open court, direct the county surveyor to make a survey, and define the boundaries and location of said land by parcels or subdivisions not exceeding six hundred and forty acres each, and deliver the same to the county assessor."

In addition to the duties of a county surveyor prescribed and required to be discharged by the foregoing sections of the Political Code, the Legislature at its sessions of 1905 (Stats. 1905, p. 102), 1907 (Stats. 1907, p. 411), and 1913 (Stats. 1913, p. 514), has charged the county surveyor with other duties equally as important and burdensome as those set forth in said Code sections.

It is thus readily to be perceived that a county surveyor is charged by law with the performance of a multiplicity of duties, in the discharge of which skill or capacity of a superior quality is imperatively required. It is generally true that, when the Legislature has fixed the compensation of a county officer, it is to be presumed that such compensation has thus been allowed in proportion to the duties required of him; that is, that such duties are such in nature and volume as to make the compensation so fixed substantially the reasonable value of the services required by such duties. But that presumption loses its force where, as here, the "compensation" of any county officer has been fixed at a sum so small as to show upon its face that it amounts to no compensation at all, considering that the numerous, onerous, and responsible duties of the county surveyor of counties of said class remain substantially the same as they existed prior to the action of the Legislature of 1925 in adding to section 4236k of the Political Code and the proviso whereby the salary of that officer was reduced from the sum of $2,400 per annum to the sum of $120 per annum. See Code sections and other statutes hereinabove noticed. Indeed, it is practically admitted by the respondent in his answer to the petition herein that the duties of the county surveyor of counties of the seventh class as prescribed by law are now no less numerous and exacting than they were prior to the amendment of section 4236k of the Political Code in 1925. The answer alleges:

> "That the board of supervisors of the county of Sacramento does now and has ever since June 3, 1927, employed a competent engineer and other engineering assistants in drawing plans and specifications for the construction of highways, bridges, and other structures built by said Sacramento county; that by reason thereof said Drury Butler, as county surveyor, has not been called upon by the board of supervisors of Sacramento county to do any of the engineering work pertaining thereto."

[7, 8] But we take judicial notice of the fact that the duties prescribed for the county surveyor of counties of the seventh class by the Code sections and other statutes hereinabove considered were not in any respect diminished prior to or contemporaneously with the adding of the amendment to section 4236k of the Political Code, but were allowed to stand as they had stood for many years prior to the enactment of said amendment. It is therefore clearly true that the Legislature in reducing the salary of the county surveyor of Sacramento county to the sum of $120 per annum did not attempt, nor evidently even pretend, to be controlled by the mandate of section 5 of article 11 of the Constitution. The validity of this conclusion is reinforced by the consideration that in every other county in the state the compensation of the surveyor has been allowed to remain sub-

stantially as it had always been, the same ranging in amount (save in those counties in which the compensation of that officer has been adjusted upon a fee or per diem basis) from $1,000 to $6,000 per annum, fixed, presumptively, in proportion to the duties required to be performed by the surveyor of each of the counties.

Manifestly, if the salary which the Legislature of 1925, by the amendment of section 4236k, attempted to fix for the surveyor of Sacramento county were to be sustained as a valid legislative enactment, the virtual abolition of that office in counties of the class to which said county has been assigned would inevitably follow, for it would be absurd to suppose that any licensed land surveyor possessing the qualifications of a civil engineer would seek election to that office to which the Legislature had annexed, as a salary, the mere pittance of $120 per annum.

[9, 10] If it was the object of the Legislature (and apparently it was) practically to abolish the office of county surveyor in Sacramento county in adding the proviso in question to section 4236k of the Political Code, the attempt to attain that object was abortive. No proposition could be less subject to controversy than that a public office cannot be abolished in that manner. It would involve an attempt by the Legislature to do by indirection what it is inhibited by the Constitution from doing directly (Coulter v. Pool, 187 Cal. 181, 201 P. 120; Reid v. Smoulter, 128 Pa. 324, 18 A. 445, 5 L. R. A. 517; People ex rel. Burby v. Howland, 155 N. Y. 275, 49 N. E. 775, 41 L. R. A. 838), since it is true that the abolition of any of the county offices enumerated in section 4013 of the Political Code in one county only would involve an act in direct conflict with section 5 of article 11 of the Constitution, which enjoins upon the Legislature the duty of establishing a system of county governments and, further, that such system so established "shall be uniform throughout the state." That provision of the organic law "means one system applicable alike in all its parts and continuously operating equally in all the counties of the state. * * * The Legislature itself must by its own enactment establish in the first instance a system of county government uniform throughout the state, and it necessarily follows that such system, when once established, must, in so far as its uniformity is concerned, be kept intact by the Legislature and must not be impaired by any subsequent legislation authorizing in counties a material difference in the manner of performing functions of government intrusted to them." Coulter v. Pool, supra. That case involved the question of the constitutional validity of an act of the Legislature purporting or attempting to create the office of county engineer in all the counties of the state, but leaving to the board of supervisors of any of the counties the matter of determining whether any such county would adopt the provisions thereof, and if so, upon the appointment of such engineer, the office of county surveyor should be immediately abolished, if the appointee is at the time of such appointment the incumbent of the office of surveyor, or, in case he is not, then such office should be abolished upon the expiration of the term of the person then holding the same. The Supreme Court held that said legislative act was unconstitutional and void, because it would necessarily tend to interfere with that uniformity throughout the state in the system of county governments which is contemplated or required by section 4 of article 11 of the Constitution. Coulter v. Pool is important here for the reason that the opinion clearly expounds the meaning of section 4 of article 11 and shows that the Legislature cannot directly or indirectly (as is the attempt here) abolish in any one county alone any of the county offices which have been created by the Legislature and which are enumerated in section 4013 of the Political Code. Clearly, the Legislature could by direct action abolish the office of county surveyor, or it may change the name of the office to that of county engineer; but such a course in either case would have to apply to all the counties in the state.

[11] The allegation in the answer to the petition that the board of supervisors of the county of Sacramento has not called upon the petitioner to perform certain work in connection with the duties of a surveyor or engineer, but has employed a competent engineer and other engineering assistants to perform such work, is manifestly without legal force. The board of supervisors has no right or authority to transfer the duties of the county surveyor to any other officer or person. It has no right to employ a private person to perform the duties of any county officer. Severance v. Ball, Treasurer (Cal. App.) 268 P. 1068. If the county surveyor of any county is not competent by reason of a want of professional capacity or skill to discharge the duties of his office, there is an appropriate legal method for removing him and selecting for the office a person with the educational qualifications which the law and the very nature of the duties of a surveyor and engineer require in such officer.

[12, 13] The contention of the respondent, as indicated by his answer to the petition here and as urged in his briefs, that the fact that the petitioner voluntarily, or upon his own initiative, sought election to the office of county surveyor of Sacramento county with full knowledge that section 4236k had long prior thereto been so amended as to reduce his salary from the sum of $2,400 to $120 per annum, constitutes indubitable evidence of an agreement and a willingness by him to accept the office and discharge the duties thereof for the salary last named, and that therefore he should be compelled to accept such salary as in full compensation for any services as such surveyor that he might perform, is obviously devoid of any legal foundation for its support. The contention necessarily proceeds upon the erroneous theory that the petitioner holds the office by contract, or, perhaps, having sought election and having been elected to the office of surveyor, knowing that the salary had previously been reduced to $120 per annum, an estoppel arose against any claim he might make to the salary attached to the office prior to the lowering thereof by the Legislature of 1925. But "salaried public offices, created by the Legislature, are not held by contract or grant. The Legislature has full control over them, unless restricted by the Constitution, and may abolish them altogether, or impose upon them new duties or reduce their salaries." Miller v. Kister, 68 Cal. 144, 8 P. 814; Pennie v. Reis, 80 Cal. 266, 269, 22 P. 176, 177; Mansfield v. Chambers, 26 Cal. App. 499, 504, 147 P. 595, 597. The office of county surveyor, as seen, is a creature of the Legislature. Obviously, the doctrine of estoppel, in any of its known or conceivable forms, is not applicable to or permissible in such a situation as is presented here.

[14] The proviso added to section 4236k of the Political Code by the Legislature of 1925 being void for the reasons above explained, it results that the petitioner is entitled to receive as his compensation as county surveyor of Sacramento county the sum of $2,400 per annum, or $200 per month. This is true for the obvious reason that the attempt to amend section 4236k by adding thereto the proviso purporting to reduce the compensation of said surveyor to the sum of $120 per annum was futile, and said proviso was therefore void ab initio. The situation is as though no amendment of said section was made. There is no interdependency between the section as it stood before the attempt was made to amend it and the purported proviso which constitutes the attempted amendment. It will be borne in mind that the Legislature of 1925 did not expressly repeal section 4236k, but merely added the proviso in question. Hence, it is clear that, at the time the Legislature of 1925 sought in vain to amend the section, there was no intention on the part of the lawmaking body to repeal the section as it then read. See 5 Cal. Jur. pp. 645, 646, and cases therein named.

It is not disputed, but inferentially admitted, that the aggregate amount to which the petitioner is entitled is as it is alleged in the petition.

Accordingly, it is hereby ordered that a writ of mandate issue out of this court, addressed to the respondent, directing him to issue and deliver to the petitioner his (respondent's) warrant or warrants on the county treasurer of Sacramento county authorizing said treasurer to pay to the petitioner the aggregate sum or sums constituting the aggregate amount alleged in the petition to be due petitioner as his compensation as county surveyor of said county for the period of time alleged in the petition.

We concur: FINCH, P. J.; PLUMMER, J.

94 Cal. App. 48

FRAHER v. EISENMANN. (Civ. 6302.)★

District Court of Appeal, First District, Division 2, California. Sept. 19, 1928.

As Modified on Denial of Petition for Rehearing Oct. 22, 1928. Hearing Denied by Supreme Court Nov. 8, 1928.

1. Evidence 🔑589—Jury is privileged to believe plaintiff's testimony and reject that offered by defendant.

In personal injury action, there being conflict between theories of plaintiff and defendant as to cause of injury and existence of negligence, jury was privileged to believe testimony offered by plaintiff, and to reject that offered by defendant.

2. Negligence 🔑136(26)—Contributory negligence is for jury, when depending on circumstances and is question upon which reasonable minds might differ.

When question of contributory negligence of plaintiff depends upon surrounding circumstances and is one on which reasonable minds might differ, it should be left to the jury.

3. Automobiles 🔑234—Insurance carrier was properly joined as defendant, if policy or ordinance pursuant to which policy was issued provided it should inure to benefit of public.

Where policy insuring jitney driver was issued pursuant to city and county ordinance, insurance carrier was properly joined as a party defendant in action for injuries from operation of jitney, provided insurance policy or ordinance provided that it should inure to the benefit of the public.

4. Automobiles 🔑238(1)—Demurrer on ground of misjoinder of insurance carrier held properly overruled, where complaint alleged that policy issued pursuant to ordinance inured to benefit of public.

Where complaint, in action against jitney driver and insurance carrier for injury from operation of jitney, alleged that policy, which was issued pursuant to ordinance, inured to benefit of public, demurrer on ground of misjoinder of insurance carrier was properly overruled.

5. Trial 🔑83(2)—Ordinance pursuant to which insurance policy on jitney bus was issued held properly admitted over objection that it was irrelevant.

In action against jitney bus driver and insurance carrier for injuries from operation of

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★Petition for rehearing denied. Hearing denied by Supreme Court.

jitney bus, ordinance pursuant to which insurance policy was issued, which was pertinent to allegations of complaint, *held* properly admitted over general objection that it was irrelevant.

6. Trial 🔑90—Objection to admission of application for jitney bus permit and insurance policies deemed waived, where motion to strike out was not made.

In action against jitney driver and insurance carrier for injuries from operation of jitney, where admission of application for jitney bus permit and insurance policy was objected to on ground that proper foundation had not been made, and court admitted documents subject to motion to strike out, but such motion was not made, *held*, that point will be deemed waived.

7. Appeal and error 🔑1050(1)—Admission of insurance policy ordinance and application for permit held not to have prejudiced jitney bus driver in action for injuries.

In action against jitney bus driver and insurance carrier for injuries from operation of jitney bus, admission of insurance policy ordinance pursuant to which policy was issued and application for jitney bus permit *held* not to have prejudiced defendant jitney bus driver, on ground that it brought to attention of jury fact that he was insured against loss, since jury had notice that law required driver to procure license and file bond or policy of insurance, and made it penal offense to operate jitney bus without doing so.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Margaret Fraher against Frank Eisenmann and another, wherein nonsuit was granted as to such other defendant. From a judgment for plaintiff, named defendant appeals. Affirmed.

Barry J. Colding and Theodore Hale, both of San Francisco, and B. P. Gibbs, of Los Angeles, for appellant.

Frank J. Creede and Thomas W. Slaven, both of San Francisco, for respondent.

NOURSE, J. Plaintiff sued for personal injuries suffered by reason of being knocked down by an automobile driven by defendant Eisenmann while the plaintiff was crossing Mission street near its intersection with New Montgomery street in the city and county of San Francisco. The California Highway Indemnity Exchange was joined as a defendant by reason of a policy of insurance issued by it to its codefendant under the terms of an ordinance of the city and county. The cause was tried before the court sitting with a jury, and at the close of plaintiff's case a nonsuit was granted to the Indemnity Exchange and the trial was continued as to the defendant Eisenmann, resulting in a verdict for the plaintiff in the sum of $5,000. This defendant has appealed upon a typewritten record.

The story of the accident, as related by the plaintiff and witnesses called in her behalf, is that at the hour of 8:15 a. m. on January 21, 1925, after alighting from an east-bound Mission street car, at the intersection of Mission with New Montgomery street, and after waiting for the car to pass across the intersection, she started to walk across Mission street from the safety station located near the westerly line of New Montgomery; that as she reached the northerly rail of the northerly set of tracks on Mission street she stopped to allow an automobile to pass her; and that while standing at this point she was suddenly struck down by appellant's automobile, which was following the other at a high rate of speed, the rear end of which swerved or careened towards her from the line of traffic which it was following. There are, as is usual in cases of this kind, some contradictions of this testimony on the part of the appellant, but it would serve no purpose to refer to these, as the jury evidently believed the evidence offered on the part of the respondent.

[1] On this appeal the appellant urges first the ground that there was no evidence of negligence on his part. The theory of respondent is that the appellant was traveling at an excessive rate of speed over an intersection in a closely built-up portion of the city, and that the accident was caused by appellant's circling an obstruction in the street at this intersection at such a high rate of speed as to cause the rear end of his automobile to skid, careen or swerve to its left. There was sufficient evidence to support this theory, and appellant does not argue that negligence could not be predicated upon these facts; but his position is that his own testimony as to the rate of speed at which he was traveling and as to the actions of the respondent at the time of the impact failed to show negligence on his part. It is sufficient to say that the jury was privileged to believe the testimony offered by the respondent and to reject that offered by the appellant.

[2] It is argued that respondent was guilty of contributory negligence per se. Here the argument is based upon the testimony offered by the appellant when taken in the light most favorable to him. But the evidence which the jury believed was that the respondent stopped while crossing the street at an intersection where foot passengers were accustomed to cross, and that while standing still the appellant's machine suddenly, and without warning, swerved or skidded into her. It is sufficient to say that when the question of contributory negligence depends so much upon the surrounding circumstances and is one upon which reasonable minds might differ it should be left to the jury. Erdevig v. Market Street R. R. Co. (Cal.) 264 P. 252; Collins v. California Street Cable R. R. Co. (Cal. App.) 267 P. 731.

[3, 4] The appellant complains that the trial court erred in permitting the jury to learn

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

that he was insured against loss by his codefendant. The insurance carrier was joined as a party defendant on the theory that the policy of insurance inured directly to the public under the rule of Gugliemetti v. Graham, 50 Cal. App. 268, 270, 195 P. 64, and Malachowski v. Varro, 76 Cal. App. 207, 213, 244 P. 936. The policy having been issued pursuant to an ordinance of the city and county, the insurance carrier was properly joined as a party defendant, if the policy itself or the ordinance provided that it should inure to the benefit of the public. See cases just cited, and Milliron v. Dittman, 180 Cal. 443–445, 181 P. 779; Kruger v. California Highway Indemnity Exchange, 201 Cal. 672–678, 258 P. 602. The point was raised upon separate demurrers interposed by the appellant and the insurance carrier. Both demurrers were overruled, and this is now assigned as error. The appellant's demurrer on the ground of the misjoinder of his codefendant was properly overruled, unless it appeared from the face of the complaint that he was prejudiced thereby. Gardner v. Samuels, 116 Cal. 84–90, 47 P. 935, 58 Am. St. Rep. 135; O'Connell v. Rogers, 72 Cal. App. 539–542, 237 P. 775. The argument is that the appellant was prejudiced because the joinder of the insurance carrier brought knowledge to the jury that he was insured as a protection against loss and that this knowledge might have influenced the jury in reaching its verdict against him. The policy was required by a special ordinance of which the jury would be presumed to have notice. Milliron v. Dittman, 180 Cal. 443–446, 181 P. 779. But the demurrers were to be determined upon what appeared upon the face of the complaint, and not upon what might be developed during the trial of the case. As the complaint alleged that this policy inured to the benefit of the public, the case came squarely within the rule of the cases above cited, and the demurrers were properly overruled.

[5, 6] But the appellant insists that the trial court erred in admitting in evidence the ordinance, the policy of insurance, and the appellant's application for a jitney bus permit. The ordinance was pertinent to the allegations of the complaint, which endeavored to fix liability upon the insurance carrier and was properly admitted over the general objection that it was irrelevant. If a separate objection had been made on the part of the appellant, the evidence might have been limited to the defendant insurance carrier; but such objection was not made. The application for a permit and policy of insurance were also a part of plaintiff's case against the insurance carrier. The objections made when they were offered were that the proper foundation had not been laid. The trial court admitted the documents subject to a motion to strike out. But such motion was not made, and the point will be deemed waived. Estate of Wempe, 185 Cal. 557–564, 197 P. 949.

[7] Respondent was unable to prove, in the presentation of her case in chief, that the appellant was actually operating the car in the jitney service at the time of the accident (the policy of insurance covered loss while engaged in that service only), and the trial court, for that reason, granted the insurance carrier a nonsuit. As the carrier has not appealed, the objection to the admission of these documents is urged by the appellant Eisenmann alone. After the nonsuit had been granted, the appellant appeared as a witness in his own behalf. The respondent then proved that, at the time of the accident, he was driving the car in the jitney service within the terms of the ordinance and the policy of insurance. His complaint now is that the admission of these documents brought to the attention of the jury the fact that he was insured against loss, but, as pointed out in the Milliron Case, this was a fact of which the jury had notice; that is to say, the jury had notice that the law required appellant to procure a license and file a bond or policy of insurance, and made it a penal offense to operate a jitney bus without doing so. The jury would not presume that the appellant had committed a crime, and it does not seem reasonable that he could be prejudiced by evidence tending to prove that he had not.

Judgment affirmed.

We concur: BUCK, Presiding Justice pro tem.; STURTEVANT, J.

94 Cal. App. 85

PEOPLE v. STERN. (Cr. 1679.)

District Court of Appeal, Second District, Division 1, California. Sept. 21, 1928.

1. Arson ⚿40—Where much of evidence was consistent with defendant's innocence, duty of determining guilt or innocence of defendant rested with jury.

In prosecution for arson, where much of evidence was consistent with innocence of defendant, duty of judging facts and determining ultimate question of defendant's guilt or innocence rested with jury.

2. Criminal law ⚿1159(2)—Appellate court is concerned only with sufficiency of evidence to justify verdict.

An appellate court is concerned only with sufficiency of evidence to justify verdict.

3. Arson ⚿37(1)—Evidence held sufficient to support conviction for burning insured property.

In prosecution for crime of burning insured property, evidence *held* sufficient to support conviction.

Appeal from Superior Court, Los Angeles County; Edward Henderson, Judge.

Harry Stern was convicted of burning insured property, and he appeals. Affirmed.

Joseph M. Wapner and Max Lewis, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the crime of burning insured property and from an order denying his motion for a new trial.

[1-3] The first point made by appellant for reversal of the judgment is that the verdict of the jury was not supported by the evidence. Among other facts, many of which at least were not antagonistic to a conclusion that defendant was wholly innocent of wrongdoing, the following may be mentioned as bearing upon the question of the sufficiency of the evidence to support the verdict, to wit: Defendant was the proprietor of a millinery store. Referring to the stock of goods in the store, each of two witnesses for the prosecution testified in effect that immediately after the fire, "practically all of it were saturated with gasoline"; and that although several articles of such stock of goods which gave off the odor of gasoline were produced as exhibits on the trial of the action, "not anywheres near all of it" was present in court. In addition thereto, a cardboard box which was inside a carton "containing scraps of material" was found in the storeroom, which box not only gave off the odor of gasoline, but which "contained a small quantity of gasoline that had not been saturated into the fibers of the box." Defendant stated that he had no enemy against whom suspicion might be directed as to the person who had started the fire. There was but one set of keys to the store, which keys were carried by defendant. "The material that was burned was on the south side of the room around the sewing machine table, and on top of the sewing machine table, and under the table which set just west of the sewing machine. * * * There was fire under the table which set just west"—which table was about six or eight feet from where the sewing machine table was located. Although the business of defendant was "on the mend," at the time the fire occurred, it was "none too good." The stock of goods, furniture, and equipment of the business was of the reasonable value of $3,650.80, while it was all insured for the sum of $5,000. The fire occurred on a Saturday afternoon, about 2½ hours after all the employees in the store had quit work; defendant's departure from the place of business having preceded the fire by approximately 20 or 30 minutes.

While, as hereinbefore indicated, much of the evidence, not herein referred to, was consistent with the innocence of defendant, the duty of judging the facts and determining the ultimate question of the guilt or the innocence of defendant rested with the jury. In that connection, the rule is universal that an appellate court is concerned only with the sufficiency of the evidence to justify the verdict; and while that part of the evidence to which reference has been had was none too strong, nevertheless this court is of the opinion that, from a legal standpoint, it was sufficient; from which it follows that the point made by appellant cannot be sustained.

[4] Prejudicial error is also predicated upon the refusal of the trial court to give to the jury certain instructions requested by defendant. Two of such requested instructions related to the effect of circumstantial evidence; while the third instruction had to do with the weight and importance to be attached by the jury to evidence of the good character of defendant. If it be conceded that each of such instructions respectively correctly stated the law as to the subject which was purportedly covered by such instruction, nevertheless it also satisfactorily appears that the substantial rights of defendant in the premises were fully protected by other instructions which the trial court gave to the jury. In such circumstances, the defendant is in no position to complain. People v. Wolfgang, 192 Cal. 754, 763, 221 P. 907; People v. Champion, 193 Cal. 441, 449, 225 P. 278.

No prejudicial error appearing in the record, it is ordered that the judgment and the order denying the motion for a new trial be, and they are, affirmed.

We concur: CONREY, P. J.; YORK, J.

94 Cal. App. 113

In re HILL'S ESTATE. (Civ. 6381.)

District Court of Appeal, First District, Division 1, California. Sept. 24, 1928.

1. **Executors and administrators 🔑314(3)—Whether estate is "but little indebted" is fact question for court.**

Whether an estate of decedent is "but little indebted" is question of fact to be determined by court.

2. **Executors and administrators 🔑314(3)—Evidence held to support finding that estate was but little indebted.**

Evidence *held* to support finding that estate was but little indebted, where inventory and appraisement showed property of appraised value of $354,287.27, approved claims of $9,646.24, and claim for $750 which had not been allowed; other items alleged to comprise indebtedness not being clearly set out in record.

3. **Executors and administrators 🔑316—Where court ordered executor to deposit money with county treasurer for paying inheritance tax, amount of which appraiser had estimated, decree of partial distribution will not be reversed because no tax had been paid or ascertained.**

Decree directing partial distribution will not be reversed on ground that no inheritance tax had been paid or ascertained, where court ordered executor to deposit certain sums with county treasurer for purpose of paying inheritance tax; inheritance tax appraisers having completed appraisement of property and having estimated tax payable.

4. **Executors and administrators 🔑315(9)—Decree directing partial distribution to persons not entitled, except under will, will be reversed where additional testimony shows will contest (Code Civ. Proc. §§ 1658–1661).**

Where, after appeal was taken from decree directing partial distribution to persons who could take only under will additional testimony was taken showing will contest, decree will be reversed, since appellate court stands in place of superior court acting as court of probate, and in exercising probate jurisdiction proceeds on principles of equity, and Code Civ. Proc. § 1661, must be construed with sections 1658–1660.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of Lucile Knowland Hill, deceased. From a decree directing partial distribution, Robert Lewis Hill and another appeal. Reversed, with directions.

H. S. Henion and Snook, Snook & Chase, all of Oakland, for appellants.

E. K. Taylor, of Alameda, for respondents.

BEAUMONT, Justice pro tem. Lucile Knowland Hill died testate December 25, 1926. Among the legatees named in her will were the following: Robert Lewis Hill, her husband; William F. (Russell) Knowland; E. Harold Dana; and Louise Hoover Dunbar. The only heirs at law of decedent were Robert Lewis Hill and Joseph R. Knowland, a brother. Petitions for partial distribution were filed by E. Harold Dana and Louise Hoover Dunbar, residuary legatees, praying for distribution to each of $15,000. These were resisted by said Robert Lewis Hill and Joseph R. Knowland. Following the hearing on the petitions, the court ordered distribution to each in the sum of $10,000, less $4,000, which latter sum was to be retained from each distributee's share for the payment of inheritance tax. The court further ordered each to give a bond in the sum of $2,500 for the payment of his proportion of the debts due from the estate. William F. Knowland and Robert Lewis Hill have appealed from the decrees. By stipulation the appeals are to be determined on one record.

[1, 2] Appellants urge as a ground for reversal that the evidence did not justify the finding that the estate is but little indebted. The inventory and appraisement show real and personal property of the appraised value of $354,287.27. Claims in the sum of $9,646.24 were allowed and approved. There was another claim for $750 which had not been allowed. Statements are variously made in the briefs of respective parties as to certain other alleged indebtedness, but the items alleged to comprise such indebtedness are not clearly set out in the record. Whether an estate is "but little indebted" is a question of fact to be determined by the court (Estate of Chesney, 1 Cal. App. 30, 81 P. 679), and we are of the opinion that the evidence fully supports this finding.

[3] Another ground upon which appellants seek reversal of the decree is that no inheritance tax had been paid or ascertained at the time the order was made. In their brief they set forth certain testimony which shows that the inheritance tax appraiser had completed appraisement of the property of the estate and had estimated the tax payable by Louise H. Dunbar at $3,940.50, and by E. Harold Dana at $3,603.69. The court ordered the executor to retain from each distributive share the sum of $4,000, and to deposit it with the county treasurer for the purpose of paying the inheritance tax. This "is sufficient to satisfy the court," as was said in Estate of Ross, 187 Cal. 467, 202 P. 646, "that the taxes will be fully paid by the time the order is executed."

[4] After the appeal had been perfected, there was filed in this court on behalf of appellant Knowland an application for an order allowing additional testimony to be taken. It was the purpose of appellant to show that subsequent to the entering of the order for partial distribution actions had been begun to revoke the probate of the will. One such contest was by Robert Lewis Hill and one by Joseph R. Knowland. At the hearing before

this court the parties stipulated as to the fact of the contests; that a copy of the contest pleadings might be considered by the court, these showing that the proceedings to revoke the probate of the will and to declare the same invalid had been instituted in the superior court of Alameda county, the court from which the appeals were taken, within the statutory time. It was represented to this court that the contest of Joseph R. Knowland was, at the time of the hearing, listed on the trial calendar of the said superior court. In view of this additional testimony and the provisions of section 956a of the Code of Civil Procedure as added by St. 1927, p. 583, we find contrary to the trial court as to the existence of a contest of the will. Instead of the finding (No. 8) that there was no contest, it is ordered that the following be substituted, to wit: That Robert Lewis Hill, an heir at law of decedent, has filed an action contesting the validity of the will; that Joseph R. Knowland, an heir at law of decedent, has filed an action contesting the validity of the will.

This case, considered in the light of the present findings, is that partial distribution has been ordered while a contest of the will is pending; that the persons who are seeking to revoke the probate of the will are the heirs at law; that the distributees are not heirs at law and will not take anything of the estate of decedent unless the will is upheld.

Counsel for respondent cites as authority for upholding the judgments the decisions in Estate of Pritchett, 51 Cal. 568, and Id., 52 Cal. 94. In that estate no contest was filed, there being only a possibility of such contest, as was the situation in the present matter when it was before the trial court.

Respondents also cite Estate of Hinkel, 176 Cal. 563, 169 P. 70, as a proceeding wherein a contest was actually pending at the time of partial distribution. We are of the opinion that that case is not controlling here. It holds substantially that the fact the will was still open to contest did not preclude partial distribution where other heirs had made an agreement for distribution under which a sufficient amount was to be retained by one heir to pay the claim of contestant should he succeed. The court therein said that "the fact that a will is still open to contest at the suit of a minor or a nonresident does not *necessarily* [italics ours] preclude a distribution," and cites Estate of Pritchett, supra.

Hantz v. Sealy, 6 Bin. (Pa.) 405, was an action by a widow against the executor of her husband's will to recover the amount of personal estate bequeathed to her by the will. It was held that the executor was not liable for a legacy where the probate of will is suspended by appeal. The court used the following language:

> "It was not the duty of the defendant to pay anything, which depended on the will, until it was decided whether the will existed."

The petition for distribution here was filed under section 1658 of the Code of Civil Procedure, which provides that, after the lapse of four months from the issuance of letters testamentary or of administration, any heir, devisee, or legatee may present his petition to the court for the legacy or share of the estate to which he is entitled, or any portion thereof, to be given to him upon his giving bonds. Sections 1659 and 1660 provide for the giving of notices to all persons interested in the estate and that they may appear and resist the application. Section 1661 must be construed with the foregoing sections. The court is not, therefore, limited to a consideration of whether it appears that the estate "is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate" (section 1661, Code Civ. Proc.), but shall also consider whether the person applying is entitled to the share claimed.

In Estate of Painter, 115 Cal. 635, 639, 640, 47 P. 700, 701, an appeal from an order denying partial distribution, the court said:

> "It is also obvious that the court may be called upon to determine other questions than those pertaining to the interests of creditors; as, for instance, whether the applicant is *entitled* [italics ours] to a share of the estate, and if so, what share is necessarily involved."

In Wm. Hill Co. v. Lawler, 116 Cal. 359, 48 P. 323, it was said that "the 'distribution' of an estate includes the determination of the persons who by law are entitled thereto. * * *" Although that case involved a final distribution, the same considerations apply to a distribution under sections 1658, 1660, and 1661, for before the court can make an order for partial distribution, it is necessary to know whether the petitioner is entitled to any part of the estate. Estate of Ross, 187 Cal. 454, 466, 202 P. 641.

In considering the question presented by the stipulated testimony and the new finding, the appellate court stands in the place of the superior court acting as a court of probate. In the exercise of probate jurisdiction the court proceeds upon principles of equity. Estate of Glenn, 153 Cal. 77, 94 P. 230; Estate of Moore, 96 Cal. 522, 31 P. 584. By withholding the partial distribution herein sought, no ultimate harm is likely to ensue. If distribution is ordered, great loss may result if the will is declared invalid. In such event, if the distributees do not voluntarily return to the estate the shares received, actions will be necessitated. If there is financial inability on the part of either distributee to pay any judgment that might be obtained against him, pecuniary loss will be suffered by the heirs. It is, of course, not only the policy of our laws to do ultimate justice, but to do it expeditiously, with as little cost to the parties as is reasonably possible and to avoid unnecessary litigation.

A reading of the decisions of our state courts leads us to the conclusion that those decisions do not attempt to construe the statutes providing for distribution of estates by an inflexible rule, but rather that each case should be viewed in the light of its own particular facts. As was said by Mr. Justice Temple in the Estate of Painter, supra:

> "There are all sorts and conditions of estates. Probably in not one in a hundred would the court be justified in ordering a distribution within four months after the issuance of letters. Yet there are estates in which it would be quite obvious that there would be no danger in so doing."

Previously, in the same opinion he had remarked that—

> "It is evident that persons interested in the estate have very little protection in this proceeding, except in the discretion of the probate judge; and he should, therefore, proceed with the greatest caution."

The petitioners (respondents) based their prayer for distribution solely upon the terms of the will. They will take nothing if the will is invalid. The validity of the will has been attacked. We are of the opinion that petitioners then should not, as a matter of right, receive anything until at least one of the contests is determined and the will upheld.

By reason of the conclusion herein reached, it is not necessary to consider the other points urged by appellant.

The orders are reversed, with the direction to the lower court to suspend distribution in accordance with the expressions herein contained.

We concur: TYLER, P. J.; KNIGHT, J.

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94 Cal. App. 79

LOS ANGELES FIRST NAT. TRUST & SAVINGS BANK v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY. (Civ. 6062.)★

District Court of Appeal, Second District, Division 2, California. Sept. 20, 1928.

Rehearing Denied Oct. 19, 1928. Hearing Denied by Supreme Court Nov. 19, 1928.

1. Wills 🔑221—Superior court acquired jurisdiction of subject-matter on filing of petition for revocation of probate.

The superior court acquired jurisdiction of subject-matter of petition for revocation of will and codicil upon the filing of the petition.

2. Wills 🔑270—Jurisdiction of parties is not acquired in absence of citation or by issuance of void one.

In absence of any citation, or by the issuance of a void one, court does not acquire jurisdiction of parties or power to try issues presented by petition for revocation of probate.

3. Executors and administrators 🔑441—Omission to cite executor in representative capacity does not invalidate citation.

A mere omission to cite an executor in his representative capacity does not invalidate a citation if from its entirety it appears that it was issued to the proper party as such executor.

4. Wills 🔑270—Citation does not give jurisdiction of person not named therein (Code Civ. Proc. § 1328).

Under Code Civ. Proc. § 1328, citation does not give jurisdiction of person who was not named therein.

5. Process 🔑45—Court properly permitted issuance of alias citation, where original citation was withheld during protracted but conscientious endeavor to obtain compromise (Code Civ. Proc. §§ 1711, 1328).

Where object of contestant, filing petition for revocation of will and codicil, in withholding service of citation beyond period allowed under Code Civ. Proc. §§ 1711, 1328, arose from protracted but conscientious and constant endeavor to obtain compromise and avoid litigation, superior court in the exercise of its discretion properly viewed such conduct as excusable and permitted the issuance of alias citation.

Original application for a writ of prohibition by the Los Angeles First National Trust & Savings Bank, as executor of the estate of Annvernette M. Crombie, deceased, against the Superior Court of Los Angeles County. Writ denied.

Hearing denied by Supreme Court: WASTE, C. J., and SHENK, J., voting for a hearing.

Gibson, Dunn & Crutcher, and E. H. Conley, all of Los Angeles, for petitioner.

Warren Lee Pierson, Newby & Newby, and Dee Holder, all of Los Angeles, for respondent.

CRAIG, J. The last will and testament, together with a codicil thereto, of Annvernette M. Crombie, deceased, was admitted to probate by the superior court of Los Angeles county on February 18, 1926, Donald J. Frick and others being named therein as beneficiaries, and the petitioner in this proceeding being nominated and appointed executor. On September 8, 1926, one Linda Hill Burrell filed a petition for revocation of the will and codicil, which was set for hearing October 15, 1926, was continued to November 2, 1926, and thereafter permitted to go off calendar. No citation was issued thereon. On November 17, 1926, an amended petition for revocation of the will and codicil was filed, which was set for hearing on December 7, 1926, continued from time to time to February 4, 1927, and also went off calendar; hearing on the amended petition was reset for hearing on August 26, 1927, and again was removed from the calendar. On the date of the filing of the amended petition a citation issued, directed

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★Rehearing denied. Hearing denied by Supreme Court.

to all beneficiaries other than Frick, and to the bank, petitioner herein, but neither Frick nor the bank as executor was named therein. Neither the executor nor any of the beneficiaries had legal notice of the fact that a citation had been issued. On February 21, 1928, the executor appeared specially by formal notice of motion, based upon affidavits reciting, among others, the foregoing facts, praying that the petition for revocation of probate be dismissed, upon the grounds that no citation had been issued or served, and that the contestant had not prosecuted her proceeding with diligence. Thereafter and prior to the hearing of said motion, the contestant returned and filed the citation, without service, together with a motion for the issuance of an alias citation, "upon the ground that the citation heretofore issued herein was, through mistake, inadvertence, surprise, and excusable neglect of the said Linda Lee Burrell's counsel not served upon the said executor." Both motions were presented together, whereupon the court denied the motion for dismissal of the contest, and directed that an alias citation issue. The executor institutes this proceeding, praying a writ of prohibition restraining all further proceedings under the petition for revocation, insisting that an alias citation is not allowable upon the facts presented below, and that the superior court is without jurisdiction in the premises. It is contended by respondent that the superior court still retains jurisdiction, and that petitioner has a plain, speedy, and adequate remedy at law by appeal, after trial.

[1-4] Jurisdiction of the subject-matter was acquired upon the filing of the petition for revocation of probate. Estate of Simmons, 168 Cal. 390, 143 P. 697. However, in the absence of any citation, or by the issuance of a void one, the court would not have acquired jurisdiction of the parties or power to try the issues presented by said petition. Estate of Hite, 155 Cal. 390, 101 P. 8; Estate of Maescher, 78 Cal. App. 189, 248 P. 537. A mere omission to cite an executor in his representative capacity does not invalidate a citation, if from its entirety it appears that it was issued to the proper party as such executor. Matter of Ricks, 160 Cal. 467, 117 P. 539. We think the citation was sufficient in this respect, though it did not give jurisdiction of Donald J. Frick, who was not named therein. Code Civ. Proc. § 1328. But from the observations following, it becomes unnecessary to consider at length the defects in the original citation.

It appears without contradiction that the contestant was a resident of the state of New York, and that other litigation was there pending between her and parties by the name of Newton, an amicable settlement of which would also result in a termination of the controversy in California. Counsel on both coasts were striving for an adjustment of Mrs. Burrell's claims, and were in constant correspondence. Much time and money were expended in that behalf, and in interviewing witnesses and assembling evidence in preparation for a possible trial of the issues presented by the litigation in this state. In July, 1927, Mrs. Burrell came to California, and assisted in the negotiations and preparation for trial, and it is alleged that she and her counsel were at all times, until petitioner moved to dismiss her petition, endeavoring to accomplish a favorable adjustment of the various controversies. It is apparent from the pleadings and affidavits that petitioner was aware of the existence of other wills, and was constantly advised, by letter and otherwise, of the filing of the petition for revocation, and of all steps which were being taken both here and in the East toward a settlement of the contestant's claims. She was offered $2,000, which she declined to accept. She avers that citation was not issued for many months, and when issued was not served, lest it should jeopardize a desired compromise.

It is the petitioner's contention that although the original citation was issued within one year after the will was probated, since it was not served, an alias citation could not be issued and served within the time specified by the statutes and decisions, if, indeed, there be any authority for the issuance of a citation in any event. Sections 1711 and 1328 of the Code of Civil Procedure, and early decisions of the Supreme Court, wherein the facts were not analogous to those here presented, are cited to this proposition. Said sections respectively provide as follows:

> "When no other time is specially prescribed in this title, citations must be served at least five days before the return day thereof."
>
> "Upon filing the petition, and within one year after such probate, a citation must be issued to the executor of the will, * * * and to all the legatees and devisees mentioned in the will, and heirs residing in the state, * * * to show cause why the probate of the will should not be revoked."

In San Francisco Protestant Orphan Asylum v. Superior Court, 116 Cal. 443, 48 P. 379, it was argued that after the expiration of one year from the date of probate the court was without jurisdiction to issue an alias citation to a party whose name had through oversight or inadvertence been omitted from the original. It was held that the court had a right to have him brought in within a year, both under equitable principles and practice, and that it did not lose jurisdiction through want of diligence in that respect. In Estate of Logan, 171 Cal. 357, 153 P. 388, our Supreme Court said:

> "The jurisdiction of the court to entertain a proceeding for the revocation of the will does not depend upon the issuance and service of a citation within a year after the probate of the will. Jurisdiction of the court attaches on the filing of the petition inaugurating the contest.

> The office of the citation is only that of a summons—to give the court jurisdiction of the parties who would be affected by its revocation. It is not essential to the jurisdiction of the court that the citation be issued and served within a year. The only penalty for failure to have it issued within that time is that the court may dismiss the contest. And even where there has been a failure to have it issued within the year, the court may nevertheless relieve the contestant for his failure to do so and thereupon order a citation issued and served. Estate of Simmons, 168 Cal. 390, 143 P. 697. It is to be observed, further, that though it is required that the citation be issued within a year, there is no provision of the law prescribing when it shall be served. As the court may relieve for failure entirely to have a citation issued and served within the year, it certainly can relieve from a failure to serve where it is at least issued within a year."

In Estate of Simmons, cited supra, it appeared that the contest had been filed eight months after the date of probate of a will and codicil, and no citation issued until thirteen days after the expiration of the year. A notice of motion to dismiss the contest was filed, whereupon the contestant interposed a counter motion for relief upon the ground of excusable neglect of herself and her counsel. The two motions were heard at the same time, and, the motion for dismissal being granted, the contestant appealed. In distinguishing earlier decisions and reversing the order of dismissal, the rules were announced in the following language:

> "While the issuance of citation within the year is requisite to the maintenance of the contest, and a failure to have it thus issued would, in the absence of an appearance by adverse parties, justify the dismissal of the contest (Estate of Hite, 155 Cal. 390, 101 P. 8; Estate of Ricks, 160 Cal. 467, 117 P. 539), the proceeding is none the less commenced by the filing of the petition, and the court's jurisdiction of the contest attaches upon such filing. Bacigalupo v. Superior Court, 108 Cal. 92, 40 P. 1055, relied on by respondent, merely holds that, where the petition for revocation had been dismissed, the court was without jurisdiction, after the expiration of a year from probate, to revive the lapsed petition and order a citation issued. While section 1328 requires that the citation shall be issued within the year, there is no provision, as there now is in the case of a summons (Code Civ. Proc. § 581a), prohibiting further prosecution of the proceeding, and requiring a dismissal, for failure to comply with the requirement.
>
> "In view of these considerations, we think it must be held that the court had power, under section 473, to relieve a contestant, whose petition for revocation, duly filed, has not been dismissed, from the failure to have citation issued and served within the year. The proceeding (i. e., the contest) has been instituted, and jurisdiction over it has attached. The 'default' sought to be excused is a failure to take, within time, one of the requisite steps in the prosecution of the proceeding thus pending. The analogies to be drawn from the decided cases point to the conclusion that, in such a case, the granting of relief is permissible under section 473. As we have heretofore had occasion to point out, this court has given a very liberal interpretation to the provisions of this section."

To the same effect are Davis v. Superior Court, 35 Cal. App. 473, 170 P. 437, and Estate of Maescher, 78 Cal. App. 189, 248 P. 537.

[5] While in the instant case there may have existed but slight evidences of mistake or inadvertence, the trial court may well have concluded that all of the conditions and circumstances surrounding the contestant constituted excusable neglect. It is not denied that her only object in withholding service of the citation arose from a protracted but conscientious, constant, and expensive endeavor to obtain a compromise and to avoid litigation. We cannot say as a matter of law that such conduct was inexcusable rather than logical and judicious. This course of conduct upon her part being the sole basis of the present proceeding, we are constrained to uphold the ruling of the superior court in liberally exercising its discretionary powers with a view to bringing about a determination of the issues upon their merits. Haviland v. Southern Cal. Edison Co., 172 Cal. 601, 158 P. 328.

The writ of prohibition is denied.

We concur: WORKS, P. J.; THOMPSON, J.

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94 Cal. App. 150

PEOPLE v. RODGERS. (Cr. 1051.)

District Court of Appeal, Third District, California. Sept. 25, 1928.

1. Criminal law 🔑511(2)—Evidence sustained conviction of burglary as against contention there was no evidence connecting defendant with crime except unsupported testimony of accomplice (Pen. Code, § 460, subd. 2; § 1111).

In prosecution for burglary under Pen. Code, § 460, subd. 2, evidence *held* sufficient to support conviction, as against contention that there was no evidence tending to connect accused with commission of crime except uncorroborated testimony of accomplice, which section 1111 requires must be corroborated.

2. Criminal law 🔑511(2)—Corroborating evidence is sufficient if it tends to connect defendant with offense, although standing by itself it is entitled to little consideration (Pen. Code, § 1111).

Corroborating evidence is sufficient under Pen. Code, § 1111, if it of itself tends to connect defendant with commission of offense, although it is slight and entitled, when standing by itself, to but little consideration.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

James Rodgers was convicted of burglary in the second degree, and he appeals. Affirmed.

H. K. Landram, of Merced, for appellant.
U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted in the superior court of Merced county of the crime of burglary of the second degree. Pen. Code, § 460, subd. 2. The appeals here presented by him are from the judgment of conviction and the order denying his motion for a new trial.

[1] The only point urged by the defendant for a reversal is that the verdict is not supported by any evidence introduced by the people, in that there is no evidence tending to connect him with the commission of the crime except the uncorroborated testimony of an accomplice.

The crime charged in the information was committed "on or about" Saturday, the 21st day of April, 1928, in the town of Dos Palos, in Merced county, at some time between, approximately, the hour of 8 p. m. of the day named and the early morning of the following day, which, of course, was Sunday. The building entered was occupied by a general merchandise store of which one E. T. Stewart was the owner.

It appears from the testimony of said Stewart that, either on Saturday, the 21st of April, or the preceding day (Friday), and prior to the usual time for closing the store for the day, the defendant, accompanied by a boy of the age of 15 years, as the latter testified was his age, and who gave his name as William Martin, entered the Stewart store, looked about for a brief time, then made a small purchase of candy, and thereupon left the store. On the evening of the 21st of April, near the hour of 8 o'clock, Stewart, after taking the money which had accumulated in the till from the day's sales, transferred it to his safe, locked and barred the doors and windows of the store, and went to his home. Between half past 6 and 7 the following morning (Sunday), Stewart returned to the store, and, before entering it, noticed that one of the panes of glass in the front door had been removed. He stepped into the store, and upon an investigation discovered that a miscellaneous quantity of merchandise (shoes, cigarettes, watches, pocketknives, postage stamps, gloves, and also some pennies which he had left in the till) had been stolen and taken from the store. The witness found on the outside of the store near the back window one of a pair of gloves which had been taken with the other articles mentioned. Later, the witness testified, the mate to the glove was delivered to him. Immediately after discovering that his store had been robbed, Stewart telephoned to John Campbell, the constable of the township, and informed him of the commission of the crime. Campbell immediately proceeded to make an investigation, and finally discovered the goods underneath a warehouse in or near a corral in Dos Palos. Stewart identified the goods so found as being those that had been taken from his store on the occasion referred to. Stewart further testified that after the discovery of the stolen property and the arrest of the defendant and Martin, Constable Campbell brought the latter into the presence of the witness. Stewart stated that he asked the two men to state the truth regarding the charge, and that if they were the parties who had entered his store to say so, or words to that effect; that either the defendant or Martin (it does not appear which) asked Stewart what charge would be preferred against them, to which Stewart replied that he did not know. Stewart testified that neither defendant nor Martin would admit having committed the crime. He did not remember whether the defendant expressly denied connection with the offense. His best recollection was that the defendant would neither "admit nor confirm" the charge against him, but that "they wanted me to say just what I would do, what charge I would place, and I would not tell them what charge I would place until they came clean and tell the whole story first."

William Martin, the young man spoken of above as having been seen with the defendant previously to the commission of the crime, testified that he and the defendant committed the act. He said that on the night of April 21st, after the store had been closed (the hour not given by the witness), he and Rodgers went to the store and removed the pane of glass from the front door and thus effected an entrance; that they picked up some grass and wiped the window for the purpose of obliterating the finger prints; that the first thing they did was to look for and secure a pair of gloves to be used for the purpose of preventing the imprint of their fingers upon any article; that they took two pairs of gloves; that they gathered the articles above mentioned, left the store by the back way, and started to leave the town; that after going a short distance from the town they observed an automobile parked on the road; that they went to the automobile and undertook to start it, but failed; that while there they dropped a pair of gloves; that they then returned to Dos Palos and went to a warehouse and secreted the goods thereunder; that they thereafter went to Los Banos, a town a short distance from Dos Palos, remained there "half an hour or an hour or so," and then again went to Dos Palos. The witness did not testify at what time he returned to Dos Palos from

Los Banos, but did state that they loitered about a corral near which the warehouse where they had secreted the goods was located; this warehouse being, as stated, in Dos Palos. Asked why they returned to Dos Palos at that time, Martin stated that "we came back to get the stuff." It was while they were in the corral that they were arrested by Campbell, the constable. The witness stated that he and Rodgers were together at all of the times mentioned by him in his testimony.

Constable Campbell testified that, immediately upon being apprised of the burglary, he went to the store and made an investigation of the situation; that he called the sheriff's office and gave information there of the commission of the crime; and that a Mr. Morse of that office went over to the store with the equipments for taking any finger prints which might be found on any of the articles or about the windows, doors, or furniture of the establishment; that they did not find any finger prints on any of the articles inside the store or the windows, but "we did find a pair of gloves that the party that went into the store had used. One of the gloves was just outside of the window, about halfway back from the building, from the front part of the store; that there is a little office there, and one of these gloves was found inside the office, and the other one just outside the window." He stated that the gloves just referred to were light-colored buckskin and resembled the pair of gloves that were introduced in evidence as one of the pair that had been taken from the store. He further stated that a mark on the back of one of the gloves appeared to have been made by the use of matches. "We checked up on the stuff that was missing," proceeded the constable, "and looking for the finger prints on everything around the store, which we did not find, and then it was reported to us that Nicoletti's car had been taken out of the yard, some one was trying to get away with it, and I went over to investigate that, and we found a pair of gloves in the car." The witness was shown a pair of gloves by the district attorney, and he identified them as being the pair that he found in the car. He further testified that, on several occasions about three or four days before the burglary, he saw the defendant and young Martin together walking about Dos Palos; that after the burglary he saw them on the evening of the 25th of April; that they were then in a cattle corral at South Dos Palos; that the corral was about 150 or 200 feet west of the warehouse underneath which the stolen goods were secreted. It was at this place that the defendant and young Martin were placed under arrest and confined in the county jail.

The witness Buchanan, who resides about a mile outside of Dos Palos, stated that on the 21st day of April he saw the defendant and Martin going into Dos Palos in a machine, and that he saw them get out of the car; that he also saw them together the next morning.

V. Guidi stated that he saw the defendant and Martin in South Dos Palos during the daytime of April 21st, and that the next day —the day following that upon which the burglary was committed—he saw the two together in Los Banos.

W. T. White, sheriff of Merced county, testified that while the defendant was confined in the county jail he (the sheriff) received information that "a couple of men in jail were trying to make their escape by sawing out, and we conducted a search of the building, searched everything, and found some articles that should not have been there. * * * They consisted of a file, a pair of pliers, and a pocketknife." That they had evidently been used on the bars of one of the cells; that he called some of the prisoners in and questioned them about the matter; and that the defendant, while this investigation was going on, called the sheriff and "said he wanted to see me, and I went over there, and he said: 'Don't blame these fellows for anything that is done, I brought these things (referring to the file, pliers, etc.) down from upstairs myself.'"

The foregoing statement involves, in substance, a recital of all the important facts and circumstances brought out at the trial.

If there was no testimony corroborating that of the accomplice, Martin, to the effect that he entered the store and abstracted therefrom the goods above mentioned, it is very clear that there would be no legal support to the verdict. But the identification by Stewart of the gloves, which the accomplice stated were among the articles taken from the store by him and the defendant and left by them in the car which Martin said he and the defendant undertook to start, certainly tends to support and corroborate the testimony of Martin that he himself did participate in the commission of the crime. Indeed, the finding of the other articles under the warehouse where Martin testified that he and the defendant secreted them is also a circumstance corroborative of the confession of the accomplice of his own participation in the commission of the crime. This being so, Martin's testimony that the defendant was also connected with the commission of the offense seems to us to be corroborated by the following facts and circumstances brought out by testimony other than that of the accomplice: (1) That on every occasion when the defendant was seen in Dos Palos and Los Banos he was in the company of Martin, the accomplice. (2) That in the daytime of either the 20th or the 21st of April, 1928, the defendant and the accomplice, in the company of each other, went into the store which was burglarized, and, after looking about the store for a brief time, purchased a small amount of candy. (3) That they were seen getting in an automobile when first they made their appearance in Dos Palos. (4) That the day after the crime was committed, they were seen together loitering about a corral, located at a point between 150 and 200 feet from the warehouse underneath which Martin testified that he and the defendant secreted the stolen property and where it was found by the constable and seen and taken to the store by Stewart. (5) The fact that he did not deny that he took part in the commission of the crime, when interviewed by Stewart in the presence of Constable Campbell and when advised by Stewart that hope for lenient consideration in the matter of punishment for the offense could rest only on their confession of guilt, if they were guilty, to which suggestion the only reply offered by either (whether one or both does not appear, yet the suggestion was made to both in the presence of each other) being in an inquiry as to the nature of the charge which would probably be laid against them. (6) The circumstance referred to by Sheriff White of the attempted jail break, and the defendant's admission that he took into the jail the implements with which an attempt was made to break open the jail doors, and the further statement by the defendant to the sheriff that he was alone responsible for "anything that was done," and that he should not "blame these fellows (referring to the prisoners that the sheriff was questioning regarding the attempted break) for anything that is done."

It is also to be considered that the accomplice in this case was a mere boy of about the age of 15 years, and the jury could reasonably conclude, in considering that fact with the other circumstances to which we have just referred, that the boy would probably not have attempted to commit such a crime without the aid of some one, and that person the defendant, with whom it was shown he was the constant associate and companion all the period of time that they were in the neighborhood of Dos Palos. Of course, it is to be conceded that the circumstances just narrated are not sufficient to establish the guilt of the defendant beyond a reasonable doubt, and it is not necessary that they should be. And it is to be conceded that each circumstance, taken alone, would be entitled to but little consideration; but, when all are considered together, it seems to us that there can be no doubt but that the result is that they sufficiently meet the requirement of section 1111 of the Penal Code as to the quantum and quality of the evidence necessary to corroborate the testimony of an accomplice in order that a conviction of the accused may legally be had.

[2] Explaining the meaning, intention, and scope, of said section, the Supreme Court, in People v. McLean, 84 Cal. 480, 482, 24 P. 32, after declaring that the corroborative evidence in that case was not strong, said that—

> "Although more is required by way of corroboration than to raise a mere suspicion (see People v. Thompson, 50 Cal. 480), yet the corroborating evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the offense, although it is slight, and entitled, when standing by itself, to but little consideration. (People v. Melvane, 39 Cal. 616; People v. Clough, 73 Cal. 351 [15 P. 5].)"

The McLean Case, on the question of the quantum of proof necessary to meet the requirement of section 1111 of the Penal Code as to the corroboration of an accomplice, has been cited in and approved by many subsequent cases of the Supreme and appellate courts of this state, many of which cases are of very recent date.

We think the foregoing review of the situation in this case as it is made by the evidence plainly shows that the accused was legally convicted.

The judgment and the order appealed from are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

94 Cal. App. 192

PEOPLE v. DAVIS. (Cr. 1027.)★

District Court of Appeal, Third District, California. Sept. 28, 1928.

Rehearing Denied Oct. 27, 1928.

1. **Jury 🔑33(2)—Separate consecutive trials before same jury of issues of guilt and insanity held not to deny defendant's right to impartial jury (Pen. Code, § 1016, and section 1026, added by St. 1927, p. 1149).**

Trial of defendant on issues raised by plea of not guilty on which verdict was returned, immediately followed by trial before same jury of issue raised by plea of insanity, pursuant to Pen. Code, § 1016, and section 1026, added by St. 1927, p. 1149, *held* not to deny right of defendant to trial by jury.

2. **Jury 🔑131(1)—Refusal to permit examination of jury after their return of conviction and before trial of issue of insanity held proper (Pen. Code, § 1016, and section 1026, added by St. 1927, p. 1149).**

In prosecution for murder, in which issues involving plea of not guilty were first tried and issues on plea of insanity were tried subsequently before same jury under Pen. Code, § 1016, and section 1026, added by St. 1927, p. 1149, refusal of court to permit examination of jurors after the return of verdict of guilty and before trial of issue of insanity *held* proper, since examination should have been made during selection of jury at beginning of trial.

★Rehearing denied.

3. Jury 🔑95—Jury having convicted defendant on trial of issue of guilt was not thereby disqualified from trying insanity issue (Pen. Code § 1016, and section 1026, added by St. 1927, p. 1149).

Jury having found defendant guilty of second degree murder on trial of issues under plea of not guilty was not thereby disqualified from trying him on issue of insanity under Pen. Code, § 1016, and section 1026, added by St. 1927, p. 1149.

4. Homicide 🔑339—In murder prosecution, exclusion of evidence of insanity held not prejudicial, where insanity was separately tried and conviction was for second degree murder only (Pen. Code, § 1016, and section 1026, added by St. 1927, p. 1149).

In prosecution for murder in which issues of guilt and insanity were separately tried under Pen. Code, § 1016, and section 1026, added by St. 1927, p. 1149, refusal of court, on trial under plea of not guilty, to permit evidence of insanity rendering defendant incapable of forming specific intent, if error, *held* not prejudicial, where defendant was convicted of second degree murder only.

5. Criminal law 🔑823(7)—Instruction that defendant was conclusively presumed sane held not prejudicial, in view of instructions on separate trial of issue of insanity (Pen. Code, § 1016, and section 1026, added by St. 1927, p. 1149).

In prosecution for murder in which issues of guilt and insanity were separately tried under Pen. Code, § 1016, and section 1026, added by St. 1927, p. 1149, instruction given on trial under the general plea of not guilty, that defendant was conclusively presumed to have been sane, *held* not prejudicial, where jury was fully instructed on question of insanity on separate trial of that issue.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Winfred Davis was convicted of second degree murder, and he appeals. Affirmed.

H. R. McNoble, of Stockton, and Ray T. Coughlin, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. [1] The defendant was charged with the crime of murder. He interposed a general plea of not guilty and a special plea of not guilty by reason of insanity. He was first tried on the issues raised by his plea of not guilty and the jury found him guilty of murder of the second degree. Immediately after the rendition of this verdict the issue raised by his special plea was tried before the same jury and a verdict was returned finding that he "was sane at the time that he is alleged to have committed the unlawful act, as alleged in the indictment herein." This appeal is from the judgment and the order denying a new trial. The most important contention of the appellant is that section 1016 and section 1026 (added by St. 1927, p. 1149) of the Penal Code are unconstitutional. The validity of the provisions of sections 1016 and 1026 which relate to the trial of a defendant who interposes the single plea of not guilty by reason of insanity were upheld in People v. Hickman (Cal. Sup.) 268 P. 909, where the constitutional right of trial by jury is discussed at considerable length. In so far as applicable to the facts of this case, those sections read as follows:

> "1016. There are five kinds of pleas to an indictment or information: 1. Guilty. 2. Not guilty. * * * 5. Not guilty by reason of insanity."
>
> "1026. When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, * * * then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury, in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law. If the verdict or finding be that the defendant was insane at the time the offense was committed, the court unless it shall appear to the court that the defendant has fully recovered his sanity shall direct that the defendant be confined in the state hospital for the criminal insane, or if there be no such state hospital, then that he be confined in some other state hospital for the insane."

The trial court strictly followed the procedure prescribed by the sections quoted. Since the issues raised by the general and special pleas were tried before a single jury, it is unnecessary to consider the validity of the provision authorizing the trial of the question of insanity "before a new jury, in the discretion of the court." In Bennett v. State, 57 Wis. 69, 14 N. W. 912, 46 Am. Rep. 26, the Supreme Court of Wisconsin upheld the validity of a statute requiring that a defendant specially plead insanity, when relied on as a defense; that the issue on the special plea shall be first tried; that if the verdict of the jury is that the defendant was sane at the time of the commission of the offense, then his trial upon the plea of not guilty shall at once proceed before the same jury; and that the finding of the jury on the special plea shall be final and conclusive. The court said:

> "Section 7 of article 1 of the Constitution declares that in all criminal prosecutions the accused shall, among other things, 'have the

right to a speedy public trial by an impartial jury.' * * * There is no constitutional objection to the statute which requires the accused to plead insanity at the time of the commission of the offense charged, as a separate defense to the information, together with the plea of not guilty. The only other objection made to the act is that it requires the jury to dispose of this plea by a verdict thereon before the trial shall proceed upon the plea of not guilty. This, we think, is a matter which relates merely to the form of a jury trial, and not to the substance. * * * It may be said * * * that the defendant cannot be required, against his consent, to make a special issue upon that fact [insanity], and proceed to try it separately, and be concluded by the verdict thereon when he is tried on the plea of not guilty; that if he can be compelled to be tried upon such issue separately, he may be compelled to plead separately, in all indictments or informations for murder or homicide, that the killing was in self-defense, or that it happened by misadventure or accident, and thus require the accused, in every case of homicide where he did not deny the killing, to plead specially his defense. Even if the support of this statute goes to that extent, we do not see how this takes away the defendant's right to a jury trial. Such a statute would simply regulate the pleadings and mode of procedure, and not go to the substance of a trial by jury. All the issues would still be tried by a jury, in the same way they are now tried. * * * It is clear, if the legislature have the power to compel the defendant to plead insanity as a defense, or waive it, then it has the power to prescribe the manner of disposing of that issue on the trial so long as it leaves the accused a trial by jury upon such issue."

See, also, Hempton v. State, 111 Wis. 127, 86 N. W. 596; Schissler v. State, 122 Wis. 365, 99 N. W. 593; Oborn v. State, 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.) 966.

The reasoning of the Wisconsin court appears to be sound. No decisions other than those of that court, relating to separate trials of the issues in criminal cases, have been discovered, but in some of the other states the defense of insanity is waived by a defendant by his failure to specially plead it, and if he pleads insanity the jury must specially find thereon. Baker v. State, 209 Ala. 142, 95 So. 467; Andrews v. State, 17 Ala. App. 456, 85 So. 840; Fritz v. State, 178 Ind. 463, 99 N. E. 727; State v. Saffron, 146 Wash. 202, 262 P. 970. The Court of Appeals of New York, however, in a civil action, upheld the provision of section 973 of the Code of that state reading as follows: "The court in its discretion may order one or more issues to be separately tried prior to any trial of the other issues in the case." Objection was made that the provision quoted impairs the constitutional right to a jury trial. The court said:

> "The constitutional provision invoked against the act is, 'The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever,' etc. This, of course, as asserted by appellant's counsel, secures the right of trial before a common-law jury of twelve men of certain classes of issues, which include the ones here involved. It is well settled that the object of such a provision is to preserve the substance of the right of trial by jury rather than to prescribe the details of the methods by which it shall be exercised and enjoyed. * * * Even if we assume, as I think we should, that this section of the code permits separate trials of separate issues at different times, before different juries, it seems very clear that it does not destroy or impair the substantial right of a litigant to have his case tried before a proper jury, but only prescribes the method in which this may be done. Every issue is submitted to the verdict of a jury. This is the substance of the right. As a matter of convenience the court may order some issues to be tried before others are taken up. This is a matter of procedure and detail." Smith v. Western P. R. Co., 203 N. Y. 499, 96 N. E. 1106, 40 L. R. A. (N. S.) 137, Ann. Cas. 1913B, 264.

In Oborn v. State, supra, while upholding the provision for a trial of the issue of insanity before that raised by the plea of not guilty, the court held that a defendant in a criminal case has the "constitutional right to have all the issues in his case, including any special issue of fact, particularly as to his sanity, tried before a single common-law jury." Since all the issues in this case were tried before a single jury, no further discussion of the constitutional question involved is deemed necessary.

[2] During the examination of prospective jurors no questions were asked concerning the attitude of any of them towards the defense of insanity. After the jury returned a verdict of guilty and before the trial of the issue of insanity, counsel for defendant asked leave to examine the jurors "to determine their state of mind on the present issue." The court refused to permit such examination. The ruling was clearly right. Such examination, if desired, should have been made during the selection of the jury at the beginning of the trial. The trial was one continuous proceeding and it would be highly impracticable to examine the jurors as to their qualifications during the stages of its progress. Schissler v. State, supra.

[3] Appellant contends that by the trial of the issue of insanity before the same jury which had found him guilty of the offense charged he was "forced to accept a jury, each member of which had already heard the facts of the case and had formed and expressed an opinion thereon; each member of which was subject to challenge for actual bias." In support of this contention he cites French v. State, 85 Wis. 400, 55 N. W. 566, 21 L. R. A. 402, 39 Am. St. Rep. 855. In that case the jurors were unable to reach an agreement on the special issue of insanity. The trial court thereupon discharged the jury and then ordered the trial to proceed before the same

jury on both the special plea of insanity and the general plea of not guilty. This was manifestly error, the jury having theretofore sat in the trial of the special issue. In the later case of Schissler v. State, supra, it was held that the jury was not disqualified to try the question of the guilt of the defendant after having found him sane on the trial of the special issue of insanity.

[4] On the trial of the issue raised by the plea of not guilty the court sustained objections to all evidence offered by the defendant tending to show that he was insane at the time of the homicide. Such evidence was admitted on the trial of the issue of insanity. The defendant was thereby given the full benefit of such evidence as a defense to the crime with which he was charged. He was subject to punishment only upon a finding by the jury that he "was sane at the time the offense was committed." Pen. Code, § 1026. Was evidence of mental weakness or derangement, not constituting insanity, admissible as affecting the degree of the crime? In Hempton v. State, supra, it was held that, while the verdict of the jury against the defendant on the special issue of insanity precluded further inquiry as to mental impairment as a complete defense, evidence tending to show mental impairment rendering the defendant incapable of forming the specific intent involved in murder of the first degree was admissible on the trial under the plea of not guilty. There are other authorities to the effect that such evidence is admissible for the purpose stated. Wharton's Criminal Law (11th Ed.) § 64; 1 Wharton & Stille's Medical Jurisprudence, § 188. Whether the same rule is to be applied in this state may, at least, be seriously doubted. People v. Sloper, 198 Cal. 238, 244 P. 362; People v. Perry, 195 Cal. 623, 639, 234 P. 890. No further discussion of the question is necessary, however, because the defendant was convicted of murder of the second degree only. In this state it has always been held that to reduce a killing from murder of the second degree to manslaughter on the ground of sudden quarrel or heat of passion "this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances, and that, consequently, no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man." People v. Logan, 175 Cal. 45, 49, 164 P. 1121, 1122; People v. Hurtado, 63 Cal. 288, 292; People v. Golsh, 63 Cal. App. 609, 614, 219 P. 456. In the Hurtado Case it is said:

> "If defendant was so far in possession of his mental faculties as to be capable of knowing that the act of killing was wrong, any partial defect of understanding which might cause him more readily to give way to passion than a man ordinarily reasonable, cannot be considered for any purpose."

[5] Complaint is made of the following instruction given by the court on the trial under the general plea of not guilty:

> "For the purposes of this case the defendant is conclusively presumed to have been sane at the time of the commission of the alleged offense herein, and the jury are instructed that they must consider that at all times mentioned in this case, the defendant was sane."

It is urged:

> "The foregoing instruction was not limited in its application to any particular phase of the case and in effect told the jury that no amount or kind of evidence would serve to show defendant's insanity."

More appropriate words might well have been used instead of the words "this case," but the jurors doubtless understood the instruction to refer to the trial of the issues then before them for consideration. The instruction could not have misled the jury in the trial of the issue of insanity. In the trial of that issue the court fully and correctly instructed the jury on the subject of insanity and specifically, at the defendant's request, that if it was proved, "by a preponderance of evidence, that he was insane at the time of the commission of the act charged against him by the indictment, he is entitled to a verdict at your hands that he was insane at the time the offense was committed."

No prejudicial error appears in the record, and the defendant's rights were fully protected by the trial court.

The judgment and the order are affirmed.

We concur: BARTLETT, Justice pro tem.; PLUMMER, J.

94 Cal. App. 66

NELSON et al. v. MYERS. (Civ. 3532.)

District Court of Appeal, Third District, California. Sept. 19, 1928.

1. Landlord and tenant 🔑169(3)—Plaintiffs, offering no evidence that gas heater vent pipe was disconnected as alleged or heater lighted when tenant's body was discovered, could not recover from landlord for death by gas poisoning.

Plaintiffs, offering no evidence that gas heater vent pipe, displacement of which, so as to discharge noxious gases into bathroom, was relied on in complaint as proximate cause of tenant's death, was disconnected, or even that gas heater was lighted, when body was discovered, could not recover from defendant landlord.

2. Death 🔑57—Substantial material variance between allegations and proof of proximate cause of death precludes recovery therefor.

A substantial and material variance between allegations of complaint and proof as to proximate cause of death will defeat recovery therefor, as jury cannot be permitted to speculate.

3. Landlord and tenant 🔑168(1)—Tenant's contributory negligence bars recovery for injuries or death from defects known to him.

Contributory negligence of tenant will bar recovery for injuries or death resulting from defects of which he had knowledge.

4. Negligence 🔑136(26)—Contributory negligence is ordinarily for jury.

Contributory negligence is ordinarily a matter to be determined by the jury.

5. Appeal and error 🔑930(4)—By verdict for defendant landlord, in action for tenant's death, jury is presumed to have found deceased contributorily negligent as alleged by defendant.

By verdict for landlord in action for tenant's death from asphyxiation, caused by defective automatic gas heater in bathroom, jury is presumed to have found that deceased was guilty of contributory negligence sufficiently pleaded and relied on as defense.

6. Appeal and error 🔑1001(1)—Jury's finding, supported by any substantial evidence, that decedent was contributorily negligent, will be upheld on appeal.

Where there is any substantial evidence to support jury's finding in death action that deceased was guilty of contributory negligence, it will be upheld on appeal.

7. Landlord and tenant 🔑103(3), 152(10)—Lessee's only remedy for landlord's failure to make minor repairs costing less than month's rent is to vacate premises or make repairs and charge expense to rent account (Civ. Code, § 1942).

When defects in premises are trivial and cost of repairing them less than one month's rent, lessee's only remedy for landlord's breach of covenant to repair is to vacate premises or make repairs and charge expense to rent account, pursuant to Civ. Code, § 1942.

8. Landlord and tenant 🔑164(2)—In absence of fraudulent concealment of known latent defects, not discoverable by reasonable diligence, landlord not directly covenanting to make repairs is not liable to tenants or others for resulting injuries; not being insurer.

In absence of fraud or deceit in concealing known latent defects not discoverable by reasonable diligence on lessee's part, landlord not directly covenanting to make repairs is not liable to tenant or others for injuries resulting from defects in rented premises; landlord not being insurer of premises against damages or injuries.

9. Landlord and tenant 🔑164(7)—Renter must inspect premises with reasonable care and diligence before renting.

It is duty of renter to exercise reasonable care and diligence in inspecting premises which he proposes to rent; the doctrine of caveat emptor ordinarily applying to leasing of premises.

10. Landlord and tenant 🔑168(1)—Lessee cannot recover for injuries to which his own negligence proximately contributed, even if landlord covenanted to repair defects or voluntarily concealed hidden defects.

Even when landlord has covenanted to repair defects or is guilty of constructive fraud in concealing hidden defects of which he has knowledge, lessee may not recover damages for injuries, to which his own negligence proximately contributed.

11. Landlord and tenant 🔑164(3)—Landlord voluntarily attempting to repair defects, irrespective of contract, is liable for injuries caused by careless or unskillful workmanship.

A landlord voluntarily attempting to repair defective premises, whether he has contracted to do so or not, must exercise reasonable care therein, and is liable for injuries caused by his careless or unskillful workmanship.

12. Landlord and tenant 🔑164(2)—Landlord sending agent to repair or clean gas heater several times held not liable for tenant's death from asphyxiation, in absence of evidence of unskillful or careless workmanship.

Landlord sending agent to repair or clean gas heater on several occasions *held* not liable for death of tenant from asphyxiation caused by defect therein, in absence of evidence of unskillful or careless workmanship.

13. Trial 🔑260(8)—Refusal of instruction that landlord, undertaking to repair gas heater, was bound to exercise reasonable care to make it safe, held not error, in view of instruction given.

In action against landlord for tenant's death from asphyxiation caused by defective gas heater in bathroom, refusal of instruction that defendant, having undertaken to repair heater, was bound to exercise reasonable care to make it safe, *held* not error, in view of instruction that, if heater was in dangerous and unsafe condition when premises were leased and defendant undertook to repair it under lease, he was bound to exercise reasonable care to make it safe for uses intended.

14. Trial 🔑296(4, 5)—Instruction not informing jury that tenant need exercise only ordinary care to discover defects held not error, in view of instructions given.

In action against landlord for tenant's death from asphyxiation caused by defective gas heater in bathroom, instructions not informing jury that renter need only use ordinary care to discover defects *held* not error, in view of instructions requiring finding that reasonably careful person would not have entered bathroom under like circumstances with same knowledge of dangers, that law presumes that deceased exercised due caution for his own safety, and that burden was on defendant to show his lack of ornary care.

15. Death 🔑58(1)—In death action there is legal presumption, to be weighed with all other evidence, that deceased exercised due diligence for his own safety.

In action against landlord for tenant's death from asphyxiation caused by defective gas heater in bathroom, plaintiffs were entitled to benefit of legal presumption that deceased exercised due diligence for his own safety, to be weighed by jury as established fact, together with all other evidence in case, in determining whether he was negligent.

16. Landlord and tenant 🔑169(11)—Tenant's contributory negligence in entering dark bathroom and using gas heater with knowledge of its defective condition held for jury, in action for his death from asphyxiation.

Whether tenant, entering bathroom and using gas heater in darkness, with knowledge of its defective condition by reason of displacement of vent pipe, was guilty of contributory negligence precluding recovery for his death from asphyxiation, *held* for jury.

17. Death 🔑104(2)—Instruction to find for defendant in death action, if impossible to ascertain cause of death, held proper, under pleadings and evidence.

In action against landlord for tenant's death from asphyxiation because of defective gas heater in bathroom, instruction to find for defendant, if impossible to ascertain cause of death from evidence, *held* proper, though weight of evidence indicated that he died as result of inhaling carbon monoxide, where answer denied that death was so caused, there was evidence of ailment from which he suffered just before his death, and autopsy was not conducted with use of spectroscope or aided by chemical analysis of blood.

18. Trial 🔑203(1)—Instructions on any valid theory made issue by pleadings or trial are proper.

It is proper to give instructions on any valid theory which is made an issue either by the pleadings or the trial of the case.

19. Trial 🔑296(3)—Instructions omitting principle that landlord voluntarily undertaking to repair defect is liable for negligence causing injuries to renter held not error, in view of instruction given.

In action against landlord for tenant's death from asphyxiation caused by defective gas heater in bathroom, instructions omitting principle that landlord voluntarily undertaking to repair defects is liable for carelessness in workmanship causing injury to renter *held* not error, in view of instruction that, if heater was in dangerous condition when premises were leased and defendant thereafter undertook to repair it, he was bound to exercise reasonable care to make it safe for uses intended and liable for death if caused by his negligent failure to do so.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by Lovica Nelson and others against S. A. Myers. Judgment for defendant, and plaintiffs appeal. Affirmed.

William P. O'Connor, Bertrand J. Wellman, and Perky, McConnell & Hill, all of Los Angeles, for appellants.

Scott McReynolds and Don G. Bowker, both of Los Angeles, for respondent.

THOMPSON, Justice pro tem. This is an appeal from the verdict of a jury in favor of the defendant in an action against the landlord of an apartment house, for the death of a subtenant resulting from asphyxiation caused by a defective automatic gas heater which was used in a bathroom.

The respondent owned the Sunnyside Apartments at Ventura, Cal., which were leased November 8, 1923, to Nannie Swanwick. The lease contained the following clause: "The lessee agrees to make all minor repairs at her own expense." Appellants' intestate, Arthur P. Nelson, and his family were tenants of the lessee at the time of his death. He was a strong, healthy man 40 years of age, and was engaged as an oil driller. A few days prior to his death, the deceased wrenched his back in attempting to adjust an automobile wheel, and did not return to his work. The night before his death he was taken to a physician for treatment, but the record fails to disclose the nature or seriousness of this ailment. The afternoon of July 13, 1924, Mrs. Swanwick assisted him in ascending the stairway to his room. She testified:

> "He came in and sat down on a couch in the hall, * * * then * * * he went up stairs. * * * I walked by the side of him—I went with him. Q. Did you help him up stairs? A. Yes, sir. * * * He seemed a little weak; his back hurt him a little."

Later in the day she saw him in the hallway upstairs, coming from the bathroom. He was weak, and she again assisted him to his room and took off his shoes. She said:

> "He complained a little bit of his back, and he was weak. * * * I think I took off his shoes. Q. What did he (then) do? A. He lay down. * * * He said he wanted to go to work. * * * He put his hand to his back, and said, 'I guess I won't; maybe I'm hurt a little more than I think I am.'"

That night Arthur Nelson was found dead in the bathtub. The appellants allege that the deceased met his death from carbon monoxide which escaped from the automatic gas heater used in the bathroom; that this heater contained a latent defect consisting of a loose disconnected vent pipe extending from the top of the heater to an aperture in the ceiling, provided for the purpose of carrying off the noxious gases generated by imperfect combustion. From the evidence it appears that the apparatus complained of was a Humphrey heater which was installed in the bathroom of the Sunnyside Apartments several years before the accident by Mrs. Baldwin, a former lessee of the premises; that it was a model of gas heater in common use at that time, consisting of coils and burners inclosed in a metal case, stationed upon brackets in the bathroom. On the top of the heater there was a cap, in the center of which there was an opening surrounded with an iron collar over which a galvanized iron pipe fitted, extending through an aperture in the ceiling to carry off the poisonous gases. This heater was 2½ feet in height and 14 inches in diameter. Both the heater and the vent pipe were in plain view of any occupant of the bathroom, and their purpose was within the common knowledge of all. The lessee and her renters, including the deceased, were familiar with this gas heater, and knew that it had previously caused some trouble in operation. Mrs. Swanwick had talked with the deceased about it. There is a sharp conflict as to whether the respondent knew that it was claimed this particular gas heater was defective or dangerous. Mrs. Swanwick and other witnesses testified that they notified respondent of the danger of using this heater. Mr. Sly, a building inspector, claimed that on December 6, 1923, he served respondent with a written notice that—

> "The heaters at Sunnyside Apartments are found to be in a very dangerous condition. Repairs are requested at your earliest convenience, as I have this date notified the parties to discontinue the use of the same until repairs can be made."

The respondent emphatically denied the receipt of this written notice, but admitted that Mr. Sly orally notified him of danger from fire which might be caused by another heater which was situated on the floor above the bathroom where the accident occurred. He claimed that Mrs. Swanwick complained only of the gas heaters in general, because they failed to heat the bath water with sufficient speed or quantity to efficiently serve their needs, and urged him to install a large heater in the basement which she argued would supply all the bathrooms in the house better and at less expense than the old ones. This he promised to do, and ordered the new heater shortly before the accident occurred, but it was not actually installed until afterwards. The respondent denied that it was his responsibility to keep the heaters in repair; yet it appears that on several previous occasions when the lessee complained to him about them he promptly sent an expert to adjust them. Mr. Johnson, with 25 years of experience as a plumber, who was acting as deputy building inspector for his principal who had succeeded Mr. Sly in that capacity, testified that at the request of respondent he visited Sunnyside Apartments December 8, 1923, and June 30, 1924, and found an accumulation of rust and foreign substance about the burners, and the screen rusted out. This prevented the obtaining of sufficient oxygen for proper combustion of the gas. He replaced the screen, cleaned the burners, lit the gas and experimented with the heater, saying, "We tested it out for half an hour, and found that it burned perfectly." He declared that the heater was in good condition, but that it had been neglected. Mr. Leach, a friend of the respondent, testified that, upon one of these occasions when Mr. Myers was away, Mrs. Swanwick phoned to him that the gas heater had blown up, and that she wanted a plumber. He promptly summoned Mr. Johnson, and they went to the apartments, but found nothing wrong with the heater except that the vent pipe had been displaced by the explosion of the gas. This pipe was promptly adjusted, and the heater was tested and found to be all right. He said that Mrs. Swanwick told them that a renter had turned on the gas, and, finding that he was without a match to light it, returned to his room to get one. In attempting to ignite the gas upon his return to the bathroom an explosion occurred, dislodging the pipe. Mr. Johnson testified that it was a simple matter to replace the pipe, which they speedily did, and found that the heater worked in good condition. He was asked, "Would this blowing off of the vent indicate a defective heater?" To which he replied, "No, * * * it would indicate carelessness on the part of the operator." Johnson instructed the lessee how to keep the burners and screens clean and free from corrosion and dirt.

Owing to the evidence of the ailment from which the deceased was suffering immediately prior to the time when his body was found in the bathroom, there may be a serious doubt as to whether the jury believed that he died from the effects of carbon monoxide. The record fails to indicate whether the physicians who participated in the post mortem examination had any knowledge of his previous ailment, or whether they examined the body with any object in view except to ascertain whether he had died from the effects of carbon monoxide. In this examination no spectroscope was used, and no chemical analysis of the blood was made. The skin of the deceased was found to be ruddy, his blood retained a cherry red appearance, and his features were composed, indicating that death was accompanied with no severe pain. From these symptoms it was assumed that death resulted from inhaling carbon monoxide, which is composed of equal parts of carbon and oxygen, one-half of 1 per cent. of which, mingled with air, will usually produce giddiness, unconsciousness, and painless speedy death. It is an odorless, colorless deadly poison, 100 times the density of air, and burns with a lambent blue flame. It causes death by combining its noxious property with the hæmoglobin of the blood, thereby destroying the efficiency of that fluid as an oxygen-carrying medium, stifling the victim. Dr. Stookey, however, testified that he was reasonably certain that the deceased died from the inhaling of carbon monoxide. Dr. Bianchi testified that, while the autopsy was unsatisfactory, and there was a possibility of death having resulted from other causes, judging from the peculiar appearance of the blood and muscles, viewed in the light of the circumstances surrounding his death, it was his belief that Nelson died from the result of the presence of carbon monoxide. But assuming that the record satisfactorily established the cause of death as a result of inhaling carbon monoxide, we are still of the opinion that the liability of the respondent has not been shown, and that the motion for nonsuit should have been granted.

[1, 2] As a proximate cause of death, the appellants relied upon their theory that the ventilating pipe, which was intended to connect the gas heater with the aperture in the ceiling and thus convey the noxious gases into the outer air, had been displaced so as to discharge the poison into the bathroom. The complaint alleged:

> That "there existed on the water heater * * * a vent pipe * * * intended to collect said noxious gases * * * and convey the same into a flue (communicating) with the outside air. * * * That said water heater and gas flame were in a bad state of repair and dangerous in this, that the said vent pipe had become disconnected and * * * conveyed the said noxious and deadly gases so generated by said gas flame and discharged the same into said bathroom."

The appellants utterly failed to prove the displacement of this vent pipe at the time of the accident. There is no evidence in the record that the vent pipe was found disconnected, or even that the gas heater was found lighted when the body of the deceased was discovered. Upon the contrary, there is evidence that the transom over the bathroom door was found to be open a few inches, and there was no evidence of the odor of gas in the room. The total failure to prove the proximate cause of death as alleged and relied upon by the appellants is fatal to their cause. In 20 Standard Encyclopedia of Procedure, 322, it is said: "A variance between the allegations of the complaint, and the proof as to the proximate cause of the injury is fatal." Certainly a substantial and material variance in that regard will defeat the recovery of a complainant. The jury may not be permitted to speculate as to the producing cause of death. 19 Cal. Jur. 696, § 118; Puckhaber v. Southern Pac. Co., 132 Cal. 363, 64 P. 480; Hopkins v. Heller, 59 Cal. App. 447, 210 P. 975.

[3-6] The respondent sufficiently pleaded and relied upon the defense of contributory negligence on the part of the deceased. Both the lessee and the deceased were familiar with the alleged defects of the gas heater. Mrs. Swanwick had talked to the deceased about it. He was employed regularly as an oil well driller, and must be presumed to have been familiar with the danger of noxious fumes incident to the improper combustion of gas. Neither the gas heater nor the alleged disconnected vent pipe may be deemed to be latent or hidden dangers under the facts of this case. The condition of both was open and visible to any occupant of the bathroom. A casual glance at the pipe would have revealed the defect, if it had been misplaced. Moreover, the evidence discloses the fact that, in spite of the knowledge of the deceased with respect to the alleged defects of the gas heater, he entered and used the bathroom in darkness, for Mrs. Swanwick testified that the electric light globe in the bathroom had burned out prior to the accident, and that she had failed to replace it. With the bathroom lighted, and with the exercise of ordinary care, the defect of a misplaced vent pipe would have been discovered. These circumstances strongly indicate contributory negligence on the part of the deceased. The contributory negligence of a tenant will bar his recovery for injuries sustained from defects of which he has knowledge. 16 R. C. L. 1049, § 568. Contributory negligence is ordinarily a matter to be determined by the jury. 1 Thompson on Negligence, 408, § 425; 29 Cyc. 631; Kelly v. Santa Barbara R. R. Co., 171 Cal. 423, 153 P. 903, Ann. Cas. 1917C, 67; Hoffman v. Southern Pac. Co. (Cal. App.) 258 P. 397; Phillips v. Pacific Elec. Ry. Co. (Cal. App.) 264 P. 538. In 16 Ruling Case Law, 1058, it is said:

> "It has been held that (the question as to) whether the tenant is guilty of contributory negligence in using the premises after the need for repairs becomes apparent is a question for the jury."

By their verdict in the present case the jury is presumed to have found that the deceased was guilty of contributory negligence. Where there is any substantial evidence to support this finding it will be upheld on appeal.

[7-10] The chief contention of the appellant in this case is that the respondent, as the landlord of Sunnyside Apartments, is liable for damages resulting to a tenant from defects of a gas heater used as a part of the equip-

ment of the rented premises, particularly since he assumed the responsibility of repairing such defects. It is doubtful whether the respondent was required to clean or repair the gas heater under the covenants of the lease which provided, "The *lessee* agrees to make all *minor repairs* at his own expense." Cleaning the gas burners, replacing the screen, or adjusting the vent pipe appear to be "minor repairs," which could be done with little labor, at small expense. When such minor repairs cost less than one month's rent of the premises, the lessee is authorized to make the repairs and charges the expense against his rent account. Civ. Code § 1942. When the defects are trivial, and the cost of repairing them amounts to less than one month's rent of the premises, regardless of a landlord's covenant to repair, the only remedies which the lessee has for the landlord's failure to repair is to either vacate the premises or make the repairs and charge the expense to the rent account pursuant to section 1942, Civil Code. It is the settled law of this state that, in the absence of fraud or deceit on the part of the landlord in concealing latent defects of which he has knowledge, and in the absence af a direct covenant to make repairs, the lessor is not liable to the tenant or others for injuries resulting from defects in the rented premises. 15 Cal. Jur. 704; 16 R. C. L. 1059, § 580; 1 Tiffany on Landlord and Tenant, 556, §§ 86, 87; Carty v. Blauth, 169 Cal. 713, 716, 147 P. 949; Gately v. Campbell, 124 Cal. 520, 57 P. 567; Daley v. Quick, 99 Cal. 179, 33 P. 859; De Motte v. Arkell, 77 Cal. App. 610, 621, 247 P. 254; Hassell v. Denning (Cal. App.) 258 P. 426; Smelser v. Deutsche, etc., Kirche (Cal. App.) 263 P. 838. A landlord is not an insurer of his demised premises against damages or injuries. He becomes liable for injuries or damages only when his conduct amounts to fraud or deceit, such as a failure to disclose the existence of hidden defects of which he has knowledge, and which may not be discovered by the use of reasonable diligence on the part of the lessee. The doctrine of caveat emptor ordinarily applies to the leasing of premises. It is the duty of the renter to exercise reasonable care and diligence in inspecting the premises which he proposes to rent. Even when the landlord has covenanted to repair defects, or is guilty of constructive fraud in concealing hidden defects of which he has knowledge, the lessee may not recover damages when his own negligence proximately contributed to the injuries sustained.

[11, 12] It is true that a landlord who voluntarily attempts to repair defective premises, whether he has contracted to do so or not, will be required by law to exercise reasonable care therein, and will become liable for injuries caused by his careless or unskillful workmanship. 1 Tiffany on Landlord and Tenant, 608, § 87; 16 R. C. L. 1045, § 565; 36 C. J. 217, § 900; Callahan v. Loughran, 102 Cal. 476, 36 P. 835; Seid Pak Sing v. Barker, 197 Cal. 321, 355, 240 P. 765. But in the present case, while it is true that the respondent did send his agent to repair or clean the gas heater upon several occasions, there is no evidence of unskillful or careless workmanship on their part which would make him liable. The record contains substantial evidence from which the jury was warranted in determining just the contrary. The foregoing exception to the rule respecting the liability of a landlord for injuries sustained from defective premises is therefore not applicable.

[13] The appellants seek a reversal of the judgment for the alleged erroneous giving and refusing of certain instructions. The following instruction was refused:

> "The defendant, having undertaken to repair the heater in question, was bound to exercise reasonable care in the repair and replacement of the same to make it safe. * * *"

This was a correct statement of the law, but was fully covered by appellants' instruction No. 11, which was given as follows:

> "If, when defendant leased the premises to Mrs. Swanwick, the said heater was in a dangerous and unsafe condition, and if following that he undertook to repair the same under his lease, then he was bound to exercise reasonable care to make the same safe for the uses for which it was intended, and, if he negligently failed to do so, and because thereof the deceased met his death, without contributory negligence on the part of the deceased, then your verdict will be for the plaintiff. * * *"

[14] Defendant's instructions Nos. 18 and 22 are challenged because they omitted to inform the jury that the law requires a renter to use only ordinary care to discover the defects which resulted in his injury. No. 18 reads:

> "I instruct you * * * that, even if the water heater was in a bad state of repair and known to be so by the defendant, and that he negligently failed to repair it, still, if the defect was one that was clearly patent, open, and observable by the deceased or any one using the bathroom, then the law charges the deceased with knowledge of the danger, and the defendant cannot be held responsible for such defect."

Instruction No. 22 reads:

> "I further instruct you that, if you believe that the said Albert P. Nelson knew of the defective condition of the heater, if it was defective, and that he thereafter used the same, that he thereby assumed the risk of such defective condition so far as it was known to him."

The omitted element of these instructions, to the effect that the deceased was liable only for a failure to use reasonable care for his own safety, was supplied by instruction No. 13, which was given as follows:

"If the defendant was negligent as charged in the complaint, the fact that the deceased may have known there was some danger in entering the bathroom will not, in and of itself, defeat the plaintiff's right to recovery, but you must find that a reasonably careful person would not have entered the bathroom under like circumstances, and with the same knowledge he had of the danger."

In this regard, the jury was further instructed:

"The test is, Did the deceased do what a reasonably careful person would have done under the same situation, facts, and circumstances, viewing it as the deceased did? * * *"

[15, 16] These instructions were further supplemented by informing the jury in the language of the statute that, in the absence of an eyewitness to the accident which caused the death of the deceased, the law presumes that he exercised due caution for his own safety, and that the burden was upon the defendant to show his lack of ordinary care. These instructions, taken as a whole, fairly informed the jury that the deceased was required to exercise only ordinary care for his own safety, and that the burden rested upon the defendant to prove a lack of such diligence. The deceased was entitled to the benefit of the legal presumption that he exercised due diligence for his own safety, to be weighed by the jury as an established fact, together with all the other evidence in the case in determining whether he was guilty of negligence. The appellant contends that this presumption was controlling, and that it absolutely refutes the theory that he was guilty of contributory negligence. There was, however, substantial evidence of his negligence, which was a matter solely for the jury to determine. He knew of the alleged defective condition of the heater. Mrs. Swanwick testified that she had discussed it with him about a week before his death. "Q. You had some discussion with Mr. Nelson about the condition of the heater? A. Yes, sir. Q. When was that? * * * A. I would judge a week or more * * * before his death." The defect in the heater relied upon by appellant was the frequent displacement of the vent pipe which carried off the noxious gases. In spite of his knowledge of the alleged defective condition of the heater, he entered the bathroom, and apparently used this heater in the darkness, without an electric light. Mr. Reardon, the undertaker, testified:

"Q. Now you may tell when it was, and where, that you first saw him after his death. A. In the bathtub at Sunnyside Apartments. * * * It was just about dark, or just before dark, and there was no light in the room, so that you couldn't decipher the expression on his face."

[17-19] Appellants also challenge defendant's instruction No. 21, contending that there was no dispute as to the actual cause of death. This instruction reads:

"If the jury believe from the evidence that it is impossible to ascertain what was the cause of the death of Mr. Nelson, then your verdict should be for the defendant."

We are of the opinion that the appellants are in error regarding their claim that the cause of death was not disputed. The answer "denies that the said Arthur P. Nelson then and there died as a result of breathing said noxious or deadly gases, or as a proximate result of the negligence of the defendant." It is true that the weight of the evidence indicates that he died as a result of inhaling carbon monoxide. But there was evidence of an ailment from which he suffered just before his death. The autopsy was not conducted with the use of a spectroscope or aided by a chemical analysis of the blood. The jury had a right to consider these circumstances in determining the cause of death. It is proper to give instructions upon any valid theory which is made an issue either by the pleadings or the trial of the case. This instruction was therefore proper. The appellants also complain of the giving of defendant's instructions Nos. 23, 24, and 26, on account of their omission of the principle of law heretofore announced to the effect that, when a landlord voluntarily undertakes to make repairs of defects, he will be held liable for negligence or carelessness in the workmanship which causes the injury to the renter. We are of the opinion that instruction No. 11, which was given, and which was heretofore quoted, sufficiently covers this feature of the law. The jury was fully and fairly instructed upon the doctrines of negligence and contributory negligence in their application to the relationship of landlord and tenant, and we think the record is free from reversible error.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

94 Cal. App. 160

GODWARD v. BOARD OF TRUSTEES OF MARIPOSA COUNTY UNION HIGH SCHOOL et al. (Civ. 3623.)

District Court of Appeal, Third District, California. Sept. 25, 1928.

1. Schools and school districts 🔑133—High school district trustees cannot employ principal and teachers for longer terms than one year (Pol. Code, § 1617, subd. 7, as amended, and sections 1741, 1793).

St. 1911, p. 1362, amending Pol. Code, § 1617, subd. 7, as amended by St. 1881, p. 41, and St. 1917, p. 737, re-enacting section 1617 as section 1609, do not authorize trustees of high school district, who are invested with same powers as those of other school districts by section 1741, to employ high school principal and teachers for longer terms than one year, as in case of city superintendents, under section 1793.

2. Statutes 🔑219—State education department's long-continued practical construction of statute as authorizing school trustees to employ principals for one-year terms only is entitled to great weight (Pol. Code, § 1617, subd. 7, as amended, and section 1741).

Long-continued practical construction of Pol. Code, § 1617, subd. 7, as amended by St. 1881, p. 41, Stats. 1889, 1891, 1893, 1906, 1909, and St. 1911, p. 1362, and re-enacted by St. 1917, p. 737, as section 1609, by state department of education as authorizing school trustees, including high school boards invested with same powers as those of other school districts by section 1741, to employ principals for terms of only one year, is entitled to great weight, though not conclusive; presumption being that it was brought to Legislature's attention.

Original application by W. A. Godward for a writ of mandate to the Board of Trustees of the Mariposa County Union High School and the members of such Board. Writ denied.

F. M. Ostrander and Stephen P. Galvin, both of Merced, for petitioner.

Louis T. Milburn, Dist. Atty., of Mariposa, for respondents.

FINCH, P. J. This is an original application for a writ of mandate to compel the respondents to reinstate the petitioner as principal and teacher of the Mariposa County union high school. October 12, 1926, the respondent board adopted a motion to employ the petitioner "for a period of three years, beginning September 13, 1926, and ending June 30, 1929." He thereafter acted as principal of the school and teacher of algebra, geometry, and physics until the close of the term ending in May, 1928. During the same period five other teachers were continuously employed in the school. June 9, 1928, the board notified the petitioner that his services were no longer required.

The only question to be considered is whether the board of trustees had authority to employ the petitioner for a longer term than one year. Prior to 1911 the power to employ a principal was included in the general authorization to employ teachers. Section 1617 of the Political Code, as amended in 1881, provided:

> "The powers and duties of trustees of school districts, and of boards of education in cities, are as follows: * * * Seventh—To employ the teachers, janitors, and employés of schools; * * * provided, that no board of trustees shall enter into any contract with such employés to extend beyond the thirtieth day of June next ensuing." Stats. 1881, p. 41.

In Kennedy v. Board of Education, 82 Cal. 483, 489, 22 P. 1042, 1044, it is said:

> "This section contains no limitation as to the time for which a board of education in a city may employ a teacher. There is such a limitation, but it is confined in terms to boards of trustees."

Section 1617 was amended in 1889, 1891, 1893, 1906, and 1909, but no material change was made in the foregoing provisions. In 1911 the seventh subdivision of section 1617 was amended to read as follows:

> "(a) To employ a principal for each school under their control, and in schools employing eight teachers or more, they may employ a supervising principal for one or more schools under their control, and in each city school district governed by a city board of education to employ a city superintendent of schools and, when necessary, deputy or assistant city superintendent of schools; * * * provided, that any supervising principal, or city superintendent, or deputy, or assistant city superintendent, who shall be employed after the passage of this act, may be employed for four years.
>
> "(b) To employ the teachers, * * * also to employ janitors and other employees of the school; * * * provided, that no board of trustees shall enter into any contract with such employees to extend beyond the close of the next ensuing school year; except that teachers may be elected on or after June first for the next ensuing school year, and each teacher so elected shall be deemed reelected from year to year thereafter unless the governing body of the school district shall on or before the tenth day of June give notice in writing to such teacher that his services will not be required for the ensuing school year." Stats. 1911, p. 1362.

Section 1617 was again amended in 1913, but no material changes were made in the parts quoted. In 1917 the provisions of section 1617 were amended and re-enacted as section 1609, reading in part as follows:

> "Boards of school trustees and city boards of education shall have power, and it shall be their duty:
>
> "First—To employ a principal for each school under their control, and they may employ a dis-

> trict superintendent for one or more schools employing eight teachers or more under their control. In each city school district governed by a city board of education, such board may employ a city superintendent of schools and such deputy or assistant city superintendents as it may deem necessary. * * * Any deputy city superintendent of schools, or assistant city superintendent of schools, or district superintendent may be elected for a term of four years.
>
> "Second—To employ the teachers, * * * also to employ janitors and other employees of the school; * * * provided, that no board shall enter into any contract with such employees to extend beyond the close of the next ensuing school year; except that teachers may be elected on or after June first for the next ensuing school year, and each teacher so elected shall be deemed re-elected from year to year thereafter unless the governing body of the school district shall on or before the tenth day of June give notice in writing to such teacher that his services will not be required for the ensuing school year." Stats. 1917, p. 737.

Section 1609 was amended in 1921 and again in 1927, but the first subdivision thereof has not been changed, and, while the phraseology of the second subdivision has been changed, the foregoing provisions thereof have been retained. Section 1793 provides that "city superintendents of public schools, elected by city boards of education, shall be elected for a term of four years." Section 1741 invests high school boards with the same powers as those of school districts.

[1] From the foregoing it clearly appears that prior to 1911 high school trustees had no authority to employ a principal for a term longer than one year. At all times since 1911 either subdivision (a) of section 1617 or the first subdivision of section 1609 has provided for the employment of principals, supervising principals or district superintendents, city superintendents, and deputy and assistant superintendents, and, without further mention of principals, has, specifically, provided that all the others enumerated may be employed for terms of four years. Applying the maxim, "Expressio unius est exclusio alterius," it does not appear that it was the intention to authorize the employment of a principal by the trustees of a school district for a longer term than one year, the maximum term authorized by the law prior to the amendment of 1911.

[2] The state department of education has at all times, both before and after the amendment of 1911, construed the various provisions quoted as authorizing school trustees to enter into contracts employing principals for terms of only one year. It must be presumed that this long-continued practical construction was brought to the attention of the Legislature and that, if contrary to the legislative intent, some of the numerous amendments mentioned would have made specific provision for the employment of a principal for a term of more than one year. While such contemporaneous construction is not conclusive of the question under consideration, it is entitled to great weight. Riley v. Forbes, 193 Cal. 740, 745, 227 P. 768; Riley v. Thompson, 193 Cal. 773, 778, 227 P. 772.

It appears from the agreed statement of facts that the petitioner was employed as teacher as well as principal. It clearly appears from a mere reading of the statutory provisions quoted that school trustees are not authorized to employ teachers for terms of more than one year.

Viewed from any standpoint, the employment of the petitioner for a term of three years was unauthorized by the law.

The petition is denied.

We concur: PLUMMER, J.; HART, J.

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94 Cal. App. 143

AMBASSADOR HOTEL CORPORATION v. LOS ANGELES COUNTY. (Civ. 3561.)

District Court of Appeal, Third District, California. Sept. 25, 1928.

1. Taxation 🔑348—Failure of assessor in computing value of hotel by cubic contents to deduct excess contents of light spaces held not to invalidate assessment, not excessive or discriminatory.

Fact that assessor in computing valuation of hotel for assessment, purposes according to cubic content included contents of light and air spaces without excluding portion of such spaces exceeding 10 per cent. of entire cubic contents of building, in accordance with alleged rule for computing value, *held* not to render assessment illegal or void, where it was not shown that the valuation arrived at was excessive, unjust, or discriminatory.

2. Taxation 🔑347—Assessor's mistake in computing valuation does not injure taxpayer unless resulting tax is excessive or discriminatory.

Taxpayer is not injured by error of assessor in computing valuation of property taxed, unless tax exacted is excessive, unjust, or discriminatory.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by the Ambassador Hotel Corporation against Los Angeles County. Judgment for defendant, and plaintiff appeals. Affirmed.

Roger Marchetti and H. R. Collins, both of Los Angeles, for appellant.

Everett W. Mattoon, County Counsel, and J. A. Tucker, and W. Sumner Holbrook, Jr., Deputy County Counsels, all of Los Angeles, for respondent.

PLUMMER, J. By this action the plaintiff sought to recover the sum of $9,084.87, alleged excess in taxes paid the county of Los Angeles for the years 1922, 1923, and 1924. Judgment was entered for the defendant after the defendant's demurrer to the second amended complaint had been sustained. From this judgment the plaintiff appeals.

The complaint alleges that the plaintiff is the lessee and in possession of certain real property situate in the county of Los Angeles known as and called the Alexandria Hotel property. A description of the property is set forth in the complaint, showing that the hotel is so erected as to leave certain light wells or open spaces to give light and air to the rooms contained in said building; that the light spaces referred to have walls on only three sides. It is then set forth that for the purposes of determining the assessable value of said property, the assessor of the county of Los Angeles adopted the method of computing the cubic contents of the building erected upon the real property possessed by the plaintiff; that in so doing the assessor included all the light and air courts existing between the extra walls of the building, and figured the same as though said light and air courts were built in with solid construction, etc., the same as the rooms contained in the hotel building. It is then alleged that it was the rule of the assessor, in determining the method of computation for assessment purposes, to exclude from his computation all of that portion of the light and air courts the cubic contents of which exceed 10 per cent. of the entire cubic contents of buildings. It is further alleged by the plaintiff upon information and belief that the cubic contents of the light and air courts in the building erected upon the real property described in plaintiff's complaint is considerably in excess of 10 per cent. of the entire cubic contents of the buildings erected upon the real property. It is then alleged that the assessor, in making his computation, failed to exclude from the cubic contents of the hotel building all that portion of the light and air courts in excess of 10 per cent., etc.; that the failure to exclude such portion of the light and air courts by the assessor was owing to the mistaken belief of the assessor that in his calculations, the cubic contents of the light and air spaces had been excluded. The complaint then sets forth that the alleged error in computation was not discovered by the plaintiff until in April, 1925, after the taxes referred to had all been paid, and that the plaintiff could not have discovered the mistake by reasonable diligence; that the plaintiff paid said taxes, together with the erroneous tax or the amount assessed by the assessor upon said light and air courts without knowledge, at the time of the payment, that the taxes were erroneously assessed and without knowledge that the taxes were assessed upon the said spaces, etc. The complaint then sets forth a schedule of the property assessed, showing that the property referred to was described on the assessment roll as follows:

Subdivision northerly part of block 13, Ord's survey, being the southerly 24 feet of the northerly 48 feet of lot 7.

(A) Assessment No. 22783.

Real estate	$ 45,600 00
Improvements	111.280 00
	$156,880 00

(B) Assessment No. 22782.

Northerly 24 feet, lot 7 aforesaid.

Real estate	$ 45,600 00
Improvements	111,280 00
Total assessment	$156,880 00

(C) Assessment No. 22781.

That portion of Ord's survey, being the northerly 12 feet of lot 6 and the southerly 12 feet of lot 7.

Real estate	$ 45,600 00
Improvements	111,280 00
Total assessment	$156,880 00

(D) Assessment No. 22780.

That portion of block 13, described as the northerly 24 feet of the southerly 48 feet of lot 6 of the subdivision thereof.

Real estate	$ 45,600 00
Improvements	111,280 00
Total assessment	$156,880 00

(E) Assessment No. 22772.

Lot A.

Real estate	$382,280 00
Improvements	344,170 00
Total assessment	$726,450 00

This is followed by the amount of taxes for the respective years, which is not material herein.

The complaint contains no allegation that any application was ever made to the board of equalization for a reduction in value of any of the properties assessed. The whole cause of complaint is based upon the assumption that the assessments were made upon nonexisting property.

[1,2] There is nothing in the complaint from which the conclusion can be drawn that there was any discrimination made by the assessor in assessing the Alexandria Hotel property. The complaint is entirely silent as to whether other like property was or was not, during the same period of time, assessed in the same manner. There is no allegation in the complaint that the amount of taxes paid by the plaintiff was in excess of the amount of taxes which should have been paid by the plaintiff on the true assessable value of the properties involved. In fact, the cause of complaint is not that the plaintiff has paid more taxes than it should have paid, that the property has been assessed too high, that the assessor was guilty of any discrimination, or that any other like property has been assessed at a lower figure. The only cause of complaint is that in determining the assessable value of the property, the assessor in-

cluded in his calculations air and light spaces, whereas it is alleged:

> "It was the rule of said assessor, in determining the said method of computation for assessment purposes, to exclude from his computation all of that portion of said light and air courts the cubic contents of which exceeded ten per cent. of the entire cubic contents of the building or buildings."

It does not appear from the complaint that the assessor followed that rule during any of the years referred to, or that any other buildings were assessed by the assessor of Los Angeles county by figuring the cubic contents thereof, and then excluded the air and light spaces exceeding 10 per cent., etc. The copy of the assessment roll contained in the complaint which we have set forth herein shows clearly that the assessment was levied only against the real estate and the improvements thereon possessed by the plaintiff, the improvements being described only as to the value. The accuracy of this value is not contested. If the assessment is not too great, if the value placed upon the improvements is not disproportionate to other like property in the county of Los Angeles, if there has been no discrimination between the property possessed by the plaintiff, and other property of like character, if no extra burden has been cast upon the plaintiff over and above that borne by other taxpayers, it does not appear in just what manner the plaintiff has been injured or how the assessment has been rendered discriminatory, illegal or unjust. It may be true, as contended by the appellant, that if the light and air spaces had been excluded from the cubic contents of the Alexandria Hotel, a somewhat lessened value might have been placed upon the improvements referred to, but that does not lead to the conclusion that the assessment is excessive or is unjust or is discriminatory. The question to be determined is not whether the assessor used an erroneous method, or even whether the assessor made a mistake in the method employed by him in ascertaining the value of the property to be assessed, but whether the plaintiff has paid taxes upon his property which in law and in justice should not have been paid. True, the complaint alleges that by reason of the mistake of the assessor taxes were illegally assessed, and that there has been unlawfully set down and collected from plaintiff during the years referred to the aggregate amount for which the plaintiff prayed judgment; but the conclusions drawn by the appellant are not supported by the facts. There is nothing illegal or void or unlawful in the assessment so far as the complaint sets forth any facts, nor is there any double assessment, as concluded by the pleader. All that is set forth is contained in the simple statement, if the allegations be correct, that the method of computing the cubic contents of the Alexandria Hotel was erroneous in not excluding the open-air spaces. If the assessed value of the property is just, and there is no allegation that it is unjust, there is no basis for the conclusion that the assessment was either "erroneous, fraudulent, illegal or void." There is nothing in the complaint from which the trial court could conclude that the plaintiff had been required to pay a tax based upon an unjust assessment or based upon an assessment which assessed the plaintiff's property at a higher value than other like property, or based upon an assessment discriminatory in any manner whatever. The only conclusion at which the trial court could arrive from the allegations in the complaint would be (following strictly the allegations of the complaint) that perhaps plaintiff would not have been required to pay all the taxes that it did pay had the assessor excluded the open-air spaces, and not that the plaintiff had paid or been required to pay excessive taxes or any amount of taxes that it should not have paid. The complaint is entirely wanting as to any facts from which a trial court could conclude that the Alexandria Hotel, for assessment purposes, was not worth every dollar of the value placed upon it by the assessor, and justly subject to the taxes levied thereon. If it be conceded that the assessor made a mistake in not excluding the open-air spaces, and that he had intended to exclude the open-air spaces in figuring the cubic contents of the Alexandria Hotel, yet as there has been no complaint made that the value of the hotel as ascertained by the assessor, was excessive no legal cause of action is set forth. In order for the plaintiff to have been injured, the plaintiff must have been required to pay taxes in excess of that which it should have paid, not merely that by reason of an error in computation made by the assessor it was required to pay more than otherwise would have been the case.

The answer to plaintiff's contention may be stated in a different manner: If the assessed valuation of plaintiff's property is not greater than it should have been, the plaintiff has not been legally injured because, perchance, it might have been relieved of the payment of some of its taxes had the assessor not committed the alleged mistake. That is the sum and substance of the plaintiff's alleged cause of action. We do not find anything in section 3804, of the Political Code which would relieve the plaintiff under such circumstances. The reasoning of this court and the authorities cited in the case of Wild Goose Country Club v. County of Butte, 60 Cal. App. 339, 212 P. 711, is a complete answer to plaintiff's contention. Among other things, it is said in that case, in speaking of the determination of the equalization board, that it "cannot be avoided unless the board has proceeded arbitrarily and in willful disregard of the law intended for its guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers," is most pertinent to the allegations of the plaintiff's complaint in this action, nothing of that kind being alleged. The opinion further contains the following language: "In the absence of evidence tending to show the value of plaintiff's lands or of other lands in the county, the premises were wanting from which a conclusion could be drawn by the board that inequality of assessments existed" (citing authorities). This applies with striking force to the plaintiff's complaint. Nothing is said about the value of other property. Not a single fact is set forth showing that other property was not likewise assessed during the three years involved. The plaintiff has not shown by any facts alleged that its property was assessed at a higher rate or higher proportion of its value than other property in the county of Los Angeles. We do not think it necessary to review the authorities cited by appellant, further than to state that a reading thereof shows that they were all based upon dissimilar circumstances, to wit, excessive valuation of property, discrimination or inequalities in assessment by which an unjust burden had been cast upon the complaining taxpayer.

An extended review of the authorities is unnecessary. It is sufficient to state that the following cases, among others, support the judgment of the trial court, to wit: Birch v. Orange County (Cal. App.) 262 P. 788; Wild Goose Country Club v. County of Butte, 60 Cal. App. 339, 212 P. 711; Globe Grain & Milling Co. v. Los Angeles County, 62 Cal. App. 297, 216 P. 631; Luce v. City of San Diego, 198 Cal. 405, 245 P. 196; Los Angeles G. & E. v. County of Los Angeles, 162 Cal. 164, 121 P. 384, 9 A. L. R. 1277.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

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94 Cal. App. 157

WHALEN v. YANK, County Clerk.
(Civ. 3620.)

District Court of Appeal, Third District, California. Sept. 25, 1928.

Mandamus ⚷3(3)—Mandamus would not lie to compel clerk to enter judgment for treble damages, where actual damages were awarded legal remedy being adequate (Code Civ. Proc. § 1086).

Where plaintiff in action for negligently setting fire to her property was awarded verdict for actual damages only, clerk on application to enter judgment in her favor for treble damages was without authority to either enlarge or abridge scope of judgment, and writ of mandate to compel him to enter treble damages, therefore, would not lie, under Code Civ. Proc. § 1086; plaintiff having a speedy and adequate remedy at law.

Application by Eva M. Whalen for writ of mandate prayed to be directed to Errol A. Yank, as County Clerk of the County of Shasta, State of California, and ex officio Clerk of the Superior Court thereof, to compel him to enter judgment for treble damages in her favor, based on a judgment recovered by her. Writ denied.

Carter & Smith, of Redding, for petitioner.
Carr & Kennedy, of Redding, for respondent.

FINCH, P. J. This is an original application for a writ of mandate to compel the respondent to enter judgment for treble damages in favor of petitioner in an action prosecuted by her against the Postal Telegraph-Cable Company and others. The case was tried before the court, without a jury, and the court found that, on August 8, 1926, the defendants negligently set fire to "weeds, grass, and vegetation" growing on the plaintiff's land and negligently suffered the fire to spread and destroy the plaintiff's barn; that by reason of such negligence "plaintiff has suffered the loss of her said barn and has thereby suffered actual damages in the sum of $573.38," the actual value of the barn. The court made the following conclusions of law and direction for entry of judgment:

> "That plaintiff is entitled to judgment against the defendants * * * in the sum of $573.38 as actual damages suffered by her as the result of the destruction of her barn, as hereinabove found, together with her costs of suit incurred in this action.
>
> "Let judgment be entered accordingly."

It appears from respondent's return to the alternative writ of mandate herein that the conclusions of law, as originally drafted, contained the following:

> "That the defendants are liable to the plaintiff to treble damages in the premises, pursuant to the provisions of section 3346a of the Civil Code and section 3344 of the Political Code of the state of California."

The return further shows that the trial judge struck this paragraph from the draft of the findings and conclusions before the same were filed; that immediately after the findings were filed the respondent entered judgment in favor of the plaintiff for $573.38; that "the judgment so entered * * * was prepared and presented to respondent, for use in entering judgment in said action, by counsel for plaintiff, the petitioner herein."

Six days after the entry of such judgment the petitioner made demand upon respondent to enter judgment in her favor in the sum of $1,720.14, being for treble damages. On respondent's refusal to comply with the demand, this proceeding was commenced. Thereafter, September 1, 1928, the petitioner herein, as plaintiff in the action for damages, filed a notice of appeal to this court from the judgment entered by the clerk in that action. Section 3346a of the Civil Code and section 3344 of the Political Code are identical in language and read as follows:

> "Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured."

Since the case is on appeal to this court from the judgment entered therein by the clerk, on the hearing of which appeal the matters involved may be more fully presented, it is not deemed proper unnecessarily to express an opinion whether or not the plaintiff is entitled, under the provisions quoted, to treble damages. The facts found by the court do not bring the case within the strict terms of those provisions, because the fire was not set on the defendants' land and did not extend therefrom to plaintiff's or other lands. Those facts apparently bring the case within the terms of the Forestry Act. Stats. 1905, p. 235. Section 14 of that act provides:

> "Every person, who willfully, maliciously or negligently sets on fire or causes or procures to be set on fire any woods, brush, prairies, grass, grain or stubble on any lands not his own, * * * whereby any property of another is injured or destroyed, * * * shall be guilty of a misdemeanor."

Section 18, as amended in 1919 (Stats. 1919, p. 234), provides:

> "In addition to the penalties provided in sections fourteen, fifteen, sixteen and seventeen of this act, the United States, state, county, or private owners, whose property is injured or destroyed by such fires may recover in a civil action, double the amount of damages suffered if the fires occurred through willfulness, malice or negligence."

On the submission of the case for decision it became the duty of the trial court to determine whether the case made by the plaintiff warranted a recovery of treble damages under the sections of the Civil and Political Codes, of double damages under the provisions of the Forestry Act, or of actual damages only under general provisions of law, and the court evidently decided in favor of such actual damages. If it be conceded that the court erroneously construed the law applicable to the facts, it does not follow that a ministerial officer has authority to correct the erroneous judicial act of the trial court. "The written findings of fact and conclusions of law constitute the decision of the court and judgment must be entered in accordance therewith." Prothero v. Superior Court, 196 Cal. 439, 238 P. 357. "Since, in entering a judgment on a verdict or findings, the clerk performs a ministerial duty, he may neither enlarge nor abridge the scope of the judgment. * * * In so far as he departs from the decision rendered, his action is void and may be set aside and corrected at any time." 14 Cal. Jur. 920; City and County v. Brown, 153 Cal. 644, 650, 96 P. 281. "In the generality of cases, to an intelligent clerk, the conclusions of law will be sufficient guidance for the entry of a correct judgment." Takekawa v. Hole, 170 Cal. 323, 324, 149 P. 593. The judgment entered by the clerk in this case is in strict accordance with the conclusions of law and he has no authority to vacate it and enter a different judgment.

It may be observed further that a writ of mandate should issue only in "cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." Code Civ. Proc. § 1086. A motion in the action affords a plain, speedy, and adequate remedy for the correction of a judgment entered by the clerk contrary to the decision of the court. City and County v. Brown, supra.

The petition for a writ of mandate is denied.

We concur: PLUMMER, J.; HART, J.

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94 Cal. App. 141

NEWTON et al. v. MARSH, Judge of the Superior Court. (Civ. 6171.)

District Court of Appeal, Second District, Division 2, California. Sept. 25, 1928.

1. Exceptions, bill of 🔑53(7)—In original proceeding to compel judge to settle bill of exceptions differently, court held confined to question whether there was testimony supporting statements objected to.

In original proceeding for writ of mandate to compel judge of superior court to settle bill of exceptions different from the one allowed by him, court was confined to question whether there is testimony supporting statements contained in portion of bill of exceptions giving rise to proceedings, in absence of showing that petitioners suggested any statement in lieu of portion to which objection was lodged or of any showing that any matter explanatory of or in limitation of any part thereof was requested.

2. Exceptions, bill of 🔑51—Trial judge should certify correct bill of exceptions to give litigants every reasonable opportunity of presenting cases on merits.

It is the function of the trial judge to certify a correct bill of exceptions, and he should lean in favor of giving to litigants every reasonable opportunity of presenting their cases on the merits.

Application of Jesse Newton and another for writ of mandate to be directed to S. M. Marsh, Judge of the Superior Court of San

Diego County, to compel said judge to settle bill of exceptions different from that allowed by him. Writ denied.

F. L. Richardson, of San Diego, for petitioners.

J. C. Hizar, of San Diego, for respondent.

THOMPSON, J. This is an original proceeding by which it is sought, through the medium of the writ of mandate, to compel the respondent judge to settle a bill of exceptions different from the one allowed by him on the claim of petitioners that a portion of the present bill is "contrary and diametrically opposed to the evidence introduced." The portion objected to reads as follows:

> "That from the testimony of John H. Landes, city clerk, and H. D. Brodie, former city clerk and one of the defendants, and from the books of the city of Oceanside, that there was in the 'Water Fund' on the 1st day of January, 1924, an overdraft, or deficit, in the amount of $1,229.95; that on December 31, 1924, there was in said 'Water Fund' $2,025.26; that on December 31, 1925, there was in said 'Water Fund' $2,982.07, and that there was in said 'Water Fund' on December 31, 1926, $3,640.88. That there was collected and paid into the 'Redemption Fund' for taxes of the year 1924, collected in the year 1925, $514.29; in the year 1926, $1,754.98, and in the year 1927, $533.91."

We have examined the transcript of the testimony, in accordance with the understanding between counsel, and deem it material to summarize the state of the record with respect to the disputed points, but before doing so it may aid in a general understanding of the subject-matter to say that the action in which judgment went against these petitioners in the trial court was one to compel the city trustees to pay into the treasury about $2,000 which they had ordered paid from the water fund of the city of Oceanside in satisfaction of a judgment obtained against the city for water pipe sold and delivered to it. With this preliminary statement it appears that at the trial the cashbook of the city for the years 1924, 1925, 1926, and 1927 was introduced with the statement by the respondent judge that counsel had better call the attention of the witness J. H. Landes to any portions of the book which he desired "looked into or emphasized." Referring to some record (which we must presume was the cashbook), this witness testified that there was in the water fund $2,025.26 on December 31, 1924; $2,982.07 on December 31, 1925; and $3,640.88 on December 31, 1926. The witness Brodie testified that in the year 1925 there was paid into the city in the redemption of taxes of 1924, including interest, and penalties, $514.29 and in 1926 for the same purposes $1,754.89, and estimated that in 1927 $533.91 was paid in for like purposes. The witness Landes testified that limiting the figures to taxes, the amounts named by Brodie were not correct, and attempted an explanation which he was not permitted to make, but did say that there was a difference between taxes and special assessments, and that he took the actual amount of the taxes for the year 1924, without counting interest or penalty. On cross-examination the witness Brodie testified that these taxes were not delinquent until "after '24 had expired," and in answer to another question that "the '24 was levied for the expense of '25."

[1, 2] In the absence of a showing that the petitioners here suggested any statement in lieu of the portion to which objection is lodged, and in the absence of any showing that any matter explanatory of or in limitation of any part thereof was requested, we are confined undoubtedly to the question of whether there is testimony supporting the statements contained in the paragraph which gives rise to this proceeding. Certainly we cannot be required to search the record and draft either for counsel, or the court below, what might seem to us to be a more literal and proper statement to be included in the bill. It is the function of the trial judge to certify a correct bill, and, as has been said, he should "lean in favor of giving to litigants every reasonable opportunity of presenting their cases on the merits * * *" (Flagg v. Puterbaugh, 98 Cal. 134, 32 P. 863); but where, as here, every statement included in the portion objected to is literally true and there has been no refusal to include other testimony or to settle and certify a true bill, it must be held that petitioners have failed to instance a cause wherein this court should assume to command.

Writ denied.

We concur: WORKS, P. J.; CRAIG, J.

94 Cal. App. 97

In re MESMER'S ESTATE. (Civ. 6380.)★

District Court of Appeal, First District, Division 1, California. Sept. 22, 1928.

As Modified on Denial of Petition for Rehearing Oct. 24, 1928. Hearing Denied by Supreme Court Nov. 19, 1928.

1. Divorce 🔑236, 249(2)—Agreement as to alimony and disposition of property held binding.

Agreement between parties to divorce action, by which husband was given community property and monthly payments for wife's allowance were provided for as "allowed by the court," subject to stated maximum, with provision for selection of site for house by designated third party in case of disagreement, *held* competent and binding on the parties.

2. Divorce 🔑247—Agreement of husband to pay alimony allowed by court, together with court's order for payment monthly during wife's lifetime, required payment after husband's death (Civ. Code, § 1647).

Agreement between parties to divorce suit, by which husband received all community property and agreed to pay wife alimony which court should allow, together with order of court in divorce suit, approving agreement and requiring payment of monthly sum to wife during her lifetime, or until she remarried, entitled wife to recover monthly payments so provided for after husband's death, in view of interpretation placed on agreement, construction of contract being determined in light of circumstances and subject-matter under Civ. Code, § 1647.

3. Divorce 🔑236—Husband may by agreement bind his personal representatives for payment of alimony during wife's lifetime.

Husband may by agreement bind his personal representatives for the payment of alimony to his wife during her lifetime; amount, terms of payment, and length of time of payment of alimony being determinable by consent of parties, subject to ratification of the court.

4. Divorce 🔑247—Order directing monthly payments to wife during her lifetime held binding on estate of husband, who had previously consented to pay alimony allowed by court.

Where husband in divorce suit entered into agreement with wife, in which he consented to pay wife alimony allowed by the court, court's order, directing monthly payments of alimony for each month thereafter during her lifetime, was binding on husband's estate after his death.

5. Executors and administrators 🔑102—Husband's executors, on allowance of monthly alimony to wife, should set aside or invest sufficient funds, but purchase of annuity was improper.

On allowance against husband's estate of wife's claim for $75 per month alimony during her lifetime, purchase of annuity by executors was improper, because involving loss of large sum belonging to the estate, and executors were required instead to set aside sufficient funds of the estate to make monthly payments, or to invest funds income from which would be sufficient to pay alimony.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Proceeding by Elizabeth G. Mesmer against the estate of A. J. Mesmer, deceased, for the allowance of a claim, opposed by Roy W. Ballard. From an order approving the claim, and directing the executors to purchase an annuity in claimant's favor, contestant appeals. Affirmed in part, and reversed in part, with directions.

Wallace Rutherford, of Napa, for appellant.

Mahoney & Sweeney, of San Francisco, for respondent Mesmer.

Gillogley, Crofton & Payne, of San Francisco, for respondents Smith and Burdick.

BEAUMONT, Justice pro tem. A. J. Mesmer, decedent herein, and Elizabeth G. Mesmer, were married in June, 1897. In August, 1917, while an action for divorce, instituted by the wife, was pending, the parties entered into an agreement regarding their property and providing for the maintenance of the wife. This agreement was apparently carefully drawn, and covers 11 pages of the printed record. It goes into detail concerning the property, and sets out minutely items concerning certain expenses and taxes. By the terms of the agreement all of the community property was conveyed to defendant. The agreement provides in effect that defendant will pay plaintiff "alimony, and costs and attorney's fees allowed by the court, such alimony not to exceed the sum of $200 cash and $75 per month." The defendant further agreed that he would make a will in which he would leave plaintiff one-fourth of all the property of which he might die possessed, provided plaintiff should survive him. It was also agreed that the parties were, within a fixed period, to select a lot with a house thereon, which was to be used as a home for plaintiff; that this was to cost not less than $2,000, and not more than $2,750; that, if the parties could not agree upon a place, then B. A. Smith was to select a location, and his selection was to be binding on the parties; that the property was to be purchased by the defendant in his own name and at his own expense, and that he was to convey to plaintiff a life estate therein; that defendant, during his lifetime, was to pay taxes, insurance, and repairs within a fixed limit. "In consideration of the foregoing agreement" (referring to the agreement between the said plaintiff and defendant) and certain valuable consideration, B. A. Smith guaranteed that defendant would pay for the maintenance of said Elizabeth G. Mesmer at the times and in the manner required by the terms of said agreement, and any decree "that might be entered in the said

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★Rehearing denied. Hearing denied by Supreme Court.

divorce action," but limited his guaranty to payments that would become due during the lifetime of defendant. At the end of this guaranty agreement, said Smith states that all his liability shall end, "except as to such liability as may have been incurred hereunder previous to the death of said Alphonse J. Mesmer, and which was due and payable previous to the death of said Alphonse J. Mesmer."

On the day of the execution of both of the foregoing agreements, August 23, 1917, the divorce action was tried. The court found the agreement settling the rights of the parties was reasonable, and approved it, and further found that by reason of this agreement there was "no community property of the marriage of the said plaintiff and defendant to be divided between the parties to this action, or to be assigned to either of the parties." The court ordered defendant "to pay to said Elizabeth G. Mesmer, the sum of $200 * * * upon the entry of this decree, and the further sum of $75 per month in gold coin of the United States hereafter during the lifetime of the said plaintiff, or until she remarries." The decree was granted on the ground of extreme cruelty, and recites as follows:

> "Findings herein and notice of decision and judgment having been expressly waived by the respective parties to this action, by oral consent in open court, entered in the minutes of the court."

The decree was never modified, annulled, nor appealed from. A. J. Mesmer made all the payments required under the decree until the date of his death, more than eight years thereafter. A. J. Mesmer made a will, and by the terms of this will Elizabeth G. Mesmer was to have one-fourth of said A. J. Mesmer's estate, the remainder to go to Clara Mesmer, who was his wife at the time of his death. Clara Mesmer, while the matter of her husband's estate was pending, married Roy W. Ballard. Before distribution was ordered, Clara Ballard died. Said Roy W. Ballard appears herein as residuary legatee and executor of his wife's will.

Elizabeth G. Mesmer filed her claim against the estate for payment to her of $75 a month during her life. This claim was allowed by the executors, one of whom is B. A. Smith, the former partner of the decedent, and the same B. A. Smith named in the agreements referred to herein. When the matter of settling the final account was before the court, testimony was taken. One of the witnesses was B. A. Smith, who testified he had known A. J. Mesmer for more than 30 years; that he and decedent Mesmer were for some years partners in business, and that decedent, at the time of the property settlement with Elizabeth G. Mesmer, was worth approximately $100,000. The court approved the claim, ordered that the payments due since the death of Alphonse J. Mesmer be paid, and directed the executors to purchase an annuity from some responsible life insurance company for the payment of $75 per month to Elizabeth G. Mesmer, or that the executors pay in cash to said Elizabeth G. Mesmer a less amount than the amount required to purchase such annuity. Roy W. Ballard has appealed from the order allowing the claim, and from that part of the order directing the executors to purchase an annuity.

[1] Appellant sets out in his brief numerous points for reversal of the orders. All of these, however, are but variations of two contentions. The first is that the decree in the divorce action directing payments to Elizabeth G. Mesmer had no binding effect after the death of A. J. Mesmer. The agreement between the parties in the divorce action shows that plaintiff relinquished all her right in the community property; that, in consideration thereof, defendant was to make certain arrangements for the support of plaintiff. Most of the provisions of this agreement were definite, evidencing the fact that the parties had reached conclusions thereon. Some of them, however, were incomplete. For example, it was not certain as to the selection of a location for a home for plaintiff. If the parties could not agree as to this, then B. A. Smith was to make the selection, and his choice was to be binding on the parties. Likewise the amounts, time, and duration of the payments for the maintenance of plaintiff were not determined, but were to be such as were "allowed by the court, such alimony not to exceed $200 cash and $75 per month." It was proper for these matters, both as to the selection of a home for plaintiff and as to provisions for support of plaintiff, the parties so desiring, to be left to the judgment of other persons, and the action of such persons is binding upon the parties to such agreement. M. E. Church v. Seitz, 74 Cal. 287, 15 P. 839. "An agreement that the question of alimony should be referred to a member of the court is not objectionable." 19 C. J. 252. In Carson v. Murray, 3 Paige (N. Y.) 483, the court said:

> "I cannot see that there is anything in the contract, as proved, to render it invalid. It appears to have been an agreement for an immediate separation; the amount of alimony to the wife, and the particular mode of carrying it into effect, to be settled by arbitrators selected by the parties."

[2] As an aid to the construction of the contract, we may take into consideration the circumstances under which it was made and the matter to which it relates. Civ. Code, § 1647. Elizabeth G. Mesmer had sued for divorce on the ground of extreme cruelty. There was community property, consisting of real property in Oakland and Richmond, a partnership interest in a shoe business, and stock in various corporations. Her husband was worth $100,000. She had lived with him as the wife of his youth until middle age, more than 20 years. If she should secure a decree of divorce, she had reason to expect to receive

more than one-half of the community property. Gorman v. Gorman, 134 Cal. 378, 66 P. 313. By her agreement, made in consideration of relinquishing all right in the community property, she was to receive, in addition to the payments to be ordered by the court and the promise of defendant to leave one-fourth of his estate to her, a life estate in a home. On the whole, the contract bespeaks a desire on the part of A. J. Mesmer to provide for his then wife for her lifetime, and the order of the court to that end, fixing the duration of the payments for life or until she should remarry, was consistent with the tenor of the agreement, as well as within the specific covenant that the court should determine the allowance she was to receive.

The acts of the parties as set forth in the statement of facts herein show the interpretation they placed on the agreement. Without taking the time to advert to all of these, we shall point out that the record discloses that the parties, by oral consent in open court, waived findings and notice of decision; that B. A. Smith, whose agreement of guaranty was attached to the contract between the parties and was made "in consideration" thereof, expressly limited himself to payments that might be due previous to the death of A. J. Mesmer, thereby indicating that he contemplated payments might become due and payable subsequent to Mesmer's death. The same B. A. Smith was one of the executors of decedent's will, and as such executor allowed the claim of Elizabeth G. Mesmer, again placing his construction upon the agreement.

In Storey v. Storey, 125 Ill. 608, 18 N. E. 329, 1 L. R. A. 320, 8 Am. St. Rep. 417, the husband having consented to the entry of a decree for the payment of a certain sum per annum to his wife "for so long as she may be and remain sole and unmarried," the court held the estate of the deceased husband responsible for the payments due after his death. In that case a bond and trust deed were given to secure the payments ordered in the decree. The court said:

> "The decree, the bond, and the trust deed, which all bear the same date, must be regarded as one transaction, and must be construed together in determining the intention of the parties in making their agreement for alimony."

Again, in the same case, the court remarked:

> "Here the equities in appellant's favor appeal strongly against the withdrawal of the support provided for her by the agreement of her husband. * * * By her and his joint exertions the value of his fortune had reached nearly a half million of dollars at the time of the divorce."

[3] "It is generally held that the husband may, by agreement, bind his personal representatives for the payment of alimony to the wife during her life." 19 C. J. 279. "While it is true that husband and wife cannot lawfully enter into an agreement for divorce, yet it is well settled that the amount of alimony which the husband is to pay to the wife, the terms of the payment and the length of time during which such payment is to continue, may be all arranged between them by consent, subject to the ratification of the court. * * * Similarly, where by the consent of the parties alimony is awarded for the natural life of the wife, it continues to subsist even after the husband's death." 1 R. C. L. 935, and cases cited.

In Stratton v. Stratton, 77 Me. 373, 52 Am. Rep. 779, the parties entered into an agreement that two referees should determine what alimony a wife should receive and how she should receive it and that the decision should be binding on the parties. In the decree of divorce the court ordered that the payments should be as provided in the award of the referees. After the defendant's death no payments were made. Action was brought against his administrator. On appeal, it was said that:

> "The court, in adopting the award of the referees as a part of its decree, gave alimony to the wife 'during her natural life.'"

[4] This case presents a quite similar situation to that before the court in Parker v. Parker, 193 Cal. 478, 225 P. 447, as to the question of consent of the parties. There the parties stipulated that:

> "If a decree for divorce should be awarded to either party, the court, instead of dividing the property of said parties between them, might provide for the separate maintenance of defendant by awarding to her certain property for life, and that plaintiff pay defendant such monthly allowance and secure the same by a lien upon such property of plaintiff as in the discretion of the court should seem proper."

Thereupon the court ordered that:

> "Plaintiff pay to said defendant the sum of $50 on the 1st day of each and every month during the remainder of her natural life."

The judgment was upheld on appeal, the Supreme Court saying relative to the award:

> "It rests, not upon the obligation which the law imposes upon a husband to support his wife, but upon the contract of the parties thereto."

Here we find that because of the agreement between the parties there was no community property to divide, but that the defendant, having been given, by the terms of said agreement, all of the community property, had consented that the court should fix the payments he was to make for the support of his then wife. This the court did, ordering payments to be made on the 10th day of each month thereafter during the lifetime of the wife. The decedent husband having consented to be bound by any order the court should make, his estate is bound by the order the court did make.

[5] Appellant's second contention is that the court should not have directed the purchase of an annuity, for the reason that the sum necessary therefor, about $13,000, will be lost entirely to the estate. We are of the opinion that this is sound. The purpose of A. J. Mesmer will be subserved by having the executors make the payments prescribed by the court. These payments will have to be made from the general assets of the estate, no provision therefor having been made in the will. In the interest of justice, therefore, it seems to us proper that the executors be directed to set aside sufficient of the funds of the estate to pay $75 per month to Elizabeth G. Mesmer as long as she lives, or until she remarries, or invest such sum, under approval of the superior court acting in its probate jurisdiction, as will produce sufficient income to make such payments.

As to the allowance of the claim of Elizabeth G. Mesmer, the order is affirmed. As to that part of the order directing the purchase of an annuity, it is reversed, with directions to proceed in accordance with the opinion expressed herein.

We concur: TYLER, P. J.; KNIGHT, J.

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94 Cal. App. 124

SALTER v. MARSH. (Civ. 3557.)★

District Court of Appeal, Third District, California. Sept. 24, 1928.

Hearing Denied by Supreme Court Nov. 22, 1928.

1. Compromise and settlement ⟹23(3)—Evidence held to show mistake in computation of amount due plaintiff from defendant, and that acceptance of computed amount was not by way of compromise.

Evidence *held* to sustain finding of mistake in computation of amount due plaintiff from defendant, and that payment of computed amount by defendant was not accepted by plaintiff by way of compromise in full satisfaction of debt.

2. Escrows ⟹5—Escrow instruction held not to have constituted compromise agreement whereby plaintiff accepted in full payment amount less than due (Civ. Code, § 1542).

Escrow instruction delivered to title guaranty company *held* not to have constituted an agreement of compromise whereby plaintiff accepted in full payment less than amount owing to her by defendant, but at most amounted only to a form of release which, under Civ. Code, § 1542, would have released defendant only upon payment of full amount due.

3. Assumpsit, action of ⟹7—Assumpsit will lie to recover sum mistakenly omitted in computing amount due plaintiff by defendant on theory of implied promise.

Where plaintiff accepted from defendant amount less than sum actually owing, by reason of mistake in computation of such amount, *held*, that an action of assumpsit to recover remainder of amount due will lie, since law raises implied promise to pay amount owed.

Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by Amanda Meta Salter against Robert Marsh for money had and received. Judgment for plaintiff, and defendant appeals. Affirmed.

Clyde C. Shoemaker, of Los Angeles, for appellant.

Hunsaker, Britt & Cosgrove, of Los Angeles (John N. Cramer, of Los Angeles, of counsel), for respondent.

PLUMMER, J. The plaintiff had judgment in an action of assumpsit for the sum of $10,000 and interest thereon from the 13th day of February, 1924, from which judgment the defendant appeals.

The complaint in the action contains three counts. The first count in the complaint alleges that on June 13, 1924, the defendant was indebted to plaintiff in the sum of $42,612.50, with interest thereon at the rate of 7 per cent. per annum from February 13, 1924, amounting to the sum of $994.29. That on said last-mentioned date defendant paid to plaintiff on account thereof the sum of $33,379.80, leaving a balance due plaintiff of $10,000, with interest thereon at the rate of 7 per cent. per annum from February 13, 1924. That said last-mentioned sum has not been paid and is wholly due. The second cause of action alleges that on June 13, 1924, defendant was indebted to plaintiff in the sum of $10,233.33, for and on account of the money received by defendant to the use of plaintiff, no part of which has been paid.

The court sustained a motion for nonsuit as to the third cause of action, and as the propriety of said motion is not involved upon this appeal, the third alleged cause of action is omitted.

The original answer of the defendant denies the indebtedness to the plaintiff, and then, by an amended answer, sets up that on or about the 11th day of June, 1924, the plaintiff, by way of compromise, agreed to accept the sum of $32,612.50, with interest thereon at the rate of 7 per cent. per annum from February 13, 1924, in full satisfaction of the indebtedness then owing by the defendant to the plaintiff.

[1] The court found that on the 13th day of June, 1924, the defendant was justly indebted to the plaintiff in the sum of $42,612.50, with interest thereon at the rate of 7 per cent. per annum from February 13, 1924. That on said 13th day of June, 1924, the defendant paid to the plaintiff on account thereof the sum of $33,379.80, leaving a bal-

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★Hearing denied by Supreme Court.

ance due the plaintiff in the sum of $10,000, with interest thereon at the rate of 7 per cent. per annum from the 13th day of February, 1924, and that no part thereof had since been paid, and the same was wholly due. The court further found that there was no compromise or agreement or settlement entered into between the plaintiff and the defendant whereby the plaintiff, for a valuable consideration, or otherwise, agreed to accept from the defendant, in full satisfaction of the indebtedness owing to her by the defendant, the sum of $32,615.50, with interest thereon from the 13th day of February, 1924, in lieu of the total indebtedness which then existed in the sum of $42,612.50. The court further found that the plaintiff accepted the said sum of $32,615.50, with interest thereon, instead of the sum of $42,612.50, by reason of a mistake made by one W. E. Mitchell in computing the amount due the plaintiff from the defendant. The court further found that it was not true, as alleged in the defendant's answer, that the plaintiff and defendant had entered into an agreement of compromise whereby the plaintiff agreed to accept said sum of $32,612.50, with interest, in full payment of the sum of $42,612.50, with interest, owing by the defendant to the plaintiff. The court also found that the paper hereinafter set forth called "escrow agreement" was signed by the plaintiff in ignorance of the full amount due, and also in ignorance of the fact that W. E. Mitchell had made a mistake in calculating the amount owing from the defendant to the plaintiff, and that such mistake was not discovered by either W. E. Mitchell or the plaintiff until after the 19th day of June, 1924. The court also found that the defendant was aware of the mistake herein referred to. We have not followed the language of the findings, but have set forth the substance and effect thereof. Upon this appeal the appellant urges that an action in assumpsit will not lie, and also that the findings of the court are not sustained by the evidence.

The facts disclosed by the record are substantially as follows:

On the 13th day of February, 1924, there was pending in the superior court of the county of Los Angeles an action numbered 104,972, between the parties to this action, wherein the plaintiff in this action was plaintiff and the defendant in this action was also defendant. In that action the plaintiff was demanding judgment from the defendant for the sum of $90,000, with interest thereon from June 19, 1921, for attorney's fees and costs, and that certain pledged property be ordered sold. On the date mentioned the plaintiff and the defendant in this action entered into an agreement of compromise and settlement whereby the defendant paid to the plaintiff the sum of $40,000 in cash and agreed to pay to the plaintiff the sum of $10,000 on or before September 1, 1924, $10,000 on or before February 1, 1925, $15,000 on or before September 1, 1925, and $7,612.50 on or before February 1, 1926, with interest thereon at the rate of 7 per cent. per annum until paid, in full satisfaction and discharge of the indebtedness claimed by the plaintiff in the action numbered 104,972, a list of securities hereinafter mentioned being held by the plaintiff to insure the payment of the sums herein mentioned, which sums aggregate $42,612.50, as the principal sum owing. Prior to the 11th day of June, 1924, the defendant had made some proposals to the plaintiff to accept other securities than those held by her, but these proposals were never acted upon. On the 11th day of June, 1924, the defendant stated to the plaintiff, according to the plaintiff's statement, that he wanted to pay her what he owed her, but wanted her to take some certificates of deposit. What the defendant claimed as a version of this conversation will appear by his testimony later set forth. The plaintiff told the defendant she did not know what the certificates were and did not care to take anything with which she was not familiar. The defendant stated that if she did not want to accept the certificates he would give her cash. It appears that the plaintiff and the defendant went to the office of Hunsaker, Britt & Cosgrove, and in the presence of Mr. Hunsaker some conversation was had relative to paying the amount still owing on the contract of settlement to which we have heretofore referred; Mr. W. J. Hunsaker stating that Mr. Mitchell had attended to the matter, that Mr. Mitchell was out of the office, but that he would telephone to him; the plaintiff testifying that in the presence of Mr. Hunsaker and Mr. Marsh she stated that Mr. Marsh was going to pay the plaintiff what he owed her, together with interest, but desired her to accept in part payment some certificates of deposit, that she did not know what they were, and did not want to take anything she did not know about. Mr. Hunsaker, after saying that Mr. Mitchell had attended to all previous matters connected with the business under consideration, proceeded to call Mr. Mitchell, who returned to the office of Hunsaker, Britt & Cosgrove. It appears that upon the return of Mr. Mitchell, the plaintiff, the defendant, and Mr. Mitchell went to the private office of Mr. Mitchell; that Mr. Mitchell took the contract to which we have hereinbefore referred, calling for the payment of $42,612.50, together with interest thereon from the date named in the instrument, following the plaintiff's statement that the defendant was proposing to pay her the amount owing and also wanting her to accept as part payment the certificate referred to, and proceeded to compute the amount owing as of the date of June 11, 1924. This computation was made by Mr. Mitchell and set down by him upon a piece of paper which was introduced in evidence and practically beyond question proven to be in the handwriting of Mr. Mitchell. The computation made by Mr. Mitchell on the date mentioned is as follows:

Statement to June 11/24

```
                 10000
                 10000    Int. fr. February 13th/24
                 15000
                  7612.50
                 --------
                 32612.50
                        7        3 mo.  28 days
                 --------        9)2282.88
            12)22828 750         ---------
            ............           570.72
                   190.24          177.58
                        3        ---------
                 --------          748.30
                   570.72
       30) 190.24 (  634-2/15
           180.           28
           ----         ----
           102             6
            90          5072
           ----
           124          1268
                        ----
                     $177.58=
```

Principal	32612.50
Interest	748.30
	$33360.80
Certf.	25000.
Cash	8360.80

After this computation was made, the plaintiff, the defendant, and Mr. Mitchell went to the office of the Security Trust & Savings Bank and had some conversation relative to the certificates. It appears that the certificates bore interest at the rate of 4 per cent. per annum but did not mature for about six months. After some conversation the plaintiff declined to accept the certificates, and stated that she would accept the cash, stating the amount which Mr. Mitchell had computed as being due, to wit, $32,612.50 as principal and interest thereon from the 13th day of February, 1924. The defendant thereupon stated that he would pay the cash, and the writing called the "escrow agreement" was made out, giving the defendant ten days within which to pay said sum. The writing just referred to is in the following words and figures:

"Escrow Instructions No. 545600

"Los Angeles, Cal., June 11, 1924.

"Title Guarantee & Trust Company:

"I hand you herewith note for $100,000.00 executed by Robert Marsh in favor of A. M. Salter, dated September 19th, 1924, and

"Certificate of stock No. 29 for 3,333⅓ shares of the Main, Broadway & Hill Street Investment Company, also

"A release of interest until Title Insurance & Trust Company, Trust No. 4232, which you are authorized and instructed to deliver to Robert Marsh or his order when you can hold for my account the sum of $32,612.50 plus interest thereon at 7 per cent. per annum from February 13, 1924, to date of payment to me, and you shall deposit the same in my account in the name of Mrs. A. M. Salter in the main office of the Security Trust & Savings Bank, Los Angeles, Cal., and notify my below mentioned attorneys.

"Your company is hereby relieved of all liability and responsibility in connection with the validity and legality of the certificate of stock above referred to or the transfer of same on the books of the company, and it is understood and agreed that your company is relieved of all liability in connection with the $100,000.00 note above referred to except as to the delivery of same.

"This escrow is to run for a period of ten days from date hereof unless the time limit is extended by mutual written consent of the parties hereto. In the event that the escrow is not consummated within the 10-day period and no such extension has been had, all papers and documents deposited by me herein are to be returned to Hunsaker, Britt and Cosgrove or to Mrs. A. M. Salter on demand of either of them.

"It is agreed and understood that all charges and expenses incurred in connection with this escrow are to be paid by Robert Marsh.

"In the event that the conditions of this escrow have not been complied with at the expiration of the time provided for herein, you are instructed to complete the same at your earliest possible date thereafter, unless I shall have made written demand upon you for the return of all instruments deposited by me.

"Signature: Mrs. A. M. Salter.
"Address: 533 No. Mariposa Ave. L.A.
"Phone: 593201.

"I have read, understood and hereby approved instructions as given above and have examined and approve the instruments and documents called for to be delivered to me, and hereby relieve your company of all liability and responsibility in connection with same except with delivery thereof. Robert Marsh."

During the period mentioned in this writing, the defendant paid the sum therein mentioned, the securities referred to were delivered to him, and the original action which we have heretofore mentioned was dismissed.

Following the discovery of the mistake made by Mr. Mitchell in computing the amount due, this action was commenced; the defendant having previously declined to pay the further sum of $10,000 and the interest accrued thereon.

The answer to the contention that the findings of the court as to the mistake in the computation of the amount owing, and that there was no compromise or agreement to accept less than the amount owing, is completely answered by a summary of the testimony.

William J. Hunsaker, one of the witnesses for the plaintiff, testified that he had been acquainted with W. E. Mitchell for many years; that Mitchell had been connected with the law firm of which the witness Hunsaker was a member, for a long period of time; that he was perfectly familiar with the handwriting of Mr. Mitchell; that the paper containing the computation as hereinbefore set forth in this opinion was wholly in the handwriting of Mr. Mitchell. The witness also testified that he had known the plaintiff for a considerable period of time; that on June 11, 1924, the plaintiff and the defendant came to his office; that upon coming to his office Mr. Marsh stated as follows: "Judge, I am trying to pay or going to pay Mrs. Salter what I owe her, and I want her to take some $25,000 in certificates of deposit of the Continental National Bank, and she wants to talk to you about it." I can't recall all that was said; there was considerable discussion on that subject. I remember that I said to Mr. Marsh, or inquired of Mr. Marsh, why he wanted to give her certificates of deposit; if he could get the certificates of deposit, why couldn't he pay cash. And he said he was making some sort of a three-cornered deal and it was important to him to do it that way. At some stage of the conversation, I telephoned to Mr. Mitchell to come over. When Mr. Mitchell arrived, I said to him that Mr. Marsh was about to settle with Mrs. Salter; that he was familiar with the transaction, having taken care of the compromise, and I would ask him to take the matter, and I think I had, either before they came in or after Mrs. Salter telephoned me, or while they were there, sent out for the office file, and I believe I handed the file to Mr. Mitchell and asked him to take care of the matter. That while Mr. Marsh and Mrs. Salter were in his office discussing the matter with him, there was not anything said or any suggestion made by any one present that Mr. Marsh was to pay or that Mrs. Salter was to receive anything else or other than the full amount of principal and interest to which she was entitled under the compromise agreement of February 13, 1924. The witness further testified that Mr. Mitchell was deceased. The plaintiff testified, in substance, that she and Mr. Marsh went to the office of Mr. Hunsaker; that she stated to Mr. Hunsaker that Mr. Marsh was going to pay off what he owed up to date, with interest, and wanted her to accept in part payment some certificates of deposit; that she did not know anything about certificates; that Mr. Hunsaker stated that Mr. Mitchell had taken care of the transaction for a good many years, and he would call him; that when Mr. Mitchell came in he was told what we were there for; that Mr. Marsh was going to settle up what he owed. Mr. Mitchell was asked to look after the matter. That we then went into Mr. Mitchell's office; upon arriving there I informed him what we were there for. I said Mr. Marsh wanted to pay me in full with interest but he wanted me to accept certain certificates of deposit and I did not know anything about them. Mr. Mitchell said that was for the two of us to decide what we were going to do, and he did not care to decide for either one of us. He said that some officer of some bank should be asked about it and take his word for it. Mr. Mitchell said that we could go over to the Security Trust & Savings Bank, and that he would be over in a few minutes. On arriving at the bank we consulted an officer of the bank. Mr. Marsh said to Mr. Mitchell that it would be quite an accommodation for me to take the certificates of deposit; that they were just as good as cash. While we were in Mr. Mitchell's office, he had the papers before him; I do not know what the papers were that he was examining. He had a pencil in his hand while he was sitting at his desk; I do not remember whether I saw what he was doing; I think I saw him making some marks on the paper but I did not know what they were. Mr. Marsh and I then went over to the Security Trust Bank, and Mr. Mitchell joined us in a few minutes. We spoke about going over to the bank to ask some officer about the certificates of deposit. At the bank Mr. Marsh said to one of the officers that he wanted to offer me some certificates of deposit in part payment of settlement, and I did not seem to feel that I knew what they were, and were not they just as good as cash. Mr. Toll, the officer, said: "Why don't you just give her the money, if she would rather have the money, instead of giving her the certificates of deposit?" Mr. Marsh stated that he could not understand why I wouldn't accept them, and then I told Mr. Toll I did not know anything about them, and I felt I would rather have the cash, and would he accept them, or would he take cash, and he said he wouldn't accept them; that there was no reason why I shouldn't have the cash; and then Mr. Marsh asked him if he wouldn't accept them, and he said no, and then I decided I didn't want them. At the time I saw Mr. Mitchell in his office he was writing on something; I think it was on a white piece of paper; I remember seeing the paper at the Security Bank; he had a little memorandum with him and I recall him saying, "This is the amount." He said, "These are the amounts that are due." I saw the paper again at the Title Guaranty office. The paper was handed to me on June 11th by Mr. Mitchell.

The record shows that, following this conversation, the paper called the "escrow" was made out, the amount entered therein corresponding to Mr. Mitchell's figures.

The witness further testified, in substance, that not one word was ever said to her by Mr. Marsh on June 11, 1924, about the plaintiff accepting less than the amount owing to her, as set forth in the compromise agreement of February 13, 1924. We may here state that the record does not show that the defendant ever made any such proposition to the plaintiff during said period of time, nor does the record show that the defendant ever made any proposition of compromise or settlement on June 11th, at the time of the execution of the so-called escrow paper, asking, suggesting, or intimating to the plaintiff that in paying cash he wanted her to discount the amount owing, or to accept any sum whatever in payment or settlement less than $42,612.50, with interest thereon, as evidenced by the settlement dated February 13, 1924. This all appears from his own testimony, as the following summary will show. The defendant testified: I said, "Mrs. Salter, I would like to submit to you a proposition of paying off and anticipating the contract." She says, "What do you mean?" I said, "Rather than to hold that continuing contract that you have, I would like to submit some contracts that we have on hand and some mortgages in payment of it." "Well," she said, "I wouldn't mind listening to any proposition, and what have you to offer?" I mentioned several contracts on National Boulevard Heights and mortgages. This was preceding the 11th day of June, 1924. Nothing came of these conversations. On June 11th I called up Mrs. Salter and told her I was prepared now to discuss the question of settlement of the contract on a cash basis, and in part payment of cash I had certificates of deposit I wanted her to entertain as part of the cash. She said she did not understand what certificates of deposit were, but would meet me and then go to her attorneys and decide definitely what she would do. She asked me to meet her in the safe deposit department of the Security Trust & Savings Bank where she had her deposit box. After we met, Mrs. Salter said, "What are these certificates of deposit?" I said they were the same as cash to this extent; it was the obligation of the bank to pay money but had to run for a period of six months. And I said, "Mrs. Salter, in discussing these certificates of deposit I consider them the same as cash, so when I am speaking of certificates of deposit, I feel that I am talking cash to you." She asked me what interest they paid, and I told her 4 per cent., but that difference I would pay; I would pay her the difference between 4 and 7 per cent., which would make it identical with cash in so far as the interest was concerned. Mrs. Salter said, "Well, we will go up and see Mr. Mitchell and will decide definitely what cash we will take in complete settlement." We went up to Mr. Hunsaker's office. I said, "How do you do, Mr. Hunsaker?" I said, "We are up with Mrs. Salter regarding a settlement, and as I stated to Mr. Hunsaker, a cash settlement with the exception that I am offering her some certificates of deposit which she wanted to ask Mr. Mitchell or yourself about." Mr. Hunsaker said, "Mr. Mitchell is not in; he is over at the Pacific Finance Building; but I can get him on the phone and have him come over, and he is the man to discuss this matter with because he has handled the matter from the start." So Mr. Hunsaker phoned for Mr. Mitchell to come over. Mr. Hunsaker said, "You are speaking of certificates of deposit, Mr. Marsh. Why don't you use cash instead?" "Well," I said, "I am making a three-cornered deal and taking these certificates of deposit; that is the reason I want to use them." We discussed the matter in a few words. I said I had told Mrs. Salter in discussing it with her that they were the same as cash. In a short time Mr. Mitchell came in. That was all the conversation between Mr. Hunsaker and me. Mrs. Salter and I stayed there and talked just as you will when sitting waiting for some one, and while sitting there, she turned to me and said, "Mr. Marsh, what is the face of the contract or the amount of the full contract?" I said, "About $40,000." I do not recall anything else, only she said, "I don't think very much of certificates of deposit, because I don't know anything about them." When Mr. Mitchell came in, Mr. Hunsaker said, "Mr. Mitchell, Mrs. Salter is here with Mr. Marsh. Mr. Marsh wants to make a settlement with her. Will you handle the proposition?" We then went to Mr. Mitchell's office. Nothing was said about paying the balance in full. The witness further denied that anything was said to Mr. Mitchell that he was there to pay the amount of the contract with interest; Mr. Mitchell gave Mrs. Salter a chair adjoining his desk and sat down at his chair at his desk. Mr. Mitchell asked, "What about these certificates of deposit?" And I explained to him, as I had explained to Mrs. Salter. He said, "What do you mean?" I said, "These certificates of deposit run for six months and bear 4 per cent." I said to Mrs. Salter, "They are the same as cash." He said, "Well, anything that is not cash is not the same as cash;" that they are the obligation of the bank; the only difference is that they bear 4 per cent., and that I would make up the difference. I then turned to Mrs. Salter and said, "Why don't you call up Mr. Toll down to the bank?" She said: "We might do that; that would be the thing to do, because I am satisfied that he could explain it thoroughly." Mr. Mitchell suggested that we go over to the bank and that he would join us a little later on. I did not say to Mr. Mitchell that I wanted to pay the balance in full. I did not, in his office, use any words, in substance, to that effect. After going to the bank, the witness testified that Mr. Mitchell and the plaintiff had a short conversation when they were standing a few feet away from where he was, and then the plaintiff came up with Mr. Mitchell and said, "Well, Mr. Marsh, I have discussed it with Mr. Mitchell. I don't want the certificate of deposit." And he stepped up and said, "Yes, I have so advised her." But she says: "What I will do will be to take cash, and I don't want you to talk to me about any certificates of deposit or anything else but the cash. I will take this amount if you are able to raise the cash. Now, can you do that?" She mentioned the amount and it was $32,612.50. I said, "I can raise the cash." She says, "Well, we will make an escrow right here at the bank." I said, "No, if you are going to make it an escrow, I would rather have you make the escrow at the Continental Bank, because I am arranging a loan there." He says: "I don't know them there at all. I wouldn't advise Mrs. Salter to go to the Continental." He says, "We will either make it here or at the Title Insurance." I said, "Then let's make it the Title Guaranty." He said, "All right." The witness then stated that they then went over to the office of the Title Guaranty Company. Mr. Mitchell said to Mr. Wilson (an officer at the office of the Title Guaranty Company), "We have an escrow that we would like to have you take." He said, "All right; what sort of an escrow is it?" Mr. Mitchell said. "We are making a settlement here and I want to hand you a note and some securities, and Mr. Marsh is to hand in certain moneys." And Mr. Wilson called a stenographer and took out a long pad of yellow paper and began to make notes. Then Mr. Mitchell gave him the details of the transaction and dictated to the stenographer. The escrow was then typewritten. It was handed to Mr. Mitchell, and he read it over aloud, and then we signed it.

The foregoing summary of the testimony contains all that is material and shows beyond controversy that nothing whatever was said between the plaintiff and the defendant at any time, or between the plaintiff and the defendant and Mr. Mitchell, relative to any discount of the amount owing, in order to effect a cash settlement. The whole subject-matter of the conversation hinged about the certificates of deposit, and when the amount of the calculation made by Mr. Mitchell was stated to the defendant, he immediately accepted the same and the ten days was allowed for him to raise the cash. It cannot even be contended that the defendant was negotiating for a discount, as he never even mentioned the subject to the plaintiff. He was talking to her all the time about the certificates and knew all the while that the amount owing was something over $40,000, and when the amount owing was erroneously stated to him by the plaintiff at $32,612.50, instead of $42,612.50, he simply remained quiet and stated he could pay the cash. Was the statement as to the amount owing made by the plaintiff to the defendant the result of a mistake? As heretofore stated, the plaintiff stated to the defendant the amount owing, basing her statement upon what had just been said to her by Mr. Mitchell. We have only to examine the paper upon which Mr. Mitchell made his computation to verify the finding of the court as to the mistake. In the upper left-hand corner of that statement we find the figures: 10,000, 10,000, 15,000, and 7,612.50, added as aggregating 32,612.50. To argue that a mistake is not apparent in this addition is an insult to intelligence. The computations further contained on the paper to which we are referring show that the interest was calculated upon the mistaken principal of $32,612.50. The paper also discloses a further important fact: There is no indication whatever that any discount was carried into the computation. The paper shows the amount of the principal as erroneously computed, the interest thereon, and then the proposed payment of certificates in the sum of $25,000 and the balance that would remain as cash. Thus, the only conclusion that could be arrived at by the trial judge was that when Mrs. Salter stated to the defendant what she would accept, she was simply eliminating the certificates and saying that she would take the cash according to the erroneous computation, nothing more, nothing less, not indicating in the slightest degree that the plaintiff was contemplating a discount or a rebate on the amount owing of a sum between $10,000 and $11,000. We do not very well see how any trial judge could find other than the trial judge did in this case in so far as the question of mistake, in so far as the absence of any compromise, and in so far as every material circumstance relating thereto is involved.

[2] It is further argued that the writing called "Escrow Instruction Number 545,600," left with the Title Guaranty Company, constituted an agreement of compromise. A reading of this instrument leads unavoidably to the conclusion that the trial court was correct in rejecting this contention. The writing is in no sense an agreement of any kind. It is simply a direction to the Title Guaranty Company that, if so much money is paid to them for the account of the plaintiff within ten days, all the securities mentioned therein, and then and there placed in the custody of the Title Guaranty Company, may be delivered to the defendant. There is not a single word in this writing indicating that the plaintiff, on the one hand, was accepting in full payment, less than the amount owing to her, or that the defendant was making advance payments on account of receiving a discount on the amount owing. The whole argument of the appellant is based upon the untenable assumption that this instrument, in and of itself, is a compromise agreement, and therefore the only action that could be maintained would be an

action in rescission. At best, it only amounts to a form of release, and had it expressed the true amount, would have operated as a release to the defendant upon paying the full amount, and comes directly within the terms of section 1542 of the Civil Code, which reads:

> "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

And, as held in Rued v. Cooper, 119 Cal. 463, 51 P. 704, this section does not limit relief to actions based upon fraud or concealment by the debtor, but includes actions based upon mistake.

There being no compromise agreement, there appearing nothing in the record from which it can be concluded either that the parties, by reason of any oral contract or written agreement, intended to discount or reduce the amount of the principal owing on June 11, 1924, the authorities cited by counsel relative to compromises are wholly inapplicable and do not need to be reviewed herein. What constitutes a compromise that would be effective and bar further action is set forth in 5 California Jurisprudence, p. 399, § 14. A reading of this section and the authorities there cited shows that the case at bar is readily distinguishable from the basis upon which the defendant's appeal is founded, and that the argument advanced in support of the appeal is at variance with the law governing this action.

[3] That an action of assumpsit to recover the omitted item of $10,000 will lie is clearly established by applying the rule of law set forth in the case of White v. Thompson, 40 Cal. App. 447 [180 P. 953] in an opinion written by Mr. Justice Waste. This case refers to items omitted in the settlement of an account. Here we have four different items that should have been added together in order to ascertain the amount of principal owing. In making the calculation the calculator failed to follow the rule of carrying one when making his computation, and therefore just omitted the sum of $10,000. In the case of White v. Thompson, supra, the court said, in an action to recover upon the omitted item instead of for rescission, that—

> "It appears to us that the action at bar is merely a legal action in assumpsit to recover an item of indebtedness owing from defendants to plaintiff's assignor, which was entirely omitted in the negotiation leading to the account stated. 'While a suit to open, surcharge or falsify an account is one proper for equitable jurisdiction, yet the rule seems to be established that a stated account need not be impeached by a direct suit brought for that purpose. It may be impeached for fraud or mistake either at law or in equity whenever it is brought forward as a defense or cause of action' "—citing 1 Cor. Jur. 715.

And, also, the court further said:

> "An action in assumpsit will lie to recover for items of indebtedness omitted by mistake on the settlement of an account, if there is no other objection"—citing a number of authorities.

And further:

> "An account stated does not bar a recovery for items not within the contemplation of the parties when the settlement was made."

We do not need to cite any further authorities to support the rules of law stated in this case. We need not cite any authorities to the effect that where one, through mistake, obtains a release and surrender of securities for a sum less than the amount owing, the law raises an implied promise to pay the amount owed. The subject, however, is dealt with in 3 California Jurisprudence, 374.

We do not need to give any attention to the argument, pro and con, by counsel as to the character of the defense set up in this action, or as to the attempt of the defendant to escape payment of his just obligations, but prefer to let the record itself stand as the uncontrovertible support of the trial court's findings in this cause.

The summary of the facts which we have hereinbefore set forth relieves us of the necessity of reviewing the numerous cases cited in the voluminous briefs submitted to us for consideration.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

94 Cal. App. 104

SHEPARD v. YALE. (Civ. 6260.)

District Court of Appeal, First District, Division 1, California. Sept. 22, 1928.

1. Appeal and error 🔑695(1)—Sufficiency of evidence to sustain findings could not be considered on appeal, where all evidence was not in record.

Appellate court could not consider sufficiency of evidence to sustain findings, where all evidence was not included in record on appeal.

2. Trial 🔑397(6)—Finding of truth of allegations of cross-complaint that defendant owned realty held to negative claim realty was partnership property.

Where defendant's cross-complaint, in suit by former partner for accounting, alleged that defendant owned real property described in complaint and that it was not a part of partnership assets, trial court's finding that all allegations of cross-complaint were true *held* to negative any mistake on plaintiff's part, or misrepresentation by defendant of any material fact in respect to ownership of realty.

3. Appeal and error 🔑931(3), 1071(6)—Judgment will not be reversed for failure to make express finding, if finding is necessarily implied from findings made or would have been against appellant.

Judgment will not be reversed because of the failure to make an express finding on an issue, if finding thereof is necessarily implied from findings made, or where, if finding had been made, it would have been against appellant.

4. Evidence 🔑376(12)—Evidence held to lay sufficient foundation for introduction of partnership books in evidence in suit for accounting.

Where former partner, suing for accounting, testified that during entire partnership he kept account of partnership business, that he informed defendant that he was keeping these accounts, and that defendant at all times during existence of partnership had access to books, a sufficient foundation was laid for introduction of books in evidence.

5. Evidence 🔑354(11)—Partnership books are admissible to show state of partnership affairs, even when kept by one partner alone, if each partner has access thereto.

Partnership books are admissible in evidence to show state of partnership affairs, even when entries are made by one partner alone, if each partner has access to books at or soon after time entries are made.

6. Appeal and error 🔑1058(1)—Error in excluding evidence was harmless, where fact sought to be established thereby was proved by other competent evidence.

Error in excluding partnership books from evidence in former partner's action for accounting *held* harmless, where fact sought to be established thereby was proved by other competent evidence.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Stanley Y. Shepard against William H. Yale. Judgment for defendant, and plaintiff appeals. Affirmed.

Warren H. Pillsbury, of San Francisco, for appellant.

Frederick Schneider, of Palo Alto, for respondent.

BEAUMONT, Justice pro tem. Plaintiff and defendant entered into a partnership for the purpose of raising and selling pigeons. After approximately a year of partnership business, a dissolution was had. About two years thereafter plaintiff began this suit for an accounting and settlement. The complaint alleged that the property of the partnership consisted of certain real and personal property; that there had been a dissolution of the partnership; but that no accounting had been had. Defendant's answer admitted the dissolution, denying there had been no accounting, and denied the ownership by the partnership of said real property. Defendant, by way of special defense, set up certain new matter which will be referred to later herein. Defendant also filed a cross-complaint to quiet title to the real property. Plaintiff, ex industria, filed an answer not only to the cross-complaint, but to the special defense. Defendant had judgment on the complaint, and on his cross-complaint obtained a decree quieting title as prayed. Plaintiff appeals.

[1] Appellant urges many points for reversal of the judgment. Seven of these alleged that the evidence was insufficient to support the findings. After a thorough study of the record, we are of the opinion that the evidence is amply sufficient to sustain the findings. Even if we were not of this opinion, we would not be in position to hold that the evidence is insufficient, in view of the state of the record. Testimony was taken on two days. No reporter was present the first day. The record so shows, and the certificate of the judge attached to the transcript is to the same effect. Without the benefit of the entire record we could not say that the testimony was insufficient to support the findings. Foster v. Young, 172 Cal. 317, 156 P. 476; Ross v. Burr, 69 Cal. App. 286, 230 P. 986. California Jurisprudence (vol. 2, p. 697) states:

> "The appellate court will not consider a question of the sufficiency of the evidence, unless all the evidence is included in the record on appeal."

[2, 3] The point most strongly urged by appellant for a reversal of the judgment is that the court failed to find upon the issue of mistake. In his special defense respondent alleged that he was the owner of the real property described in the complaint, and that it was not a part of the partnership assets; that

when the dissolution was had, the partnership affairs were adjusted, and a complete settlement effected; that at the time of dissolution he agreed to sell, and appellant agreed to buy, the real property, a copy of the contract being attached to his answer. Appellant, though not required to do so, as the law supplies the denial necessary to raise an issue upon new matter contained in an answer (section 462, Code Civ. Proc.), filed a replication. In this he admitted the execution of the contract, but alleged that he was mistaken as to his rights when he executed it, and that respondent had represented to him that he (appellant) had no interest in the real property, for the reason that he did not have a deed to a half interest thereof. Respondent in his cross-complaint alleged that at the time of the execution of the contract above mentioned, and for a long time prior thereto, he was the owner of the real property; that said contract was for a valuable consideration; and that said agreement was "reasonable, fair, and just, and the price for said land and premises was reasonable, fair, and adequate, and all of which was well known to plaintiff herein." The court found that all the allegations of the cross-complaint were true. This alone is sufficient to negative any mistake on the part of appellant or that respondent had misrepresented any material fact. Estate of McClelland, 181 Cal. 227, 183 P. 798; New Blue Point Mining Co. v. Weissbein et al., 198 Cal. 261, 244 P. 325, 45 A. L. R. 781. In addition, the court specifically found that the real property was not a part of the partnership assets, but was the individual property of respondent; that it had been purchased with the individual funds of respondent; that upon the dissolution of the partnership an accounting was had, a settlement made, and that appellant thereupon agreed to buy the property from respondent. In this case the findings fully support the judgment. It is well established that such a judgment will not be reversed because of a failure to make an express finding upon an issue, if a finding thereon is necessarily implied from the findings made. 24 Cal. Jur. 974, and cases cited. Even if the inference as to the implied finding be illogical, still the judgment should not be set aside on this phase of the case, for failure to find on an issue is not ground for reversal of a judgment where, if the finding had been made, it would have been against appellant. Hulen v. Stuart, 191 Cal. 562, 572, 217 P. 750; Krasky v. Wollpert, 134 Cal. 338, 66 P. 309. From the evidence in the record, from the facts found, and from the judgment ordered, it is evident that had the findings been more complete they would have been adverse to the contention of appellant.

[4-6] Another specification of error is the exclusion of offered testimony. Appellant testified that throughout the life of the partnership he kept account of the partnership business, entering in a book the items of receipts and expenditures; that he informed respondent that he was keeping these accounts and that the books were open to respondent's inspection; that respondent, at all times during the existence of the partnership, had access to the books. We are of the opinion that in view of this testimony, a sufficient foundation was laid for the introduction of the books. Partnership books are admissible in evidence for the purpose of showing the state of partnership affairs, even when the entries are made by one partner alone, provided each partner has access to the books at or soon after the time the entries are made. 20 Cal. Jur. 782; Clark v. Gridley, 49 Cal. 105; 30 Cyc. 743; 20 R. C. L. 934-935. We are of the opinion, however that the exclusion of the proffered testimony was not prejudicial to appellant, as apparently from the record the offer was for the purpose of showing there was a record of the purchase of the land made in the partnership books, and that an entry relative to the land was placed therein with other entries pertaining to partnership business. This had already been shown in various parts of the testimony and was definitely in evidence when the books were offered. There was, at the time the offer was made, also testimony as to the balance shown by the books; the exact amount of the profits being given. The exclusion of the evidence was harmless where the fact sought to be established thereby was proved by other competent evidence. 2 Cal. Jur. 1022; Ash v. Soo Sing Lung, 177 Cal. 356, 170 P. 843; Duffy v. Duffy, 71 Cal. App. 251-261. 235 P. 62. We cannot determine whether there was anything else of material testimony in the books tendered in evidence, as a copy of the offered exhibit does not accompany the record. In such case we cannot say that there was error, having determined, of course, that the only apparently material testimony therein contained was clearly before the court at the time of the offer. McCormick Saeltzer Co. v. Grizzly Creek Lbr. Co., 74 Cal. App. 278, 240 P. 32; S. F. Commercial Agcy. v. Hogan Co., 6 Cal. App. 408, 92 P. 312.

We do not deem it necessary to consider other points argued by appellant.

Judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

94 Cal. App. 180

STAMM v. COLVIN. (Civ. 3553.)

District Court of Appeal, Third District, California. Sept. 28, 1928.

1. Specific performance 🔑51—Where defendant in ejectment asked plaintiff's performance of contract between defendant and third person, plaintiff cannot dispute justness of contract when third party defaulted.

In action in ejectment, in which defendant sought to compel specific performance by plaintiff of contract between defendant and third person, plaintiff *held* not entitled to dispute justness of such contract when third person had defaulted as to averments of fairness thereof.

2. Specific performance 🔑28(2)—Contract for transfer of land held not too uncertain to be specifically performed (Civ. Code, § 3390, subd. 6).

Contract for transfer of land *held* not so ambiguous and uncertain as to bar specific performance under Civ. Code, § 3390, subd. 6, notwithstanding provision as to obtaining from third person extension of mortgage.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action in ejectment by Clara Vivian Stamm against B. E. Colvin. Judgment for plaintiff, and defendant appeals. Reversed.

E. A. Lane, of Los Angeles, and R. R. Sleeper, of Venice, for appellant.

Joseph N. Owen, of Los Angeles, for respondent.

WEYAND, Justice pro tem. Plaintiff and respondent, Clara Vivian Stamm, originally brought this action in ejectment against the defendant and appellant, B. E. Colvin. By cross-complaint said defendant and appellant sought to compel specific performance by plaintiff of a contract between defendant and one Colin N. Clinch. Colin N. Clinch was, on May 11, 1924, the owner of the premises in controversy, and both plaintiff and defendant derive their respective titles, if any they have, through said Clinch.

On May 11, 1924, Colin N. Clinch made and executed a written offer to exchange properties, which said offer was in words as follows:

"Los Angeles, California, May 11, 1924. Mr. J. K. Delozier, 515 Hillstreet Bldg., Los Angeles, Califórnia. Dear Sir: I will deed lot 1, tract 5155, to B. E. Colvin subject to incumbrance and liens of record, and agree to pay off same down to $8,000; also to pay interest on all incumbrance, until it is reduced to the $8,000. And let Colvin take immediate possession of said property. Providing B. E. Colvin, will deed to me or my assigns, lot 5, of Ivareen Terrace tract, *abd* extend note of $8,000, and return same when incumbrance on lot 1 is reduced to the $8,000.

"The $8,000, on lot 1, of Tract 5155, is not to become due within two and a half years, and the interest rate not to exceed 7 per cent. Yours very truly, C. L. Clinch."

Colvin at the time of making said offer was in Willows, Cal. The said J. G. Delozier to whom said offer was addressed, was at said time a partner of said Colvin, and lived in Los Angeles, Cal. Prior to the making of said written offer Clinch and Colvin had discussed the making of such a trade, and Clinch took Colvin to see the property in controversy. Upon receipt by Delozier of the written offer, Delozier at the request of Clinch, forwarded the written offer to Colvin at Willows and thereupon Colvin returned to Los Angeles, accepted Clinch's offer, and about June 15, 1924, was by Clinch put into possession of the Clinch property, and has lived upon the same with his family ever since.

On or about February 5, 1925, while Colvin and his family were living on the property, and in sole and exclusive occupation thereof, Clinch conveyed the said premises to the plaintiff herein, Clara Vivian Stamm, and said plaintiff first demanded rent from defendant, Colvin, and thereafter possession of the premises. Defendant Colvin has always refused to pay rent, and has refused to deliver possession to the plaintiff. Colvin has frequently offered to perform under the contract, and by his pleadings offers to fulfill the conditions, agreement, and stipulations, as set forth in the written offer.

On May 11, 1924, the date of the written offer, Colvin owned and held a promissory note of Colin N. Clinch and Nan K. Clinch, his wife, dated September 6, 1923, in the sum of $8,000, with interest at the rate of 7 per cent. per annum, and payable 120 days after date. On May 11, 1924, said Colvin owned the said lot 5 of Ivareen Terrace tract, described in the written offer. This lot was of the value of $5,000. The lot 1 of tract 5155, held by Clinch on May 11th, was of the value of not to exceed $13,000.

By cross-complaint of defendant the plaintiff, Clara Vivian Stamm, and her husband, H. E. Stamm, and Colin N. Clinch and his wife, Nan K. Clinch, were named as cross-defendants, and the record discloses that the default of all of said cross-defendants was regularly entered, save and except as to the cross-defendant Clara Vivian Stamm, which said cross-defendant alone answered.

The court made two separate findings, which form the basis for the entry of the judgment herein in favor of the original plaintiff, Clara Vivian Stamm. These two findings are as follows:

"V. The court further finds with reference to said alleged contract upon which the defendant and cross-complainant relies, that it is too ambiguous and uncertain, and is lacking in such details as to the manner, time and methods of performance as are essential and necessary to enable the court to specifically perform the same.

"VI. The court further finds that said contract as to said Colin N. Clinch and his successor in interest, the plaintiff, is not just and reasonable, and that there is not sufficient or adequate consideration on the part of said defendant and cross-complainant, B. E. Colvin, to entitle him to have said contract performed as against said Colin N. Clinch and the plaintiff."

[1] We will treat of these findings in their reverse order. Finding No. VI is not supported by the evidence, but is directly contrary thereto. Defendant by his affirmative defense alleged that the agreement with Clinch was fair and equitable, and alleged that the lot 1 of tract 5155 was of a value not greater than $13,000, and that the Ivareen Terrace lot was worth $5,000. By special admission of the attorneys it was agreed and stipulated at the trial "that the affirmative facts as alleged by the defendant are true, and that they may be considered as proven." The record fails to disclose any testimony to the contrary. Quite beside all this, it should hardly be for the present plaintiff to dispute the justness of the trade, when the real party to said trade had defaulted as to averments of the fairness thereof. So we cannot assent to said finding of the trial court.

[2] As to finding V, the record discloses that Colin N. Clinch and his wife defaulted as to all the allegations of the cross-complaint. In other words, Clinch and his wife made no claims that the provisions of the written offer were "too ambiguous and uncertain" to enable them to understand just what they were to do in the matter of the execution of the offer. They made no plea that they could not perform. The only provision about which there could be question was the one as to obtaining from another person an extension of the mortgage on the Clinch lot. As to that nothing appears to show that Colvin insisted upon that extension. It was a provision presumably in favor of Colvin.

As before stated Clinch was at the time owing to Colvin $8,000, which was some time past due. Colvin was placed in possession of the property by Clinch. Colvin was extending to Clinch forbearance as to Clinch's note. We cannot agree that under the circumstances the contract of Clinch presented any such difficulties that could not be definitely and fully adjudicated between the party making the offer, and the acceptor of such offer.

It is true that when a contract lacks essentials such as those enumerated in finding V, its specific performance cannot be enforced. Subd. 6, § 3390, Civ. Code. Under the facts as here presented this could not have been a difficulty such as would prevent an adjudication of the rights of the respective parties to the agreement.

In the cases cited by respondent it generally appears that the promisor was the one making objection that he could not perform under the agreement. The instant case presents the peculiar situation of a stranger to the original agreement, making the contention that the contract was so indefinite that its maker cannot be forced to perform its covenants.

In section 1424 of Williston on Sales, it is said:

> "It is necessary not only that the defendant's duty under the contract shall be certain, but the plaintiff's also, since the decree must provide for that performance as well as the defendant's. But if there is sufficient expressed to make a legally valid contract, a court of equity can make certain by its decree, within reasonable limits, subordinate details of performance which the contract itself did not state. Thus where no time of performance is stated in the contract, the court may by its decree fix a reasonable time. In cases where specific performance of only part of an agreement is in question, it should also be observed that such uncertainty in another portion of the contract as would preclude specific performance of the latter portion will not destroy the plaintiff's claim for specific performance of the former part, if partial enforcement is otherwise allowable. It seems probable that the difficulty regarding uncertainty has been over-emphasized. It should not be allowed to hamper equitable relief further than necessity requires."

We cannot believe that this written offer, as made by the one owning the property, presents such a lack of details as to leave a court powerless to enforce its terms.

It is therefore ordered that the judgment of the trial court be reversed.

We concur: FINCH, P. J.; HART, J.

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94 Cal. App. 175

LASS v. ELIASSEN. (Civ. 6383.) ★

District Court of Appeal, First District, Division 1, California. Sept. 28, 1928.

Rehearing Denied Oct. 27, 1928. Hearing Denied by Supreme Court Nov. 26, 1928.

1. Executors and administrators 🔑137—Representative of an estate has no authority to transfer decedent's property without authorization of probate court (Code Civ. Proc. § 1517).

A representative of an estate, in view of Code Civ. Proc. § 1517, has no authority to transfer the property of the decedent he represents without the authority of the probate court.

2. Executors and administrators 🔑375—Until confirmation by probate court of sale by representative of decedent's property, it is ineffectual to pass title.

Sale by representative of decedent's property is ineffectual and passes no title thereto until confirmation of sale by probate court.

★Rehearing denied. Hearing denied by Supreme Court.

3. Equity 🔑54—Equitable doctrine will not be applied for purpose of defeating equity or doing injustice, nor against innocent stranger to proceeding.

Equitable doctrine will not be applied for the purpose of defeating equity or doing an injustice, nor against an innocent stranger to a proceeding.

4. Equity 🔑54—Neither fiction nor maxim may nullify statute.

A court of equity applies neither fiction nor maxim to nullify a statute.

5. Equity 🔑54—Equity court will not lend aid to accomplish by indirection what law forbids to be done directly.

A court of equity will not lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly.

6. Executors and administrators 🔑388(3)—Purchaser at probate sale held not entitled to rents accruing between time of purchase and confirmation of sale (Code Civ. Proc. § 1517).

In action by vendee to recover the rental value of certain land purchased under probate sale for period during which confirmation of sale by probate court was being litigated, where, after confirmation, executor immediately executed the requisite conveyance to plaintiff, he being under no legal duty to do so until confirmation, and in view of Code Civ. Proc. § 1517, providing that no title passes until confirmation, *held*, that plaintiff had no cause of action against executor in his representative capacity or as individual.

Appeal from Superior Court, Alameda County; J. T. B. Warne, Judge.

Action by W. T. Lass against Edward R. Eliassen. Judgment for defendant, and plaintiff appeals. Affirmed.

Knight, Boland & Christin, of San Francisco, for appellant.

Crosby, Naus & Crosby, and Milton W. Sevier, all of Oakland, for respondent.

TYLER, P. J. Action by vendee to recover the rental value of certain land purchased under a probate sale. A demurrer to the complaint was interposed and sustained. Plaintiff refused to amend and judgment went in favor of defendant. This is an appeal from such judgment.

The complaint alleges defendant to be the duly appointed, qualified, and acting executor of the last will and testament of one Richard Flaherty, deceased. During the month of September, 1923, defendant, as such executor, caused a notice of sale to be published of his intention to sell a described parcel of real property to the highest bidder, subject to confirmation of the probate court. On the 10th day of October, following, plaintiff submitted a bid in writing signed by himself in the amount of $33,300. This was the highest bid received, and defendant accepted the same on October 19, 1923. On the same day plaintiff paid defendant the sum of $3,300 as deposit and part payment of the purchase price, whereupon defendant immediately filed a duly verified return to the probate court and petitioned for confirmation. At the hearing the court erroneously and contrary to law refused to confirm the transaction and ordered a new sale. From such order plaintiff took an appeal to the Supreme Court. After due hearing, the District Court of Appeal, to which court the cause was transferred, reversed the trial court and directed it to confirm the sale and cause the property to be conveyed to plaintiff pursuant to the return of sale. Estate of Flaherty, 69 Cal. App. 429, 231 P. 591. This judgment of the District Court of Appeal was confirmed by the Supreme Court upon its denial to grant a hearing. Subsequently, on February 15, 1925, some 16 months after the original hearing upon confirmation, the probate court made an order confirming the sale as directed. On February 20th, following, plaintiff paid to defendant as executor of said estate the balance due upon the purchase amounting to the sum of $30,000, and on the same day defendant, as executor of the estate, caused to be prepared and delivered to plaintiff a deed conveying the real estate so sold. During the period from the time of the sale to the date of the delivery of the deed, defendant was in the possession of the property and collected the rents and profits. The rents so collected by him amounted to the sum of $3,367.98, to recover which this action is prosecuted.

It will be noticed that the action is not brought against defendant in his representative capacity, but individually. Upon this state of facts the trial court was of the opinion that no cause of action existed. Appellant claims in support of his appeal that inasmuch as the confirmation should have been made by the probate court on the return of the sale and was erroneously refused through no fault of his, equity will consider that done which ought to have been done, and will hold that confirmation when made was effective as of the time it should have been made. He also contends that irrespective of the error of the probate court, by the doctrine of relation, confirmation when made related back to the date of sale so as to entitle plaintiff to the immediate rents. The further claim is urged that irrespective of these two points, and in any event, plaintiff, being the equitable owner from the date of the sale, was entitled to the rents and profits from the time he became such owner. While this question has received consideration in other jurisdictions, it seems to be one of first impression in this state. In some jurisdictions when the sale has been duly confirmed the purchaser is entitled to the rents and profits from the time of the sale; in others, from the time of confirmation; and, in still others, from the time of confirmation and the payment of the purchase price. 35 C. J. 86. The reason given for the first rule, as pointed out by the learned trial court, is that courts proceed upon the theory that the purchaser's title on confirmation relates back to the time of sale, while the rule holding that the purchaser is not entitled to the rents and profits until confirmation is based on the theory that he acquires no title until that time. A review of these conflicting authorities would answer no useful purpose. Section 1517 of the Code of Civil Procedure provides that all sales of property must be under oath, reported to and confirmed by the court, before the title to the property passes.

[1-3] Under the statute the representative of an estate has no authority to transfer property of a decedent, without authority of the probate court. Bovard v. Dickenson, 131 Cal. 162, 63 P. 162. Without confirmation such sales are ineffectual and no title or estate passes. Horton v. Jack, 115 Cal. 29, 46 P. 920. In such a case it is only when all acts are performed which result in a sale that a purchaser has any interest in the property sold. Then, and not until then, has he any title so as to entitle him to a conveyance. Budelman v. Am. Ins. Co., 297 Ill. 222, 130 N. E. 513; Standard Leather Co. v. Mercantile, etc., Co., 131 Mo. App. 701, 111 S. W. 631. Confirmation having been denied, defendant was therefore guilty of no breach of duty, statutory or otherwise, for prior to actual confirmation he had no power to execute an effectual conveyance. Nor did he have power to control the action of the probate court in the determination of the application for confirmation. He was a stranger to this act of the court. While the equitable doctrines invoked by appellant are regarded with favor and will be vigorously applied in proper cases between the parties, they will never be applied for the purpose of defeating equity or doing an injustice, nor will they be applied against an innocent stranger to a proceeding. Lewis v. Hall, 38 Cal. App. 329, 176 P. 171; Cronbach v. Ætna Life Ins. Co., 153 Tenn. 362, 284 S. W. 73.

[4-6] The doctrines are designed to promote justice and to give effect to the lawful obligations of a party against whom complaint is made for refusing to perform some duty imposed upon him. Here, upon confirmation, defendant immediately executed the requisite conveyance, and he was under no legal duty to do so before that time. Then, again, no maxim nor any fiction can be applied to defeat the express terms of a statute. Section 1517 of the Code of Civil Procedure in express terms declares that no title passes until confirmation. The case is not one, therefore, for the application of equitable doctrines, but rather one for the construction of an act of the Legislature. Rules of equity cannot be intruded in matters that are plain and fully covered by positive statute. Beeson v. Brotherhood of Locomotive Firemen, etc., 101 Kan. 399, 166 P. 466. Neither a fiction nor a maxim may nullify a statute. Harrison Machine Works v. Aufderheide [Mo. App.] 280 S. W. 711. Nor will a court of equity ever lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly. Jackson v. Torrence, 83 Cal. 521, 537, 23 P. 695. Here defendant performed every authorized act required by him. Having done so, plaintiff has no cause of action against him in his representative capacity, much less as an individual. Respondent urges the principle of unjust enrichment as a further ground for support of the judgment, claiming that as plaintiff has been in the enjoyment of the purchase price during the period the case has been litigated, it should be deemed an equivalent to the rents and profits. The conclusion we have reached renders unnecessary a discussion of this question.

The judgment is affirmed.

We concur: CASHIN, J.; KNIGHT, J.

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94 Cal. App. 164

PEOPLE v. GOODWIN. (Cr. 1657.)

District Court of Appeal, Second District, Division 1, California. Sept. 26, 1928.

1. Homicide 🔑253(1)—Evidence held to sustain conviction for murder, first degree.

Evidence *held* sufficient to sustain conviction of murder in the first degree.

2. Criminal law 🔑564(1)—Evidence held to establish venue of murder case in county where prosecution was had.

In prosecution for murder, evidence *held* sufficient to establish venue in county in which prosecution was had.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Philip A. Goodwin was convicted of murder in the first degree, and he appeals. Affirmed.

Buel R. Wood, of Los Angeles, and O. A. Jacobs, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., Z. B. West, Jr., Dist. Atty., of Santa Ana, and L. W. Blodget, Deputy Dist. Atty., of Los Angeles, for the People.

YORK, J. This appeal is prosecuted from a second trial wherein the defendant, Philip A. Goodwin, was again convicted of murder in the first degree and was in said second trial sentenced to life imprisonment. On the first trial he was found guilty of murder in the first degree and sentenced to death, in which first case the judgment and order denying a new trial were appealed from and the order denying a motion for a new trial was reversed and a new trial was granted ([Cal. Sup.] 261 P. 1009), which new trial resulted in the present verdict and order which were both appealed from in this matter now before this court.

[1] It is useless to discuss the circumstantial evidence, as it was unquestionably sufficiently strong for the jury to have believed the defendant guilty of murder in the first degree.

[2] As to the claim of appellant that there was a lack of proof of venue, it is true it was not absolutely proven, but there was sufficient evidence for the jury to find, as it must have found (to have found the defendant guilty under the instructions), that the murder was committed in Orange county.

We can see nothing in the charge of misconduct on the part of the court and as to the charge of misconduct on the part of the district attorney—there is less to criticize in the remarks of the district attorney in this matter than in the average criminal case that comes before this court.

The alleged error in refusing to give instructions relative to admissions of defendant brings up a rather novel point by presenting apparently a claim of the defendant that the people are bound to accept the truth of statements made by defendant concerning admissions of a crime if the prosecution sees fit to show by their witnesses that the defendant made false and inconsistent statements. Quotations of parts or portions of evidence by themselves might substantiate the necessity of a greatly modified form of the instruction requested, but an examination of the entire transcript and all of the evidence discloses no such necessity, and in fact shows that the giving of the instruction which was refused by the court and requested by the defendant would have been misleading and confusing to the jury, as it is, to say the least, involved and uncertain. It is expressly provided by section 1870, subdivision 2, of the Code of Civil Procedure, that the declaration of a party is admissible as evidence against such party.

The expert witness as to handwriting, it is true, did, in explaining how he drew certain conclusions, refer to matters that were not proper; yet the court, when his attention was called to them in each instance, promptly instructed the jury to disregard same, so that no prejudice to the defendant can be presumed.

An examination of the entire evidence shows that it was amply sufficient to sustain the conviction. We do not find any errors prejudicial to the defendant in the trial of the case, and the instructions of the court taken as a whole amply and sufficiently stated the law of the case to the jury.

The judgment and the order denying a new trial are affirmed.

CONREY, P. J. I concur in the judgment. The contention of appellant that the venue of the crime was not proved to be within the county of Orange seems to be entirely without merit. Not only was the body of the deceased found at a place well within the county limits, but the condition of the body, together with the surrounding circumstances, were strongly convincing of the fact that the murder had taken place on the same premises and within a few feet from the spot where the body was found. People v. Watts, 198 Cal. 776, 789, 247 P. 884.

Almost equally without merit is the contention that the evidence is not sufficient to justify the verdict or to prove that appellant participated in the commission of the crime. The disappearance of Patterson and the probable date of his death was March 15, 1926. Four days before that time, in the city of Los Angeles, appellant opened a bank account by using a forged check of Patterson, drawn to an assumed name used by appellant in that transaction. Next we find that on March 13th appellant and Gaines (who was separately tried and convicted of this murder) went to San Diego in an automobile hired by appellant, and, according to some testimony, a third man was with them. Mrs. Rockett, in whose house Patterson was a roomer, testified that on that day Patterson, carrying his suitcase, went away with two men. All are agreed that Patterson and Gaines and Goodwin were seen together in San Diego. It was at some time during Patterson's attempted return to Los Angeles that he was murdered. Appellant contends that the evidence is insufficient to prove that Patterson was with appellant and Gaines when they left San Diego on their own drive back to Los Angeles, or that appellant had any share in the planning or action of the murder. No witness at this trial testified to the presence of Patterson with appellant and Gaines on their return trip. Gaines was brought down from the penitentiary and offered by the state as a witness, but he refused to testify. It is an established fact that, a few days after the murder, appellant sold valuable securities which had belonged to Patterson; that such sale was accomplished by forging Patterson's signature; and that the proceeds were divided between Gaines and appellant. The foregoing statements are by no means a complete history of the case, but they indicate some of the circumstances of the transactions described at the trial.

The suggestion made by counsel for appellant that the Supreme Court, when it reversed the judgment after the first trial (People v. Goodwin, 261 P. 1009), held that the evidence at that trial was insufficient to sustain the verdict, and the further suggestion that the evidence produced at the second trial was weaker than at the first trial, and that therefore the case is really settled in appellant's favor by the Supreme Court decision, is all based upon a misconception of the intention and effect of the former decision on appeal. The Supreme Court, in its opinion, specifically withheld expression of the view which has been imputed to it that the evidence was insufficient to support the verdict. Aside from a holding that the court had committed an error in one of its instructions to the jury (an error not repeated in the present record), the principal reason for reversal of the first judgment was that the superior court should have granted appellant's motion for a new trial on the ground of newly discovered evidence not available or known to appellant at the time of the first trial. Appellant had produced in support of that motion affidavits showing that these newly discovered witnesses would have testified in support of defendant's story; particularly in reference to occurrences at San Diego on the night when appellant claims to have remained at San Diego, while waiting for Gaines to return from a pretended trip to Tia Juana. The Supreme Court, in its decision, indicated that if the testimony of those witnesses had been given and had been such testimony as was shown by the affidavits, this might have produced an important effect in favor of appellant and might have led to his acquittal. In view of that decision, and especially because counsel for appellant have emphasized it, I have looked into the transcript in order to read the actual testimony of those witnesses when produced at the second trial, but, so far as I can discover, none of those names is in the record now before us.

HOUSER, J. I concur in the judgment.

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94 Cal. App. 168

TROWER et al. v. RENTSCH et al.
(Civ. 5792.)

District Court of Appeal, Second District, Division 1, California. Sept. 26, 1928.

As Modified Oct. 16, 1928.

1. Quieting title 🔑51—Assignee of contractor, joined as defendant in owner's suit to quiet title, in which no damages for detention were claimed, held not entitled to recover value of improvements.

Assignee of contractor *held* not entitled, in owner's suit to quiet title to property, to receive compensation for value of improvements placed thereon by him and his assignor, where plaintiff made no claim for damages and defendant had no color of title, since Code Civ. Proc. §§ 738, 741, permit allowance of value of improvements to defendants in action to quiet title only where plaintiff claims damages for withholding property and where improvements have been made by defendants holding adversely, in good faith, and under color of title.

2. Equity 🔑54—Equitable principles in contravention of provisions of positive statute cannot prevail.

Equitable principles cannot be permitted to prevail, when contrary to provisions of a positive statute.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Action by Hilda Trower and another against George A. Rentsch, John A. Novotny, and others, in which defendant last named filed a cross-complaint. From an adverse judgment, plaintiffs appeal. Reversed with directions.

Lewis J. Utt, of San Diego, for appellants.
C. J. Novotny and E. S. Torrance, both of San Diego, for respondent.

HOUSER, J. The outstanding facts upon which this appeal is predicated are that plaintiffs were the owners of certain real property which they sold on an installment contract to defendant Rentsch for the sum of $700, of which amount the sum of $100 only was paid on account of the purchase price of the property. Thereafter Rentsch entered into an agreement with defendant Carpenter for the construction by him of a building thereon. After such construction had progressed to some extent, owing to some financial embarrassment, defendant Carpenter, being unable to complete his said contract, assigned all his right, title, and interest therein to defendant Novotny. Prior to the commencement of building operations on the property, in at least attempted compliance with the provisions of section 1192 of the Code of Civil Procedure, plaintiffs posted on the property a notice to the effect that they would not be responsible for the payment of the labor or materials used in the construction of the proposed building, and thereafter filed for record a copy of such notice in the office of the county recorder of the county in which the property was situated, notwithstanding which certain lien claimants (other than defendant Novotny) filed for record their respective claims of lien against the property on account of either labor performed or materials furnished by them in the construction of the building. Rentsch, who was the person who had contracted with plaintiffs for the purchase of the property, defaulted in the payment of the purchase price thereof and repudiated his said agreement of purchase. Thereupon plaintiffs rescinded said contract, but offered to defendant Novotny to sell the property to him for the balance of $600 due on the original contract of sale between plaintiffs and Rentsch, "together with accrued interest, taxes, and assessments, plus the sum of $15 for bringing down the title to said land and $1 revenue stamps," making a total of $663.57, which offer defendant Novotny failed to accept within a reasonable time thereafter. Some time prior to the happening of the last-mentioned fact defendant Rentsch executed and caused to be recorded a trust deed of the property herein involved, wherein defendant Carpenter was named as beneficiary, purporting to secure the payment to said defendant Carpenter of the sum of $1,400. In such circumstances, plaintiffs commenced an action to quiet title to the property. Therein no claim of damages of any sort, whether by reason of detention or withholding of the property, or otherwise, was made by plaintiffs against any of the defendants. Besides Rentsch, Carpenter, Novotny, and Bruffy, to which last-named person Novotny (without any title in him whatsoever) had sold the property, the various lien claimants were made parties defendant. With the exception of defendant Novotny, all the defendants defaulted, and judgment was rendered against them. Defendant Novotny answered the complaint and filed a cross-complaint, by which, as later amended, among other things, he sought to have plaintiffs reimburse him for the value of the improvements placed upon the property by him and Carpenter, his predecessor in the building contract.

Other than that the building was constructed by Carpenter and Novotny in good faith, but nevertheless with full knowledge on the part of each of them as to the condition of the title of the property and all facts as hereinbefore set forth, no finding of fact was made by the trial court in favor of any of the allegations contained either in the answer or the cross-complaint of defendant Novotny, and nothing was awarded to him by reason thereof. Preliminarily, as a condition precedent to any relief to be granted to plaintiffs, it was ordered by the trial court that within a fixed time plaintiffs pay to defendant Novotny the value of the improvements placed by him and his predecessor in interest on the property, amounting to the net sum of $1,949.16. Plaintiffs declined to make such payment. Thereupon judgment was ordered that plaintiffs take nothing as against defendant Novotny and that defendant Novotny recover the costs expended by him in the action.

[1, 2] As hereinbefore stated, defendant Novotny made no claim of lien against the property by reason of any labor performed or material furnished in the construction of the improvements. His defense, as well as his asserted cause of action, rested entirely upon the equitable principle that "he who seeks equity must do equity"; and it was solely upon that basis that the judgment of the lower court was rendered in his favor.

Chapter III of title 10 of part 2 of the Code of Civil Procedure is devoted to "actions to determine conflicting claims to real property, and other provisions relating to actions concerning real estate." By the first section (section 738, Code Civ. Proc.) of that chapter, among other things, provision is made for an action such as was brought by plaintiffs herein—to quiet title to the real property. In the same chapter, and in the fourth section thereof (section 741, Code Civ. Proc.), it is provided that:

> "When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claim of the plaintiff, in good faith, the value of such improvements must be allowed as a set-off against such damages."

It may be noted that, before the "value of such improvements" may be allowed to the defendant in an action of the nature of that before the court, the presence of certain conditions precedent must be shown to exist, in that damages must be claimed by the plaintiff for the withholding by the defendant of the property involved, and the improvements must have been made by the defendant, or by his predecessor in interest, holding adversely, in good faith, and under color of title.

In the instant case none of such conditions favorable to defendant Novotny is present. No damages were claimed by plaintiffs against any of the defendants for withholding of the property; neither defendant Novotny, nor his predecessor in interest, had color of title to the property; neither of them held a title of any kind to the property adversely to the claim of plaintiffs, either in good faith or at all. As hereinbefore stated, the basis of the judgment in favor of defendant Novotny was rested on the principle of equity, to which attention has been directed. But admitting the general application of such principle, it cannot prevail when contrary to the provisions of a positive statute. Considering the language of the statute, and the fact that all issues were decided by the trial court against the allegations contained in the cross-complaint of defendant Novotny, it would seem clear that an incorrect conclusion was reached. The principle involved is announced in the case of Wood v. Henley, 55 Cal. App. Dec. 304, 263 P. 870 (syllabus), that—

> "In an action to quiet title the defendant cannot be allowed reimbursement for improvements made by him upon the property sought to be quieted, except by way of set-off against any damages which may be claimed by the plaintiff for the withholding of the property; and where no damages are pleaded or asked for by the plaintiff reimbursement cannot be had."

To the same effect is Huse v. Den, 85 Cal. 390, 24 P. 790, 20 Am. St. Rep. 232.

In view of the fact that none of the allegations contained in the cross-complaint of defendant Novotny with reference to his claimed right to be compensated for the value of the improvements placed on the property foundation was laid upon which such compensatory relief ordered by the trial court in favor of defendant Novotny could be predicated. For illustration of the principle, see O'Brien v. O'Brien, 197 Cal. 577, 584, 241 P. 861; Martin v. Bartmus, 189 Cal. 87, 207 P. 550; Wilson v. Smith, 69 Cal. App. 211, 230 P. 963.

It follows that the judgment should be reversed. It is directed that the superior court enter judgment quieting the plaintiff's title to the property described in her complaint, and in accordance with the prayer of the complaint. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

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94 Cal. App. 119

HAMMOND LUMBER CO. v. RICHARDSON et al. (Civ. 6289.)★

District Court of Appeal, First District, Division 1, California. Sept. 24, 1928.

Rehearing Denied Oct. 23, 1928. Hearing Denied by Supreme Court Nov. 22, 1928.

1. Mechanics' liens ⚷134—Purpose of mechanic's lien claim is to give owner constructive notice of claimed lien and to facilitate investigation respecting its merits (Code Civ. Proc. § 1187).

Purpose of claim of mechanic's lien required to be filed by Code Civ. Proc. § 1187, providing that lien claimant must designate name of person by whom he was employed or to whom he furnished materials, is, in so far as it concerns owner of property against which lien is claimed, to give him constructive notice of claimed lien, to inform him as to nature and extent of claim, and to facilitate investigation as to its merits.

2. Mechanics' liens ⚷5—Mechanics' lien statutes are to be liberally construed to effectuate their objects and promote justice (Const. art. 20, § 15).

Mechanics' and materialmen's lien statutes providing procedure for carrying out right of mechanics and materialmen to liens granted by Const. art. 20, § 15, on property on which they have bestowed labor or furnished material, are to be liberally construed with a view to effect their objects and promote justice.

3. Mechanics' liens ⚷135—Claim of lien filed by materialman held not insufficient because corporate contractor was mistakenly designated as individual (Code Civ. Proc. § 1187).

Claim of lien recorded by materialman, which designated contractor as individual doing business under fictitious name and style, *held* not insufficient under Code Civ. Proc. § 1187, because contractor was in fact a corporation, in absence of showing that owner was misled to his injury thereby, injury not being presumed.

4. Trial ⚷396(2)—Trial court properly found against defendant on issue raised by answer not supported by any evidence.

Where there was no evidence offered in support of issue raised by defendant in his answer, trial court properly found against him thereon.

Appeal from Superior Court, Los Angeles County; Pearl E. Keeler, Judge.

Action to foreclose a mechanic's lien by the Hammond Lumber Company against Burt Richardson, individually and as doing business under the fictitious name and style of Richardson Building & Engineering Company, S. N. Reiss, and others. Judgment for plaintiff, and defendant Reiss appeals. Affirmed.

Zach Lamar Cobb and Earl A. Littlejohns, both of Los Angeles, for appellant.

R. L. Horton, of Los Angeles, for respondent.

BEAUMONT, Justice pro tem. This is an action for the foreclosure of a mechanic's lien upon real property in the city of Los Angeles. S. N. Reiss, defendant, owner of the property upon which the lien was claimed, entered into a contract with the Richardson Building & Engineering Co., Inc., a corporation, for the erection of a building. The plaintiff Hammond Lumber Company furnished the materials which were used in the construction of the building. Not being paid for such materials, plaintiff within the statutory time recorded a claim of lien, and subsequently brought this action. Plaintiff had judgment decreeing foreclosure, and from such judgment defendant Reiss has appealed.

Respondent had for some time before the date of the execution of the contract between the Richardson Building & Engineering Co., Inc., and appellant, done business with, and sold materials to, the Richardson Building & Engineering Company, believing that it was a fictitious name used by Burt Richardson. Without knowledge that a corporation had been formed or that appellant had entered into a contract with the Richardson Building & Engineering Company as a corporation, it continued to do business with the "Richardson Building & Engineering Company," and furnished the materials that were actually used in constructing the building on appellant's property. Burt Richardson was the president of the corporation, and his name appears as such officer on the contract entered into with the owner. In respondent's books the account covering the materials used was carried in the name of "Richardson Building & Engineering Company." The evidence shows that after the incorporation business was continued with respondent under the same name as before, and that the materials used in appellant's said building were supplied under the same name theretofore used, to wit, "Richardson Building & Engineering Company," and that no mention was made that the corporation had been formed, although such materials were in reality being furnished the corpora-

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★Rehearing denied. Hearing denied by Supreme Court.

tion. One of the officers of the corporation testified that the name "Richardson Building & Engineering Company" was the name usually used in transacting the corporation's business, and that he, as general manager thereof, had bought the materials in question under that name.

The caption of the claim of lien recorded was as follows:

> "Hammond Lumber Company, a Corporation, Claimant, v. Burt Richardson Doing Business under the Fictitious Name and Style of Richardson Building & Engineering Company and S. N. Reiss, Owners and Reputed Owners—Mechanic's Lien."

And in the body of said claim there appears: "(4) Names of persons to whom claimant furnished said materials are the Richardson Building & Engineering Company, above named." No question is raised as to the claim of lien, except as to its sufficiency in stating the name of the person to whom the materials were furnished.

[1] Appellant has four specifications of error, but they are all in effect stated in the first specification, which is as follows:

> "Claim of lien is insufficient in that it did not truly state the name of person to whom plaintiff furnished the materials and because there was a fatal variance between the notice of lien and the proof."

Section 1187 of the Code of Civil Procedure requires, among other things, that a lien claimant must in his claim of lien designate therein the name of the person by whom he was employed or to whom he furnished the materials. The purpose of the claim of lien, as contemplated in the Mechanic's Lien Law, in so far as it concerns the owner of the property against which the lien is claimed, is to give him constructive notice of the claimed lien, to inform him as to the nature and extent of the claim, and to facilitate investigation as to its merits. Trout v. Siegel (Cal. Sup.) 262 P. 320; Wagner v. Hansen, 103 Cal. 104, 37 P. 195.

[2] The right of mechanics and materialmen to liens upon property upon which they have bestowed labor or furnished materials is constitutional. Cal. Const. art. 20, § 15. It is the function of the Legislature to provide procedure for carrying this right into effect, and the statutes relating thereto are to be liberally construed with a view to effect their objects and promote justice. McClung v. Paradise Gold Mining Co., 164 Cal. 517, 129 P. 774; Hammond Lumber Co. v. Barth Inv. Corp. (Cal. Sup.) 262 P. 31; Heberling v. Day, 59 Cal. App. 13, 22, 209 P. 908.

[3] There is nothing in the evidence in the present case to show that the owner was misled to his injury in any way by the failure of the claimant to state precisely the name of the corporation with which the contract was made, and to which the materials were furnished. It will not be presumed, in the absence of evidence to that effect, that he was so misled. Putnam v. Ross, 46 Mo. 337. Indeed, it is obvious that he was not misled, and the trial court so found. A general statement of this phase of the Mechanic's Lien Law is given in Corpus Juris (volume 40, pp. 235, 236) as follows:

> "As a rule a mistake in the statement as to the name of the person with whom plaintiff contracted or by whom he was employed * * * will not defeat the lien, where there was no intention to deceive and no one has been misled to his detriment." First Presbyterian Church v. Santy, 52 Kan. 462, 34 P. 974; H. F. Cady Lumber Co. v. Conkling, 70 Neb. 807, 98 N. W. 42; Eberle v. Drennan, 40 Okl. 59, 136 P. 162; Osborn v. Logus, 28 Or. 302, 37 P. 456, 38 P. 190, and 42 P. 997, 51 L. R. A. (N. S.) 68.

Our own state courts have followed the general rule. Tibbetts v. Moore, 23 Cal. 208; Jewell v. McKay, 82 Cal. 144, 23 P. 139; Hazard, Gould & Co. v. Rosenberg, 177 Cal. 295, 170 P. 612.

In Osborn v. Logus, 28 Or. 302, 42 P. 997, supra, the contract for construction was executed by the defendant Logus, owner of certain property, with C. N. Holmes & Co. The claim of lien stated that the materials were furnished to "J. W. Holm & Bro." It was alleged in the complaint that the materials were furnished to J. O. Holm and C. N. Holm, partners, doing business under the firm name of J. O. Holm & Bro. After referring to certain of the evidence the court said:

> "But, however this may all be, it is clearly apparent that defendant Logus, who alone is contesting this appeal, has not been misled to his injury in any respect by the allegations in the complaint touching these parties or their firm name, and we are therefore not inclined to hold that there is such a disagreement between the proofs and the allegations as to constitute a variance fatal to plaintiff's case."

Further in the same opinion, in referring to the sufficiency of the claim of lien, the court points out that it is not apparent that the defendant has been misled to his injury, and states:

> "The name 'J. W. Holm & Bro.' was evidently placed in the claim of lien in good faith by Osborn. The account was kept with the contractors under that name. * * * The lien claimant having acted in entire good faith in filing his lien, it ought to be clearly manifest that parties have been misled to their injury before a slight misnomer of the contractors' firm name should be allowed to defeat the lien. This last objection is not well taken."

In Lichtenstein v. Grossman Construction Corp., 221 App. Div. 527, 225 N. Y. S. 118, the sufficiency of the lien was questioned. The court said:

"The Lien Law, § 9, requires that the name of the person by whom the lienor was employed or to whom he furnished materials must be specified in the lien. The notice in question contains the statements: * * * The name of the person to whom he * * * furnished or is * * * to furnish materials is Morris Margowitz, president of Grossman Construction Corporation. * * * This is a sufficient compliance with the statute. The lienors have named the defendant Grossman Construction Corporation, but in effect the lien states that the contract was made with the president of that corporation, whose name appears. Even if this were error, it might well be disregarded, since there is not a total failure of compliance with the requirements of the statute in this respect."

The claim of lien in the present case was sufficient to give the owner the notice contemplated by the statute. Defendant was not misled to his injury, as heretofore pointed out; and there was no material variance between the claim of lien and the proof.

[4] Appellant alleges in his fourth specification of error that the finding of the court that appellant was not misled by the use of Richardson Building & Engineering Company, instead of Richardson Building & Engineering Company, Inc., in the claim of lien is not supported by the evidence. While this specification is in effect disposed of in the foregoing part of the opinion, we particularly call attention to the fact that appellant is not in position to complain of the finding for the reason that this question was put in issue by appellant in his answer, and that no evidence was offered in support thereof. In such case the court properly found against him. 24 Cal. Jur. 945; Monterey County v. Cushing, 83 Cal. 507, 23 P. 700. "Where no evidence is introduced in regard to an issue, or the evidence * * * is insufficient to support it, the finding thereon should be against the party having the burden of proof." 38 Cyc., p. 1985.

We deem it unnecessary to advert to the remaining specifications of error, as they are in substance but a restatement of specification 1. Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

205 Cal. 392

CONRAD v. RANDELL et al. (SOUTHERN TRUST & COMMERCE BANK, Intervener). (L. A. 9566.)

Supreme Court of California. Oct. 17, 1928.

Divorce 🔑243—Divorce decree awarding wife stated sum held not to create trust during son's minority, with remainder reverting to husband on wife's death.

Divorce decree of Montana court, awarding wife stated sum absolutely out of husband's estate, *held* not to create a trust for parties' son during his minority, with amount remaining on attainment of his majority reverting to husband on wife's death; amount awarded being wife's sole and separate estate, of which she could dispose by will to entire exclusion of husband.

Department 2.

Appeal from Superior Court, San Diego County; W. P. Cory, Judge.

Action by Arthur F. Conrad, individually and as guardian of the person and estate of William H. Conrad, his minor son, against Marguerite Randell, as executrix of the last will and testament of La Nita Conrad, deceased, in which the Southern Trust & Commerce Bank intervened as substituted guardian of said minor. From a judgment for defendant and intervener, plaintiff individually appeals. Affirmed.

R. J. Reynolds, of Great Falls, and Titus & Macomber, of San Diego, for appellant.

Wright & McKee and C. M. Monroe, all of San Diego, for respondent.

George H. Stone, of San Diego, for intervener.

RICHARDS, J. The plaintiff and appellant herein commenced this action on his own behalf and also in his capacity as guardian of the person and estate of William H. Conrad, his minor son, for the purpose of having it declared that a certain sum of money which constituted the estate of one La Nita Conrad, deceased, who had formerly been the wife of the plaintiff, had been held by her, and was being held by her estate, in trust for the support, education, and maintenance during his minority of their minor son; the balance remaining thereof after said minor attained his majority to become the property of the plaintiff. While said action was still pending and untried in the trial court, the plaintiff's minor son, having reached the proper age, procured the removal by order of court of the plaintiff as his guardian, and the substitution as such guardian of the Southern Trust & Commerce Bank, and thereafter said bank as guardian of said minor presented and procured to be filed a complaint in intervention, opposing the right of the plaintiff to any share or ownership in his deceased wife's estate. Upon the trial and submission of the cause the trial court made its findings of fact and conclusions of law against the plaintiff and rendered judgment thereon that the plaintiff take nothing by his action, and that the defendant and intervener have judgment for their costs. It is from such judgment that the plaintiff and appellant herein, acting in his individual right alone, has prosecuted this appeal.

The facts of this case are practically undisputed and are briefly these: In October, 1916, La Nita Conrad, now deceased, procured a decree of divorce to be entered against her husband, the plaintiff and appellant herein, in the state of Montana, wherein it was adjudged that in addition to her divorce the plaintiff in that action was entitled to be awarded the custody and control of William H. Conrad, the minor child of the parties to said action; and it was further adjudged and decreed that the plaintiff therein was entitled to receive and was thereby awarded out of the property and estate of her husband, which was stated to be of large value, among other certain properties, the sum of $64,056. The award of said sum in said decree was absolute, and while the plaintiff in said action was by the judgment therein given no allowance for alimony for the support of said minor child, the said money judgment in her favor was not by said decree charged with any trust whatever relating to the custody, care, or control of said minor child. The amount of said judgment was presently paid over by the defendant to the plaintiff in said action and no appeal was taken from said decree. Thereafter the plaintiff in said action, La Nita Conrad, moved to California, and with her minor son took up her residence in the county of San Diego, where, in about the year 1924, she died, leaving a last will and testament, by the terms of which she disposed of her estate, which consisted in the main of the aforesaid sum of money, leaving no portion thereof to her former husband, but making her minor son the principal devisee of that portion of her estate. Upon the admission of said will to probate and the appointment of Marguerite Randell as the executrix, under said will, of said estate, the plaintiff herein, individually and as the guardian of the person and estate of his aforesaid minor son, presented for allowance a claim against said estate for the remaining balance of said sum of $64,056, wherein he asserted that the decedent had held said sum in trust for the benefit of himself individually and of their minor son, of whom he was at that time guardian. The executrix disallowed said claim whereupon this action ensued, with the result above set forth.

It is the sole contention of the appellant upon this appeal that the award to his deceased wife of the sum of $64,056 by the Montana court was an award in lieu of and in the nature of an allowance for the support of the minor child in said action during his minority, and that a trust was thereby created by which said minor was to be the beneficiary of said sum during his minority, and that upon the attainment of his majority whatever amount remained of said sum was to revert to himself upon the death of his former wife. An examination of the decree of the Montana court convinces us that there is no basis for and no merit in the appellant's contention, since it expressly appears that the award of said sum to the plaintiff in said action was made after a calculation by that court of the amount and value of the properties of the defendant in said action, and was made as and for the rightful sum to be allotted to the wife out of the properties, and that the allowance of said sum was neither expressly nor impliedly charged with any trust whatever. The appellant cites no authority in support of his aforesaid contention, and we are satisfied that none exists. The money thus awarded to the appellant's deceased wife by the decree of said court, the marriage being terminated, became her sole and separate estate, which she was entitled to dispose of and did dispose of by will, to the entire exclusion of the plaintiff and appellant herein. With the rights of William H. Conrad in relation to said sum of money during the period of his minority or thereafter we have upon this appeal no concern.

The judgment is affirmed.

We concur: SHENK, J.; LANGDON, J.

206 Cal. 428

BANK OF ITALY v. CADENASSO et al.★

(S. F. 11861.)

Supreme Court of California. Oct. 18, 1928.

Hearing Granted in Bank Nov. 19, 1928.

1. Appeal and error 🔑989—On defendants' appeal, where evidence was conflicting, court must accept plaintiff's case and reject defendant's conflicting evidence.

On defendants' appeal from judgment for plaintiff, where evidence was conflicting, Supreme Court must accept case as proven by plaintiff and reject all evidence of defendants in substantial conflict with that of plaintiff.

2. Estoppel 🔑83(2)—Defendants, representing that party obtaining loan from plaintiff owned cheese in defendant's warehouse, were estopped to claim secret lien on same.

Defendants, having represented that party, who later assigned his rights in cheese to plaintiff, was owner of cheese in defendant's warehouse, in order to induce plaintiff to make loan to such party, were estopped to claim that they had secret lien against large part of cheese under written agreement as security for money loaned.

3. Assignments 🔑90—Assignee of owner's rights and title in cheese in possession of defendants, warehousemen, were entitled to proceeds thereof after defendants sold same.

Plaintiff, having succeeded to all rights of owner of cheese stored with defendants, warehousemen, under assignment from owner, was entitled to proceeds thereof after same was sold by defendants, who claimed that they had a lien on the cheese.

Department 1.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action for money had and received by the Bank of Italy against E. N. Cadenasso and another, copartners doing business under the firm name and style of E. N. Cadenasso, and another, in which defendants filed a cross-complaint. From a judgment for plaintiff, defendants appeal. Affirmed.

F. J. Solinsky and Edward R. Solinsky, both of San Francisco, for appellants.

Louis Ferrari and J. J. Posner, both of San Francisco, for respondent.

★Hearing granted in bank.

CURTIS, J. [1] This is an action for money had and received by defendants for and on behalf of plaintiff. The trial court found in favor of the plaintiff. The evidence is conflicting. We must therefore accept the case as proven by the plaintiff and reject all evidence of the defendants which is in substantial conflict with that of the plaintiff. This controversy grew out of the dealings of the parties hereto with Domenico Caso. The latter had a cheese factory, which he was operating at Newman, Cal. On October 1, 1920, he entered into a written contract with the defendants, whereby the latter agreed to advance or loan to Caso the sum of $5,000. Caso was to deliver to defendants quantities of cheese, which the latter were to sell, and the proceeds up to 28 cents per pound were to be applied to Caso's indebtedness to defendants, and the excess of such proceeds, if any, was to belong equally to the parties to said contract. The contract further provided that, should said defendants loan to Caso any additional sums of money, the terms and conditions applicable to said loan of $5,000 should apply to any additional sums loaned to Caso.

The defendants at the time of the execution of this written contract advanced to Caso the sum of $3,500 under the terms thereof, and thereafter made him additional advancements, all of which advancements or loans amounted to $15,652.17; of this amount defendants were paid the sum of $2,366.56, leaving a balance due from Caso to defendants of $13,285.61. A few days after the execution of the contract referred to above, and on October 7, 1920, Caso desired further capital in his business. He was introduced by the defendant E. N. Cadenasso to certain officers of the plaintiff and made application for and was granted a loan of $25,000. This loan was secured, in part at least, upon a financial statement of Caso's assets and liabilities prepared by the defendant E. N. Cadenasso, from which there was omitted from Caso's liabilities the indebtedness due defendants, nor was there any reference in said statement made to the written contract between Caso and defendants. Representations were made at the time of securing this loan from the plaintiff of the amount of cheese then owned by Caso and in the possession of the defendants, and there was evidence to the effect that said loan was made on the strength of the representation that Caso was the owner of said cheese. Caso testified that the loan was made on the cheese. The cheese was kept in the warehouse of the defendants, and the officers of the plaintiff made frequent trips to the said warehouse for the purpose of inspecting the cheese, and were admitted by the defendants, who pointed out the cheese to said officers, but on the occasion of none of said visits did either of said defendants make any claim to said cheese or to any lien thereon. The parties interested were not able to sell the cheese at a price satisfactory to them, and the same was kept upon defendants' premises until sold as hereinafter set forth. On November 16, 1921, Caso made a written assignment of his interest in the cheese to the plaintiff bank, of which the following is a copy:

"November 16, 1921.

"E. N. Cadenasso & Company—Gentlemen: Please take notice that I have assigned to the Bank of Italy all my right, title and interest in and to that certain block of cheese, approximately 150,000 pounds, held by you for the purpose of sale for my account and you are hereby directed to hold the same and all proceeds thereof subject to the order of the said Bank of Italy.

"Yours truly, D. Caso."

On the same day the defendants wrote and signed a written acceptance of said order as follows: "Accepted, November 16, 1921, E. N. Cadenasso & Company, by E. N. Cadenasso." In April, 1922, Caso made and delivered to the plaintiff a bill of sale to all of said cheese. It was not until after this bill of sale was delivered to the bank that the defendants notified the officers of the bank that they (the defendants) claimed a lien upon the cheese, under the written agreement of October 1, 1920, and that their lien was prior in time and superior to the claim of the bank. Thereafter the defendants sold the cheese in different lots and at different times, and during the next few months immediately following the delivery of said bill of sale. On receiving the proceeds of said several sales, the defendants deducted the expense of making said sale, and the balance remaining was divided by defendants between themselves and the bank, by retaining for themselves 32 per cent. of said net proceeds, and remitting to the bank 68 per cent. of said net proceeds. The cheese sold for a total amount of $13,181.15. After deducting the expenses of sale, there was left a balance of $10,778.37. Of this amount the defendants remitted to the plaintiff $6,662.77, and retained for themselves the sum of $4,115.60. This action was brought to recover said sum of $4,115.60 from defendants. Defendants in their answer denied any indebtedness to plaintiff. They also interposed a cross-complaint by which they sought to recover back said sum of $6,662.77 paid by them to plaintiff as aforesaid. The trial court rendered judgment in favor of plaintiff for the amount demanded in its complaint, and denied defendants any relief whatever under their cross-complaint. From this judgment the defendants have appealed. Of the sum of $25,000 borrowed of plaintiff by Caso on October 7, 1920, $5,000 had been paid, leaving of the principal $20,000 unpaid. This amount was still unpaid until up to the time defendants began selling said cheese and making remittances thereon to plaintiff. As we have already seen, the amount due defendants from Caso was $13,285.61, and this amount was unpaid at the time the defendants began the sale of said cheese. The indebtedness of Caso to plaintiff had not been reduced at the time of the trial except as to the amounts plaintiff had received thereon from defendants, and Caso's indebtedness to defendants at the time of the trial was said sum of $13,285.61, less the amounts defendants had received on the sale of said cheese, as just stated. The division of the proceeds of the sale of said cheese was made by defendants between itself and plaintiff substantially in the proportion that their respective claims bore to the aggregate amount of said indebtedness. The defendants claimed, and defendant E. N. Cadenasso testified, that this was done under an agreement between himself and plaintiff, and that defendants had assented to said agreement and division of the proceeds of said sale "in order to keep peace and not force Caso into bankruptcy." This evidence of defendants is contradicted by the testimony of the officers of the bank, and by certain correspondence admitted in evidence. The trial court found against this claim of defendants and its finding thereon must be accepted by this court.

[2] The defendants base their claim to the money involved herein upon the terms of the written agreement, of date October 1, 1920, entered into by them with Caso. They insist that by the terms of this agreement they were given a lien upon all cheese delivered into their possession by Caso under said agreement to the extent of any and all unpaid indebtedness of Caso to them. As we view the case, however, it is not necessary to pass upon this question. Conceding that defendants were given such a lien, it is the contention of plaintiff that the defendants are estopped by their subsequent action from asserting said claim of lien as against the claims of the plaintiff. This contention of plaintiff we think must be sustained. The evidence on behalf of plaintiff, which, in view of the findings of the trial court in plaintiff's favor, we must accept, shows that it was through and by means of the efforts of defendant E. N. Cadenasso that plaintiff loaned to Caso the sum of $25,000, and that this loan was made to Caso by reason of the fact that he was the owner of this large quantity of cheese. To put it in the words of Caso, "The loan was made on the cheese." While E. N. Cadenasso was assisting in making these arrangements, which resulted in the bank parting with this large sum of money upon the strength of Caso's ownership of this cheese, he did not at any time by word or action intimate that he, or his firm, had a lien upon this same property to secure a large present and a much larger prospective indebtedness, which, as later developments showed, exceeded the proceeds finally derived from the sale of the cheese. To now permit him, or his firm, to assert that they held a secret lien against a large part of the property, which they represented Caso was the owner of, and which was the inducing cause of the bank making Caso the loan, would be to countenance a fraud against the bank of the rankest kind. The conclusion is irresistible from uncontradicted evidence that, had Cadenasso disclosed to the bank at the time he and Caso applied for the loan that his firm held a written agreement of Caso, giving them a first lien upon all cheese belonging to Caso as security for such sums of money as they had already loaned him or might loan him in the future, the bank would not have acceded to their request for a loan, nor would it have loaned Caso any money whatever. The facts bring the case clearly within the rules of estoppel, so clearly that a citation of authorities is unnecessary. The weakness of defendants' position is further borne out by their subsequent agreement to pay to the bank 62 per cent. of the net proceeds of the cheese. If their written agreement with Caso gave them a first lien against the cheese in their possession, then they would have been entitled to the full amount of said proceeds to the extent of all loans made by them to Caso. By paying to the bank 62 per cent. of these proceeds and only reserving to themselves 38 per cent., which was entirely inadequate to meet the amount of their claim against Caso, they showed how fully they recognized the insecurity of their claim. This payment was made voluntarily and after the repeated assertions by the officers of the bank that they accepted the same without prejudice on the part of the bank to recover the full amount of said net proceeds. Their only asserted reason for voluntarily turning over to the bank 62 per cent. of the money, which, if their claim was correct, belonged wholly to them, was "to keep peace and not force Caso into bankruptcy." This reason seems not to have impressed the trial court, and accordingly it can have no weight in an appeal from the judgment of that court.

The defendants contend that Caso was well acquainted with the officials of the plaintiff at the time he secured the loan from them on October 7, 1920, and that he was indebted to said bank in a large sum of money. This is partially but not wholly true. The evidence shows that plaintiff had a branch bank at Modesto, Cal., and that in May, 1920, Caso had borrowed $5,600 from this branch bank to take care of an unsecured indebtedness at the home office, and that this loan was later increased to $10,000, which was paid in August, 1920. While this evidence does show that Caso had an acquaintance with "the home office," it does not in any manner overcome the evidence that E. N. Cadenasso went with Caso at the time the latter secured the loan of $25,000, and that the loan was made upon the representations of Caso and Cadenasso that Caso owned this large quantity of cheese which made him a safe risk for the bank, and that E. N. Cadenasso at no time during the negotiations leading up to the making of the loan informed the bank of his claim of lien against the cheese.

Much of the briefs of the parties is devoted to a discussion of the legal effect of the written agreement, of date October 1, 1920, between Caso and the defendants. The defendants claim that by the terms of this agreement they were given a first lien upon all cheese delivered into their possession under said agreement by Caso, while the plaintiff denies that the agreement is susceptible of any such construction, and contends that the effect of such agreement was to make Caso and Cadenasso copartners in the disposition and sale of said cheese. Plaintiff further contends that, as they were copartners in said business, the money loaned by plaintiff was loaned to such copartnership for the purpose of carrying on said business, even though the note was signed by Caso only. Under this contention the plaintiff claims that the defendants were personally liable for the amount of said loan as members of said partnership. As already suggested, we consider it unnecessary to pass upon these various and conflicting contentions of the parties to this action. We are satisfied that, even if the defendants are right in the construction which they place upon said written agreement, they are estopped from claiming any lien under said written agreement by their subsequent actions, which resulted in the plaintiff loaning to Caso said sum of $25,000 under the circumstances already related. Therefore the legal effect of said written agreement, as between the parties thereto, becomes of no material consequence in determining the rights of the parties in this action under the facts as above set forth.

[3] The plaintiff, having succeeded to all rights of Caso in and to the cheese in the possession of the defendants, was entitled to the proceeds thereof after the same was sold by defendants. These facts proven at the trial were sufficient to sustain the findings of the court in favor of the plaintiff.

The judgment should therefore be affirmed, and it is so ordered.

We concur: WASTE, C. J.; SEAWELL, J.

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205 Cal. 386

SCOVILL v. GUY. (L. A. 9524.)

Supreme Court of California. Oct. 16, 1928.

1. Contracts 🔑99(1)—Fraud 🔑50—One suing to rescind contract and recover damages for fraud need not show confidential relation creating trusteeship (Civ. Code, § 2219).

In action to rescind contract and recover damages for fraud and deceit in procuring it, plaintiff need not show such a degree of confidential relation between parties as would create a trusteeship, within Civ. Code, § 2219, but need only show existence of such friendly relations for several years as would entitle him to place confidence in defendant's integrity and honesty and the truth of his representations.

2. Contracts 🔑94(1)—Fraud 🔑23—Party misled by representations of friend, concerning matters of which friend had particular knowledge, may rescind agreement and recover in damages sums paid.

A party misled by representations of another, with whom he has had such friendly relations for a period of years as entitles him to place confidence in such other's integrity and honesty, as to matters concerning which the latter had particular knowledge not readily accessible to the former, may rescind agreement thus procured and recover in damages whatever sums he was induced to pay thereunder.

3. Appeal and error 🔑1010(1)—Judgment on findings and conclusions, supported by evidence of false representations relied on in making contract rescinded, must be affirmed.

Where evidence in action to rescind contract and recover damages for fraud amply showed that misrepresentations inducing plaintiff to enter into contract were falsely made and fully relied on by plaintiff, who would not have made agreement otherwise, judgment for plaintiff, based on findings of fact and conclusions of law in accordance with such evidence, must be affirmed as against contention that facts might have been held to comport equally with honesty and fair dealing as with fraud and deceit.

Department 2.

Appeal from Superior Court, Los Angeles County; Robert E. Abbott, Judge pro tem.

Action by M. S. Scovill against Ralph L. Guy. Judgment for plaintiff, and defendant appeals. Affirmed.

Theodore Stensland, of Los Angeles, for appellant.

Kemp, Partridge & Kemp, Thatcher J. Kemp, and Homer N. Boardman, all of Los Angeles, for respondent.

RICHARDS, J. This action was instituted by the plaintiff for the rescission of a certain agreement between the plaintiff and the defendant upon the ground of fraud and deceit on the part of the latter in procuring such agreement and the payment of certain moneys thereunder, which the plaintiff seeks also to recover in the form of damages for such fraud and deceit. The cause proceeded to trial upon the amended complaint of the plaintiff and the defendant's answer thereto, putting in issue the averments of said amended complaint as to any acts of wrongdoing on the part of the defendant. Upon the trial and submission of the cause the trial court made its findings of fact, wherein it set forth in full the correspondence between the parties, which not only embodied their agreement, but also contained the statements and representations which the plaintiff asserted were, and which the trial court found to have been, falsely and fraudulently made, and to have been acted upon by the plaintiff in the belief that they were true to the extent of paying to the defendant the sum of money which he now seeks to recover. Upon such findings of fact and the conclusions of law drawn therefrom, judgment was entered in the plaintiff's favor for the relief sought in his amended complaint. It is from such judgment that the defendant has prosecuted this appeal.

[1] The first contention of the appellant is that there was no evidence presented at the trial sufficient to show that any confidential relation existed between the parties prior to and at the time the representations of the defendant, which resulted in said agreement, were made. It may be conceded that the evidence in the case did not disclose the existence of such a confidential relation between the parties as would bring the case within the provisions of section 2219 of the Civil Code; but it was not essential to a recovery by the plaintiff in this case that such a degree of confidential relation between the parties as would create a trusteeship within the provisions of said section of the code should exist. It was sufficient for the plaintiff to show the existence of such friendly relations during a period of several years between himself and the defendant as would entitle the plaintiff to place confidence in the integrity and honesty of the defendant and in the truth of whatever representations the latter was making to him with regard to the transaction and to the particular business wherein the defendant by his correspondence was proposing that the plaintiff and himself should jointly engage.

[2] There is ample evidence in the record that such relation existed as would have entitled the plaintiff to rely upon the representations which the defendant made to him as to matters concerning which the defendant had particular knowledge and with regard to which information was not readily accessible to the plaintiff. The authorities are ample to the effect that a party who holds such relation and has been misled by the representations of the other, which are to form the basis of a mutual agreement, and the truth of which is known to the opposite party, and unknown or not easily accessible to him, may rescind the agreement which has been thus procured, and recover in damages whatever sums he may have been induced to pay over under the agreement thus fraudulently obtained. Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011; Dow v. Swain, 125 Cal. 674, 58 P. 271; Koblick v. Larson, 57 Cal. App. 462, 207 P. 929; Sullivan v. Helbing, 66 Cal. App. 478, 226 P. 803. The cases of Ruhl v. Mott, 120 Cal. 668, 53 P. 304, and Bacon v. Soule, 19 Cal. App. 428, 126 P. 384, upon which, to sustain this point the appellant most strongly relies, will not be found, when read in full, to sustain his contention, but rather they uphold the contention of the respondent. We find no merit, therefore, in this contention of the appellant.

The appellant's next contention is that the material alleged misrepresentation upon which the plaintiff relied, and which the trial court found to have been made, while sufficiently supported by the evidence in the case, was not shown by such evidence to have been relied upon by the plaintiff. The record does not support the appellant in this contention, but, on the other hand, does afford sufficient evidence to sustain the finding of the trial court that such misrepresentation was made and was relied upon by the plaintiff as one of the main facts inducing him to enter into the agreement which he sought to rescind.

[3] The final point made by the appellant is that the trial court had presented to it in the circumstances attending the transaction in question a state of facts which might have been held to comport equally with honesty and fair dealing as with fraud and deceit, and that, this being so, the trial court should not have imputed fraud to the defendant upon the facts as shown. But, again, as to this final contention we fail to find that the record supports the appellant in making it, since the evidence amply showed both that the misrepresentations which induced the plaintiff to enter into the agreement were made, and falsely made, but that they were fully relied upon by the plaintiff, and that otherwise the agreement would not have been made. The findings of the trial court were fully supported by the evidence.

The conclusion of law based upon such findings of fact was correct, and it follows necessarily that the judgment of the trial court, based upon such findings and conclusion of law, should be and the same is hereby affirmed.

We concur: LANGDON, J.; SHENK, J.

205 Cal. 320

TURLOCK IRR. DIST. v. EDWARDS et al. (two cases). (Sac. 3957, 4116.)★

Supreme Court of California. Oct. 1, 1928.

Rehearing Denied Oct. 29, 1928.

1. Waters and water courses ⟹227—Surety on bond of treasurer for irrigation district acting also as tax collector held liable for misappropriation of fund actually turned over to himself as treasurer, though not properly receipted.

Where tax collector of irrigation district, serving also as treasurer of district, actually deposited with himself as treasurer moneys received as tax collector, though failing to receive permit to deposit total amount, surety on treasurer's bond is liable for misappropriation of such sum rather than surety on tax collector's bond; it being immaterial that deposit was irregular in view of fact that it was actually made.

2. Officers ⟹116—Actual fact, and not condition of books, fixes liability for misappropriation by public officer.

The actual fact, and not condition of books, as to misappropriation by public officer, fixes liability in case books do not represent the true facts.

In Bank.

Appeals from Superior Court.

Separate actions by the Turlock Irrigation District against J. H. Edwards, W. E. Baldwin, as administrator of the estate of Daniel Baldwin, deceased, and others, and against Jacob H. Edwards and the National Surety Company, consolidated for purposes of trial and appeal. Judgment for plaintiffs in the first case and judgment of dismissal in the second case, and defendants in the first case and plaintiff in the second case appeal. Reversed in both cases.

In Sac. 3957:

P. H. Griffin and Griffin, Boone & Boone, all of Modesto, for appellant.

A. J. Carlson, of Modesto, Stanley Pedder, of San Francisco, J. C. Nichols, of Turlock, Dennett & Zion, R. R. Fowler, W. J. Brown, and H. L. Chamberlain, all of Modesto, and R. P. Wisecarver, of San Francisco, for respondents.

In Sac. 4116:

A. J. Carlson, of Modesto, Stanley Pedder, of San Francisco, J. C. Nichols, of Turlock, and Dennett & Zion, of Modesto, for appellants.

P. H. Griffin and Griffin, Boone & Boone, all of Modesto, for respondent.

PER CURIAM. The above-entitled actions, consolidated for purposes of trial and appeal, were brought to recover money alleged to have been misappropriated by the defendant Edwards while serving simultaneously as tax collector and treasurer, respectively, of the plaintiff irrigation district. That there existed a shortage of $18,612.58, the amount sued for in each complaint, in Edwards' accounts at the time of his resignation from these offices in September, 1923, is not now disputed. So far as the defendant Edwards himself is concerned, both offices having been united in him, it is a matter of little importance in what capacity he is chargeable. But as he was required to furnish two official bonds with sureties, one for the faithful performance of his duties as tax collector and the other for a similar performance of his duties as treasurer, and as the sureties for him in one capacity differed from those who are sureties in the other, justice to the sureties requires that he should not be liable on his bond as tax collector for breaches of duty committed as treasurer and vice versa. Upon the conclusion of the joint trial, at which practically the only testimony adduced was that of a certified public accountant who had audited Edwards' books, the court below granted a motion for nonsuit as to the surety on Edwards' bond as treasurer and thereafter found, upon the evidence, that the entire defalcation had occurred in the office of tax collector. From the judgment of dismissal following upon the granting of the nonsuit to the treasurer's surety the irrigation district has appealed, while the sureties on Edwards' bond as tax collector have appealed from the judgment placing the whole burden of his peculations upon them. These appeals, as stated, have been consolidated. The sureties on Edwards' bond as tax collector concede that as tax collector he was in default at the time of his resignation to the extent of $2,278.35, for which they, as sureties on his bond in that capacity, are liable. It is urged, however, that the trial court erred in entering judgment against them for the remaining sum of $16,334.23, which, it is asserted, was misappropriated by Edwards as treasurer, thus placing responsibility therefor on his surety in that capacity. The surety on the treasurer's bond, on the other hand, argues that it was properly granted a nonsuit, for the entire misappropriation is asserted to have occurred in the office of tax collector. In order to properly protect and safeguard its rights in the premises, the irrigation district is placed in the anomalous position of having to contend, at one and the same time, that the judgment of nonsuit and dismissal was improperly granted as to the surety on the treasurer's bond, and that the judgment for the full sum embezzled was properly entered as against the sureties on the tax collector's bond. Concretely stated, our problem is to determine whether the sum of $16,334.23, the difference between the full amount misappropriated and that conceded to have been misappropriated in the tax col-

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★Rehearing denied.

lector's office, was embezzled by Edwards as treasurer or tax collector.

The business of the plaintiff district is managed and conducted by a board of directors, an assessor, tax collector, treasurer, and secretary, the latter performing functions somewhat similar to those of a county auditor. These several offices are, of course, separate and distinct, and the fact that Edwards simultaneously occupied two of them is immaterial here so far as the rights and obligations of the respective sureties are concerned. It had been the practice in the district to charge the tax collector at the proper time with the assessment roll. Each month thereafter he would declare under oath to the secretary the amount of his collections, for which he would then be given a "permit" to deposit said collections with the treasurer. Upon his subsequent presentation to the secretary of the treasurer's receipt, the collector would then be credited as against the assessment roll with the amount so deposited and a charge therefor made against the treasurer on the secretary's books. In the present case, as disclosed by the evidence, the treasurer's books reveal that from September 30, 1921, until and including August 31, 1922, his monthly reports of cash on hand exactly checked with and equaled in amount the total of his bank deposits. During this period there apparently existed no shortage in Edwards' treasury account. However, on September 30, 1922, his books as treasurer disclose that his bank deposits were $16,334.23 less than the cash reported on hand, the exact amount here in controversy. This discrepancy between the cash reported on hand by the treasurer and his bank deposits continued through the months of October, November, and December, 1922. At the close of January, 1923, however, the bank deposits of the treasurer again equaled in amount the cash reported by him to be on hand.

Passing now to a consideration of Edwards' books as tax collector, it appears from the record that in the period from December 10, 1922, to January 6, 1923, he collected $186,975.93. This entire amount, as evidenced by the certificates of deposit purchased by him and deposited to his account as treasurer, was actually paid over by Edwards as tax collector to himself as treasurer. As tax collector, however, he reported to the secretary that his collections for this period were only $170,641.70, and consequently received "permits" from the secretary to deposit only this latter sum, though, as stated, he actually paid into the treasury as tax collector the full $186,975.93 collected by him. It is significant to note that the difference between the exact amount collected as tax collector and actually deposited to the credit of the treasurer during this period and the amount reported to have been collected and for which "permits" were issued by the secretary and receipts given by the treasurer equaled in amount the sum here in dispute, viz., $16,334.23. This evidence, in our opinion, tends strongly to indicate that the apparent shortage of $16,334.23 appearing in the treasurer's account from September to December, 1922, and which disappeared in January of 1923 was attempted to be concealed by having the tax collector, who was also treasurer, actually deposit to his account as treasurer all of the moneys collected by him for the period ending January 6, 1923, but reporting said collections to the secretary as being $16,334.23 less than the amount so collected and deposited.

[1] It is urged by the surety on the treasurer's bond that there is no provision in the act under which the plaintiff district was formed requiring its treasurer to keep all funds received by him in such capacity on deposit and that, as a consequence, it cannot be assumed that any discrepancy in the months of September to December, 1922, between the cash reported on hand by the treasurer and that actually kept on deposit by him resulted from any defalcation of the treasurer. In other words, it is contended by the treasurer's surety that he may have had in his safe or his desk or elsewhere during these several months a sum equal to the amount ($16,334.23) representing the difference between the cash reported on hand by the treasurer during this period and that actually on deposit. For the purpose of this decision we will assume that such was the case, and that any discrepancy in the treasurer's books during the latter part of the year 1922 between the cash reported on hand and that on deposit did not represent or constitute a defalcation on that officer's part. However, this assumption does not, in our opinion, serve to relieve the treasurer or his surety from all responsibility or justify the dismissal of the action as to them. There is no dispute, as already stated, but that Edwards' conduct, either as tax collector or treasurer, or both, resulted in a loss to the plaintiff district of $18,612.58. A portion of this sum has been accounted for and charged to him as tax collector, for which his sureties in that capacity are liable. To place the burden and responsibility for the residue of this amount upon these same sureties it is, of course, necessary that the evidence show that Edwards, as tax collector, refused and failed to pay over to the treasury moneys collected by him to this amount, viz., $16,334.23. There is no evidence to this effect in the entire record. On the contrary, it therein appears that, excluding the sum of $2,278.35 already accounted for, Edwards, as tax collector, deposited to his account as treasurer every cent of money collected by him in the former capacity. It is true that he represented to the secretary that his collections were $16,334.23 less than the actuality and that he, therefore, received "permits" to deposit only the lesser sum of $170,641.70. This course, while a suspicious circumstance, does not of itself establish, as

the surety on the treasurer's bond would have us believe, a shortage or defalcation in the tax collector's office when in truth and in fact that officer deposited to the account of the treasurer the actual amount collected by him. It would seem, therefore, that Edwards as tax collector having so deposited all moneys then in his possession had fulfilled his duty in this regard, though in an admittedly irregular manner. That the treasury office might have applied or appropriated this $16,334.23, actually deposited, but for which a treasury receipt was not given, in an improper or unaccounted for way, should not make the sureties on the tax collector's bond liable therefor. In U. S. v. Irving, 42 U. S. (1 How.) 250, 261, 262 (11 L. Ed. 120), it is declared that—

> "If there was no misapplication of the public money by the collector, and he paid over to the government, or to its order, all the moneys he received during the official term for which the defendants were his sureties, however such payments may have been appropriated by the Treasury, the sureties are discharged."

That the tax collector failed to observe the strict letter of the law and deposited in an irregular manner this $16,334.23 to his account as treasurer should not place the burden of liability on his sureties as tax collector. In arriving at this conclusion we are not embarrassed by the case of County of Mendocino v. Johnson, 125 Cal. 337, 341, 58 P. 5, cited by the surety on the treasurer's bond to the effect that an irregular method of payment of public funds does not serve to relieve an official of liability therefor. In that case the plaintiff had by its evidence supported its allegation that the defendant tax collector had not paid into the treasury some $3,000 of public moneys coming into his hands. As a defense the tax collector offered to prove that he had actually paid the moneys into the treasury without following the forms of payment prescribed by the county government act. The trial court refused to permit the introduction of evidence of payment into the treasury unless the defendant could establish and show that such payment was made in conformity with the provisions of the county government act. In reversing the judgment for plaintiff because of the trial court's refusal to permit the introduction of evidence tending to show payment, though in an irregular manner, into the treasury of the moneys sued for, this court declared:

> "A payment to the treasurer in a mode other than that expressly provided by law would not exonerate the tax collector or his bondsmen from an action at the instance of the county, unless proof were made that the county actually received the money. In other words, the tax collector, or any other debtor of the county, is entitled to his acquittance from the county only when he has complied with the forms of law governing his payments into the treasury. If he sees fit to adopt an unauthorized mode of payment, he will be exonerated when he can make it appear, not only that he has paid the money, but that the county has received it. The mere deposit with the treasurer would not be proof sufficient thus to exonerate him. It would be in the nature of an individual deposit made at the party's private risk. But, nevertheless, if the tax collector could show that he had in fact paid the money to the treasurer, and that the county had obtained the benefit of it, then, notwithstanding the irregularity, no loss of funds would have resulted, and neither the tax collector nor his bondsmen could be properly charged in an action such as this for peculation or misappropriation. Therefore, although the offered evidence of the irregular payment would not have been sufficient of itself to exonerate the defendants, it was a step in that direction, and it was error upon the part of the court to refuse to accept the evidence without proof first made of a compliance with the terms of the County Government Act, since that proof, from the loose methods seemingly employed by the treasurer and auditor, as well as the tax collector, could never be made at all, not only as to the $3,000 here in question, but perhaps also as to the whole $132,000 charged upon."

In the case at bar, as we have pointed out, the evidence sufficiently establishes that the $16,334.23 now in dispute had been actually deposited by the tax collector to the credit of the treasury department of the plaintiff district. The district, momentarily at least, may be said to have actually received this money and to have received the benefit of it so far as the defendant tax collector and his bondsmen are concerned. It is therefore chargeable to the treasurer and his surety in that capacity, even though not "officially" receipted for by said treasurer, and any subsequent disposition or appropriation thereof should be explained by them. To state the proposition in a different way, the treasurer, while having accounted for all of the moneys "receipted" for by him, has apparently failed to account for all of the moneys of the district actually received by him. The judgment of nonsuit and dismissal was therefore improperly granted as to the treasurer and his surety.

The case of People v. Hammond, 109 Cal. 384, 392, 42 P. 36, is clearly distinguishable from this case. The general rule is there recognized that where a person succeeds himself in office and during his second term appropriates moneys received by him officially to make good a default committed by him in the first or other prior term, the sureties upon his bond for the second or other subsequent term will be liable. This is so, however, merely because the officer has been guilty of a second embezzlement or wrongful application of funds by employing public moneys received by him during a subsequent term of office to cover the peculations of a prior term. Such is not the case here, for, as shown, Edwards as tax collector actually deposited the $16,334.23 here in dispute to the account of the treasurer and there could not, therefore, have been any defalcation as to this sum in his office as tax collector. The conclusions herein announced are based solely on the record now before us and, of couse, nothing said in this opinion is intended to preclude the treasurer's surety on the retrial of these causes from offering, by way of defense, any proof it might have tending to show that the peculations resulting in the loss of this $16,334.23 antedate anything now appearing in the record.

[2] We are not here concerned with any so-called "book shortage" of $11,619.59 appearing upon the face of Edwards' books as treasurer, for it is the fact and not the condition of the books which fixes the liability of the defendants. Anaheim U. W. Co. v. Parker, 101 Cal. 483, 493, 35 P. 1048. With this conclusion the surety on Edwards' bond as treasurer must necessarily agree, for it concedes in its brief that "the 'books' were wrong and did not represent the true facts. * * *"

For the foregoing reasons it is ordered that the judgment in action numbered Sac. 4116 be and the same is reversed. It is further ordered that the judgment of nonsuit and dismissal entered in action numbered Sac. 3957 be and the same is reversed.

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205 Cal. 276

In re HOUSTON'S ESTATE.

ROSEBOROUGH v. HOUSTON.

(L. A. 9898.)

Supreme Court of California. Sept. 28, 1928.

1. Executors and administrators ⇨507(4)—Referee's findings that account contained full statement of moneys received and disbursed, etc., disposed of irregularities charged in account of executrix.

Referee's findings that account contained just and full statement of moneys received and disbursed by executrix, and that all items of expenditure were supported by proper vouchers, and that canceled checks were filed in lieu of misplaced vouchers, and that all items of indebtedness paid were paid in good faith and were legal charge against estate, supported by evidence, *held* to dispose of irregularities in account charged to effect that it was defective, insufficient, incomplete, inconsistent, contradictory, and on its face untrue, and that there were specific irregularities mentioned.

2. Executors and administrators ⇨503—Where executrix delivered vouchers, thereafter lost, into court clerk's custody, court properly allowed items found to be legal charges against estate (Code Civ. Proc. § 1632).

Where executrix delivered vouchers into custody of clerk of court, and they were thereafter lost or mislaid without fault on part of executrix, court, under Code Civ. Proc. § 1632, properly exercised its discretion in allowing such items as it found to be legal charges against estate and paid in good faith.

3. Executors and administrators ⇨231—Disbursements made by executrix without claim filed held properly allowed in settlement of account, where estate was then solvent and debts were justly due, etc. (Code Civ. Proc. § 1632).

Where disbursements by executrix without claim filed fulfilled all requirements of Code Civ. Proc. § 1632, requiring that debts be justly due and paid in good faith, etc., court properly allowed them in settlement of account of executrix.

4. Executors and administrators ⇨411—Where claimant abandoned claim against estate and later instituted ex delicto action after time for presenting claims expired, insolvency caused by judgment cannot retroactively invalidate executrix's previous payments of debts.

Where claimant abandoned claim against estate and thereafter executrix proceeded with administration of estate, time for presenting claims having expired, and claimant later commenced ex delicto action in federal court and recovered judgment several years later, insolvency of estate caused in part by such judgment cannot be held to retroactively invalidate previous payments of debts of estate made by executrix while estate was solvent.

5. Equity ⇨64—Equity will not come to aid of claimant allowing rights against decedent's estate to sleep, by holding executrix should have included possible amount of his judgment as part of indebtedness.

Equity will not come to aid of one allowing rights against decedent's estate to sleep by abandoning claim and later bringing action ex delicto after time for presenting claims had expired, and after executrix had paid debts of estate while estate was solvent, by holding that executrix should have considered his latent rights with possibility of their ripening into judgment and including possible amount of such judgment as part of indebtedness of estate.

6. Executors and administrators ⇨468—Proceeding for settlement of executrix's accounts is of equitable nature and court may allow executrix reimbursement for personal advancements in endeavoring to carry on decedent's business.

Proceeding for settlement of executrix's accounts is primarily of equitable nature and court had power to protect executrix in endeavor to carry on decedent's business and conserve estate and to allow executrix reimbursement for personal advancements in this behalf.

7. Executors and administrators ⇨176—Court could award family allowance to executrix, and, estate being solvent, duration of allowance was not limited to one year (Code Civ. Proc. §§ 1464 et seq., 1466).

Under Code Civ. Proc. § 1464 et seq., court had power to award family allowance to executrix, and, where estate was solvent, duration of allowance was not limited to one year under section 1466.

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

8. Executors and administrators ⚿184—Remarriage of executrix having minor children was no bar to continuance of allowance for their benefit (Code Civ. Proc. § 1464 et seq.).

Remarriage of decedent's widow, the executrix, who still had minor children to support, was no bar to continuance of an allowance, under Code Civ. Proc. § 1464 et seq., for their benefit.

9. Executors and administrators ⚿197—Modification of award of family allowance cannot operate retroactively (Code Civ. Proc. § 1464 et seq.).

Modification of an award for family allowance under Code Civ. Proc. § 1464 et seq., cannot operate retroactively, and contestant, not having undertaken to secure modification of award at time it was made, cannot urge his objections to amount thereof in proceeding for settling accounts of executrix.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

In the matter of the estate of Otho S. Houston, deceased. Proceeding for the settlement of the accounts of Elizabeth Houston, as executrix of the estate of Otho S. Houston, in which J. M. Roseborough attacks the accounts. From an order settling the accounts, the contestant appeals. Affirmed.

Westall & Wallace and Joseph F. Westall, all of Los Angeles, for appellant.

Lucius K. Chase and J. B. Tatlow, both of Los Angeles, for respondent.

PRESTON, J. Appeal from order settling the accounts of respondent as executrix. Otho S. Houston died May 8, 1917. He left surviving him four minor children, the oldest of whom was 18 years of age and the youngest 8 years, and his widow, respondent herein, whom he named in his will as the sole beneficiary and executrix of his estate. Proceedings for the probate of his estate were duly instituted and an inventory and appraisement was filed September 25, 1918, valuing said estate at the sum of $75,806.68. Creditors' claims were presented and allowed in the sum of $28,893.55. Claims of appellant, aggregating $10,304, were presented April 22, 1918, and disallowed on June 29, 1918. On November 7, 1918, appellant brought suit on said claims in the superior court in and for the county of Los Angeles, upon the theory that his recourse in the transaction which gave rise to said claims was ex contractu. It was found, however, that a complaint could not be sustained upon that theory, and, on March 28, 1919, said suit was abandoned. Thereafter, and on June 29, 1919, the period of ten months for notice to creditors expired and said executrix, both before and after said date, proceeded with the administration of said estate, which was largely involved in indebtedness. The first intimation she had that appellant had not permanently abandoned his claim was on October 10, 1919, when he commenced an action, as a nonresident, in the federal court of that district, in the form of a suit for damages, based upon the same liability that had been asserted by him in the action brought in the state court on said rejected claims. On October 17, 1922, he recovered judgment against said executrix in the sum of $10,060, abstract of which was duly filed in this proceeding on October 27, 1922, in accordance with the provisions of section 1504 of the Code of Civil Procedure, thus establishing it as an allowed claim against said estate. In other words, appellant waited until more than fifteen months had expired after the time for presentation of claims of creditors and until more than six months had elapsed after dismissal of his suit in the state court, before commencing his action in the federal court, and it was not until three years later that he recovered said judgment upon which this proceeding is predicated. It was stipulated by counsel on April 7, 1926, and the court also found, that this action was an action ex delicto and was not based upon any claim filed in said estate by appellant.

During all of the times mentioned there appears to have been a constant effort on the part of respondent executrix to get said estate out of debt, and for this purpose she made various advancements to the estate out of her personal funds, totaling $15,357.32. On July 3, 1919, February 26 and March 28, 1924, she filed accounts which show that prior to July, 1919, that is, several months before the commencement of said suit in the federal court, she had paid claims aggregating $67,742.18. On August 2, 1924, said executrix filed the account now before us for settlement, which is entitled an amended and supplemental account current and report, in lieu of all accounts previously filed. She is charged therein with the total amount of the inventory of said estate, $75,806.68, plus receipts on account of the estate, $4,041.35, and money advanced by her personally, $15,357.32, a total of $95,205.35. She claims credit for disbursements in amount of $81,215.55 and for property remaining in her possession and belonging to the estate of the appraised value of $13,989.80; total $95,205.35. The court found upon competent evidence that said sum of $15,357.32 was advanced to said estate and passed through the hands of said executrix in payment of estate debts and administration expenses, no repayment of which had been made, and that amount is set forth as a preferred claim against the estate, as is also the claim of said executrix for the accrued amount of her family allowance, $21,500, from May 8, 1917, to July 8, 1924, less $434 paid on account thereof. Thus it is seen that as the assets of the estate are valued

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

only at the sum of $13,989.80, if either of said preferred claims is allowed, and the account is approved, there will be no funds from which to satisfy the claim of appellant.

Appellant attacks the account on numerous grounds. He claims that it is defective, insufficient, incomplete, inconsistent, contradictory, and on its face untrue. He complains of numerous alleged irregularities and makes specific attack against many individual items which we are not required to detail. He claims that said executrix received credit, to which she was not entitled, for debts paid by her for which no claims were filed or allowed; that she is not entitled to credit for advancements made by her personally and used in paying estate debts; that she borrowed money on her personal note and afterwards paid her own personal debt with estate funds; that she failed to file vouchers in support of her payments and such vouchers as were filed are defective; that she failed to list the assets at their true value; that appellant, as the holder of an allowed claim, is as much entitled to payment in full as other holders of allowed claims of equal rank which have been paid in full; that no settlement of the account should be approved which would prevent him from sharing, at least pro rata, with the holders of other properly allowed claims of equal rank; that the family allowance should not be allowed; that said executrix attempted without authority to carry on the business of decedent, etc.

A referee was appointed by the court to examine thoroughly the accounts of said executrix and to take evidence and determine the merits of appellant's claims. He found the facts to be substantially as hereinabove set forth, and in addition he made findings which are, in our opinion, amply supported by the evidence, and which resolve in favor of said executrix every contention made by appellant with respect to irregularities in said account. An order was thereafter entered confirming the report and findings of said referee and settling the account from which order appellant prosecutes this appeal.

Said referee, in addition to the facts hereinabove set forth, found that said account contained a just and full statement of all the moneys received and disbursed by said executrix and that each and all of the facts therein stated were true; that all of the items of expenditure were supported by proper vouchers; that while certain of said vouchers had been mislaid, and by reason of lapse of time it was impossible to obtain duplicates thereof, yet canceled checks evidencing payment were produced and filed by said executrix in lieu of such misplaced vouchers; "that each and all of the items set forth in said account as expenditures are either proper items of expenditure incurred in the operation of said estate, or are the debts of the decedent paid by the executrix; that each and all of the items of indebtedness so paid were paid in good faith and for the best interests of the estate, and were a legal charge against said estate; that each and all of the disbursements set forth in said account were paid prior to July of 1919"; that the estate was at the time said payments were made and is now solvent; that appellant negligently failed to institute his aforesaid action ex delicto until more than two years after the death of decedent and more than two years after the issuance of letters testamentary to said executrix, and more than one year after the expiration of the time within which claims might have been filed against the estate, and that said executrix was justified in making the payments of the indebtedness of said deceased which were made by her and had no knowledge or means of knowledge that appellant had or claimed to have an action ex delicto against said estate. The findings likewise dispose of the specific items objected to by appellant. Said findings, and the order, charge said executrix with having on hand property of the appraised value of $13,989.80, as against which there are outstanding the following valid and allowed claims: Preferred claims of said executrix for $15,357.32, covering her personal advancements, and $21,066 for family allowance; preferred charges against the remaining corpus of said estate of $650 for services of the referee, and $227.50 for court reporters' fees; claim of appellant for $10,060 upon his aforesaid judgment.

We are not here required to decree a preference between said allowed claims outstanding against the estate. That matter may be determined at the time of hearing and final settlement. In other words, if we approve the action of the trial court in settling the account, the question of proper application of the assets of $13,989.80 upon said indebtedness will receive attention at the time the final account of said executrix comes before the court.

[1] We hold, as above stated, that the findings correctly state the facts shown by the evidence and dispose of the various irregularities charged in the account; therefore the settlement of said account as a whole has our approval. But two matters require further discussion, to wit: (1) In confirming payment of certain debts, without claim filed, by virtue of section 1632 of the Code of Civil Procedure, a requirement of which is that an estate be solvent, did the court give proper weight to the effect of appellant's right, which existed but was unasserted at the time said payments were made, to file an ex delicto action against said estate? and (2) Did the court err in allowing respondent's claim for family allowance, taking into consideration her early remarriage and the fact that she had minor children?

[2] Section 1632 of the Code of Civil Procedure provides that—

> "If it appears by the oath to the account and is proven by competent evidence to the satisfaction of the court, that a voucher for any disbursement * * * has been lost * * * and that it is impossible to obtain a duplicate thereof and that such item or items were paid in good faith and for the best interests of the estate, and such item or items were legal charges against said estate, then the executor or administrator shall be allowed such item or items."

Here the evidence shows that the vouchers were delivered into the custody of the clerk of the court and thereafter lost or mislaid without knowledge or fault on the part of said executrix. Under the above section the court properly exercised its discretion in allowing such items as it found to be legal charges against the estate and paid in good faith.

[3] As to payment of estate debts without affidavit and allowance, said section 1632 further provides that—

> "If, upon such settlement of accounts, * * * it shall be proven by competent evidence to the satisfaction of the court that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-offs, and that the estate is solvent, it shall be the duty of the said court to allow the said sums so paid in the settlement of said accounts."

The referee found, as above stated, that the disbursements, without claim filed, made by said executrix, fulfilled all the requirements of the above provision; that they were all made prior to July, 1919; that the estate was then solvent, and allowed them in the settlement of the account.

[4, 5] But appellant contends, even though at that time he had abandoned his claim and had not yet instituted his ex delicto action, that said executrix should have taken into consideration his latent rights with a possibility of their ripening into a judgment, and, including the possible amount of said judgment as a part of the indebtedness of said estate, should have realized that it would render the estate insolvent and necessitate a pro rata distribution of assets to creditors. The mere statement of the contention reveals that it would be inequitable and unjust to uphold it. Said executrix, knowing that she was the sole legatee, acted in good faith in endeavoring to close the estate by clearing up all the indebtedness at a time when, to the best of her knowledge and in fact, it was solvent and apparently could not but remain so, as the period within which creditors could present claims had expired and appellant's claim had been abandoned. She should therefore not be made to suffer by reason of the circumstances which forced the later insolvency, nor can said insolvency be held to retroactively invalidate said payments. Appellant alone is at fault in having negligently allowed his rights to sleep, and hence equity will not come to his aid.

[6] A proceeding of this character is primarily of an equitable nature (In re Clos, 110 Cal. 494, 42 P. 971; Estate of Freud, 131 Cal. 667, 671, 63 P. 1080, 82 Am. St. Rep. 407; Estate of Bell, 168 Cal. 253, 141 P. 1179), and the court had power to protect said executrix in her endeavor to carry on the business of decedent (Estate of Freud, supra, and cases therein cited), and conserve said estate, and to allow said executrix reimbursement for her personal advancements in this behalf (Estate of Carpenter, 146 Cal. 661, 80 P. 1072; In re Clos, supra).

[7] That the court had power to award a family allowance to said executrix is unquestioned (section 1464 et seq., Code Civ. Proc.; In re Walkerley, 77 Cal. 642, 20 P. 150; Estate of Treat, 162 Cal. 250, 121 P. 1003), and, in view of the findings and evidence that said estate was solvent, the duration of said allowance was not limited to one year under the provisions of section 1466 of the Code of Civil Procedure.

[8] Furthermore, as said executrix still had minor children to support, her remarriage was no bar to the continuance of an allowance for their benefit. This is clearly implied in the cases relied upon by appellant. As said in Re Still, 117 Cal. 509, 514, 49 P. 463, 465:

> "No doubt the court could have continued the allowance, if necessary for the benefit of the children, but when she ceased to be the widow of Still she could not claim as a perquisite for herself, or for her new husband, a family allowance from the estate of her former spouse. Estate of Hamilton, 66 Cal. 576 [6 P. 493]."

[9] Appellant is, therefore, in no position to urge the disallowance of the order granting the allowance. At the time said order was made he might, it is true, have opportunely undertaken to secure a modification of the award (Estate of Boselly, 179 Cal. 218, 176 P. 45; Estate of Nelson, 167 Cal. 321, 139 P. 692), but this he failed to do, and, as such modification cannot operate retroactively (Estate of Nelson, supra), it is now too late for him to urge his objections to the amount thereof.

However, as above stated, the decree entered herein reserves for determination by the court upon the settlement of the final account of said executrix the respective rights of said executrix and appellant to the payment of their respective claims, and further consideration of said award for family allowance is therefore really immaterial to the determination of this proceeding.

The order is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

205 Cal. 338

COUTURE v. OCEAN PARK BANK.
(L. A. 10426.)

Supreme Court of California. Oct. 1, 1928.

1. Banks and banking 🔑138—Bank, paying checks drawn payable to "M. Company" for "J. B. T." to J. B. T., was released from liability to drawer (Code Civ. Proc. § 367; Civ. Code, § 1559).

Where checks were drawn payable to order of "M. Company" for "J. B. T.," bank paying checks to J. B. T. was thereby released from liability to drawer notwithstanding that J. B. T. was not a beneficiary in actual fact, since, in case he had a beneficial interest in money as would appear from face of check, he could have maintained an action in his own name under Code Civ. Proc. § 367, Civ. Code, § 1559, and bank was not under legal obligation before paying checks to ascertain actual rights of parties.

2. Banks and banking 🔑138—Drawer executing checks so as to empower another to cash checks and misappropriate money must suffer thereby (Civ. Code, § 3543).

Where drawer of check payable to M. Company for J. B. T. by delivering them into possession of the latter vested in him power to mislead the bank in paying money to him, the drawer must suffer for wrongful act of J. B. T. in cashing checks and misappropriating money, in view of Civ. Code, § 3543, to effect that one of two innocent persons whose negligence caused injury must suffer by act of third.

3. Contracts 🔑155—Instrument uncertain as to terms is to be construed most strongly against party causing uncertainty (Civ. Code, § 1654).

In view of Civ. Code, § 1654, an instrument which is uncertain as to its terms is to be construed most strongly against the party who caused such uncertainty to exist.

In Bank.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Emile J. Couture and another, copartners doing business under the firm name of the Slingluff-Couture Company, against the Ocean Park Bank. Judgment for plaintiffs, and defendant appeals. Reversed.

Superseding opinion 263 P. 316.

Tanner, Odell & Taft, of Los Angeles, for appellant.

Weber & Crawford, of Los Angeles, for respondents.

CURTIS, J. Action brought to recover the sum of $601.02 from the defendant bank, which amount plaintiffs allege they had deposited with said bank to their credit. The defense by the bank is that it paid out said sum upon two checks drawn by the plaintiffs. The evidence shows that the plaintiffs had a checking account with defendant at least in an amount equal to the amount sued for. The plaintiffs were engaged in the plumbing business, and had in their employ, as foreman of their plumbing department, one J. B. Tailer. They were indebted to the Manual Arts Plumbing Company for materials purchased from said company on account of two jobs, upon which Tailer had acted as foreman. In satisfaction of this indebtedness to the Manual Arts Plumbing Company, they drew two checks and gave them to Tailer, with instructions to deliver them to the Manual Arts Plumbing Company. One of these checks was by mistake made payable to the Manual Arts Hardware Company, instead of the Manual Arts Plumbing Company. The total of these two checks was the amount sued for herein, and said checks, together with their subsequent indorsements, are as follows:

"Ocean Park Bank. 90–193.
"Commercial Savings.
"Santa Monica Branch.
"Santa Monica, Cal., Sept. 2, 1922. No. 103.

"Pay to the order of Manual Arts Hdw. Co. for J. B. Tailer $283.02 two hundred eighty-three and 02/100 dollars.

"The Slingluff-Couture Co.,
"Emile J. Couture."

Indorsement on back of above check as follows:

"James B. Tailer, Manual Art Hard. Co."

"Ocean Park Bank. 90–193.
"Commercial Savings.
"Santa Monica Branch.
"Santa Monica, Cal., Sept. 25, 1922. No. 177.

"Pay to the order of Manual Arts Plumbing Co., for J. B. Tailer $318.00 three hundred eighteen and xxx/100 dollars.

"The Slingluff-Couture Co.,
"Emile J. Couture."

Indorsement on back of above check as follows:

"Manual Arts Plumbing Co. J. B. Tailer."

Tailer, instead of delivering these checks to the Manual Arts Plumbing Company, presented them to the bank himself, and, after indorsing his own name on each of said checks, and forging the name of the Manual Arts Plumbing Company to the check which was made payable to said company, and the words Manual Arts Hardware Company to the other, received the money thereon, and absconded. He never paid the money, or any part thereof, either to plaintiffs or to the Manual Arts Plumbing Company. Upon this state of facts the trial court made findings in favor of the plaintiffs and from a judgment predicated upon said findings of fact the defendant bank has appealed.

The rights of the parties hereto are governed entirely by the terms of the two checks, and cannot in any way be affected or modified by any undertaking or agreement between the plaintiffs and Tailer, nor by reason of the purpose for which the checks were given by the plaintiffs to Tailer, in the absence of any knowledge by the bank of such agreement or purpose. The bank was authorized to act upon the directions given by the plaintiffs as these directions appear upon the face of the checks. If the checks were authorizations on the part of Tailer to receive from the bank the amounts stated in the checks, then the payment of said checks by the bank was legal, and the plaintiffs cannot recover in this action. This would be so even if Tailer forged the name of the Manual Arts Plumbing Company on one check and that of the Manual Arts Hardware Company on the other. For, if the checks can be legally construed as authorizing Tailer to receive the amount named in the checks from the bank, then the indorsement of the Manual Arts Plumbing Company to either of said checks was not necessary in order that the bank pay the amounts called therefor to Tailer.

[1] It will be noted that each check contains an express direction to the bank to pay the amount of money therein named to the Manual Arts Company. In each check the name of the company is immediately followed by the words "for J. B. Tailer." There is no question, had the bank paid the money called for by these checks to the regular payee named therein or upon its legal indorsement, that such payment would have been legal and would have bound respondents, as the drawers of said checks. And this would have been so in the absence of the indorsement, or any other action taken on the part of J. B. Tailer. In other words, the checks as drawn contained an express direction to the bank to pay the same to the Manual Arts Company. What effect, therefore, have the words "for J. B. Tailer" as they appear in the body of the checks? Appellant contends that the legal effect of these words in the checks, at least between the parties hereto, is to make Tailer the beneficiary of the proceeds of said checks. Whether he was the actual beneficiary of said proceeds would depend upon his relations with the Manual Arts Company. Let us suppose that by some working agreement between the plaintiffs and the Manual Arts Company the money called for by the checks was in fact the property or money of Tailer. In such a case there can be no doubt but that Tailer would have a beneficial interest in said money, and at most the Manual Arts Company would simply be the trustee of said funds when collected for Tailer. In such a case Tailer, as the real party in interest, could maintain an action against the bank for said proceeds in case the bank refused to pay the checks. Such action could be maintained by Tailer in his own name. Code of Civil Procedure, § 367; Civil Code, § 1559. On the other hand, by the agreement and understanding of the parties to said checks, Tailer might have no interest therein nor to the proceeds thereof. The evidence in this case shows that such was the agreement and understanding of the parties. But how was the bank to know just what the undisclosed agreement of said parties was? It had the right to act upon what appeared upon the face of the checks as the same were drawn by the plaintiffs and presented to it by Tailer. Apparently, from the face of the checks, the money called for by the checks was ultimately to belong to Tailer. If this were in fact true, the bank would be under legal obligation to pay the same to him. Was the bank, before paying the checks, under the legal necessity of ascertaining the true relations of Tailer to the other parties to said checks, or was it justified in acting upon the apparent relations of the parties as disclosed by the face of the checks? As we have before said, the terms of the checks determine the rights of the parties thereunder. The bank was not, therefore, under any legal obligation before paying the checks to ascertain whether the actual rights of the parties were different from their apparent rights as disclosed by the terms of said checks. Any other construction of the law applicable to this case would cast upon the bank an obligation and duty beyond that generally assumed by a bank toward its depositors. It was not the duty of the appellant bank to decide whether Tailer was the real or only the apparent beneficiary of the funds called for by the checks. It was authorized to act upon the apparent import of the checks as presented to it, and, if it afterwards were proven that the real facts were different from those appearing upon the face of the checks, then the loss, if any, should not fall upon the bank, but upon the plaintiffs, who drew the checks in the form in which they were drawn.

There is but little direct authority to be found upon the question of the legal effect of a check drawn in the form in which the checks involved herein were drawn. In the case of Ridgely Nat. Bank v. Patton & Hamilton, reported in 109 Ill. 479, it was held by the Supreme Court of Illinois, where a check was drawn in favor of Patton & Hamilton for the account of Lewis Coleman & Co., that Patton & Hamilton were the trustees of Lewis Coleman & Co. But in that case the evidence showed that the check was drawn in payment of an account due Lewis Coleman & Co. This account was in the hands of Patton & Hamilton, attorneys, for collection, and the debtor, in payment of the account, drew the checks in favor of the attorneys "for account of Lewis Coleman & Co." Had Lewis Coleman & Co., being the real parties in interest of said check, brought suit thereon against the bank, we think that without doubt, at least under our system of procedure, they could have successfully maintained said action and recovered the amount due thereon from said bank. There is nothing contrary to our views above expressed to be found in Brown v. Cow Creek Sheep Co. (Wyo.) 126 P. 886. In that case the check involved directed the bank to "Pay to the order of Ed. Brown $2,-

500 00/00 twenty-five hundred dollars. For Wilkes." In an action by Brown against the Cow Creek Sheep Company, the drawer of the check, it was claimed that the words "for Wilkes" rendered the check nonnegotiable. The court, however, held that the presence of these words had no such effect, but that "they appear, on the contrary, to be merely a statement of the object for which the check is drawn, or the person or account to which the amount was to be charged." The relative position of the words "for Wilkes" in the check in that case is different from the position of the words "for J. B. Tailer" in the checks drawn by the respondents. They not only follow the direction in the check to pay to Brown the sum of $2,500, but they are separated from the directing sentence of the check by a period. In fact, they are set off by themselves, and the court could in that case reasonably hold that they amounted merely to a memorandum on the check showing "the person or account to which the amount is to be charged." In the present action, the checks, as we have already seen, direct the bank to pay to the Manual Arts Company "for J. B. Tailer," the amount designated in each check respectively. The check in the case just cited materially differs from the checks involved herein. The case of Turner v. Eldridge, 6 Ala. 821, involved a promissory note drawn as follows: "* * * I promise to pay to Jas. W. Camp, for the benefit of Alfred Turner, five hundred dollars. * * * H. B. Turner." Camp thereafter assigned said note to Eldridge, who later instituted suit against H. B. Turner, the maker. The only point claimed to have been decided by the court was that the legal effect of the instrument was merely a promise to pay Camp, and that the beneficiary was not a necessary party to said action. That case actually holds that Alfred Turner was the beneficiary of the proceeds of said note. If he were such beneficiary, he was the real party in interest, and could have maintained an action thereon in this state. The respondents have not presented to our attention any authorities which sustain their position. We agree that there is but little direct authority to support the position of appellant, but, for the reasons before expressed, we are of the opinion that the general rules of law applicable to the facts in this case are in favor of the contentions of the appellant. We therefore conclude that, in causing said checks to be made payable to the Manual Arts Company for J. B. Tailer, the latter was, as between the drawers of said check and the bank upon which they were drawn, the beneficial owner of the proceeds of said checks, and that the payment of the checks to Tailer by the bank was justified by the terms of said checks.

[2, 3] From another angle of the case we think that the respondents should not be permitted to escape their responsibility upon said checks. The checks as drawn are undoubtedly uncertain in their directions as to whom the money for which they were drawn was ultimately to belong. By drawing these checks in the manner in which they did, thus rendering it uncertain from their terms whether they were for the benefit of the Manual Arts Company or J. B. Tailer, and then delivering them into the possession of the latter, the respondents placed it in the power of Tailer to mislead the bank in paying the money to him. In such a case the plaintiffs should suffer for the wrongful acts of Tailer. "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer." Civil Code, § 3543. The bank could have reasonably inferred, with Tailer in possession of the checks in the form in which they were drawn, that the respondents intended that the proceeds of the checks should belong to him and therefore concluded that it was authorized to pay to him the amount called for by the two checks. It is well settled that, where an instrument is uncertain as to its terms, it is to be construed most strongly against the party thereto who caused such uncertainty to exist. Civil Code, § 1654; Payne v. Neuval, 155 Cal. 46, 99 P. 476; Union Const. Co. v. Western Union Tel. Co., 163 Cal. 298, 125 P. 242; Bennett v. Potter, 180 Cal. 736, 183 P. 156.

The judgment is reversed.

We concur: RICHARDS, J.; SHENK, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.

WASTE, C. J. I concur in the judgment of reversal upon the ground last stated in the majority opinion. By drawing the checks in the manner in which they did, and placing them in the possession of J. B. Tailer, the respondents put it within his power to mislead the bank into paying the money to him, and they should therefore suffer for his wrongful act.

I am not sufficiently convinced as to the treatment of the first point in the opinion, which, in effect, holds that the checks can be legally construed as authorizing Tailer to receive the amount named from the bank, to agree with the conclusion therein stated, for which reason I express no opinion on that matter.

205 Cal. 373

CLARK v. TOMPKINS et al. (S. F. 12448.)★

Supreme Court of California. Oct. 3, 1928.

Hearing Denied in Bank Nov. 1, 1928.

1. Judgment ⚷846—Assignee of judgment is in no better position than immediate assignor, or other prior owner, in asserting right thereunder.

Assignee of judgment recovered against corporation by existing creditor at time of sale of stock for less than par stands in no better position than immediate assignor, or any other prior owner of claim, in asserting any right thereunder.

2. Corporations ⚷232(1)—Generally, existing creditors cannot recover against purchasers of stock for less than par difference between amount paid and par value.

Generally, existing creditor at time of sale of corporate stock for less than par has no right of action against stockholder purchasing such stock to recover difference of amount paid for stock and its par value, on the theory that existing creditors are not defrauded or injured by an issue of stock as a bonus or on payment of less than its par value in money, or in property, and therefore cannot complain of such a transaction.

3. Corporations ⚷232(1)—Purchasers of stock at less than par, under permit authorizing creditor's bill, were liable for payment of judgment on existing claim (Corporate Securities Act, § 4).

Where permit issued under the Corporate Securities Act (St. 1917, p. 673) § 4, authorizing sale of corporate stock for less than par, expressly provided that purchasers of such stock were liable on creditor's bill in case corporation should become insolvent, such provision became a binding obligation on purchaser, and recovery could be had against purchasers, though claim on which judgment was recovered accrued prior to date they acquired stock.

Department 1.

Appeal from Superior Court, City and County of San Francisco; E. N. Rector, Judge.

Action by R. E. Clark against W. Sydney Tompkins and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Theodore J. Savage, of San Francisco, for appellants.

Samuel D. Hamburg, of San Francisco, for respondent.

CURTIS, J. The plaintiff, a judgment creditor of the Elkhorn Oil Company, a corporation, organized, existing, and doing business under the laws of this state, filed this creditor's action against the defendants as stockholders of said corporation to recover the amount of a judgment rendered against said corporation and in favor of plaintiff's assignor. In the main the facts out of which this controversy arose are not disputed. The corporation became indebted to the Riteway Printing Company for goods sold and delivered to it between June 21, 1921, and October 21, 1921. The Riteway Printing Company assigned its account to D. Phillips, who instituted an action on said account, and in said action recovered a judgment against the Elkhorn Oil Company on the 25th day of November, 1924, for the sum of $284.64. Thereafter a writ of execution was issued on said judgment directed to the sheriff of the city and county of San Francisco, which was subsequently by said sheriff returned wholly unsatisfied. No part of said judgment has been paid, and prior to the commencement of this action the said Phillips duly assigned to plaintiff the aforesaid judgment, and plaintiff was the owner thereof at the time of the institution of this action.

The par value of the stock of the Elkhorn Oil Company was $1 per share. The commissioner of corporations of the state of California on December 12, 1922, issued a written permit to said Elkhorn Oil Company to sell a certain amount of its stock at the price of 50 cents per share. The defendant W. Sydney Tompkins on the 26th day of December, 1923, purchased of said company 11,900 shares of its capital stock at 50 cents per share, and the defendant Norman F. Hall, between the 20th day of November, 1922, and the 2d day of October, 1923, purchased of said company 4,000 shares of its capital stock at 50 cents per share. Among other things, said permit as issued by said commissioner contained the following provision:

> "Prospective subscribers are advised that holders of shares sold at less than par are liable, if said corporation should become insolvent, to the collection from them of the unpaid residue of the par value of the stock upon a creditor's bill filed for that purpose by the judgment creditors of the corporation."

A copy of this permit was printed upon the reverse side of subscription contracts used by the Elkhorn Oil Company in the sale of its stock, and the subscription contract refers to said permit and recites that said subscription contract is "subject to the conditions of the permit issued by the commissioner of corporations, a copy of which is printed on the reverse side thereof and which I have read."

There was one question upon which there was a dispute at the time of the trial. The defendants claimed, and so set forth in their answer, that at the time they purchased the shares of stock in said corporation said stock was worth no more than 50 cents per share and that they bought the said shares in good faith and paid therefor its full market value at the times at which they made their respective purchases. The court, however, found against defendants upon this claim. Upon the facts as found, which are substantially those recited above, with the one exception just noted, the court rendered judgment in

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★Hearing denied in bank.

plaintiff's favor against said defendants. Defendants have appealed.

Appellants first contend that no recovery can be had in a creditor's action against a stockholder of a corporation by a person who was a creditor at the time such stockholder purchased his stock. In other words, appellants contend that existing creditors of a corporation have no right of action against a stockholder, who purchases stock in such corporation for less than its par value, to recover the difference between the amount he paid for said stock and its par value. This is undoubtedly the general rule, and it is stated as follows:

> "Existing creditors are not defrauded or injured by an issue of stock as a bonus or on payment of less than its par value in money, or in property, labor, or services, and therefore * * * they cannot complain of such a transaction or compel such stockholders to pay the full par value of such stock so issued to them, contrary to their agreement with the corporation, * * * for they could not, by any legal presumption, have trusted the corporation upon the faith of such stock." 14 Corpus Juris, 100.

While the precise point does not appear to have been expressly decided by this court, the following statement taken from a recent decision sets forth in apt language the conditions under which a creditor's action, like the present one, can be maintained in this state:

> "The gist of the creditor's action is that he was induced to extend credit to the corporation by the false representations of the corporation respecting the amount paid in by the stockholder to the corporate capital, and the measure of his recovery is the same as in ordinary actions for damages for deceit, namely, the difference between the amount which has actually been paid in by the stockholders to the corporate capital and the amount which would have been paid in had the representations been true. It follows that the creditor cannot recover in this class of cases unless he was actually deceived by the misrepresentations. If he in fact knew that the stock was watered at the time he extended credit to the corporation, he cannot claim to have been misled by the misrepresentations, and therefore cannot recover." Spencer v. Anderson, 193 Cal. 1, 6, 222 P. 355, 357 (35 A. L. R. 822).

If, as stated in the foregoing decision, the gist of a creditor's action, such as the present one, is that the creditor "was induced to extend credit to the corporation by the false representations of the corporation respecting the amount paid in by the stockholder to the corporate capital," then such an action would be available only to a creditor who had become such after a purchase of stock by such stockholder for less than its par. This ruling is in harmony with the decisions of the United States Supreme Court—

> "We have no doubt the learned circuit judge held correctly that it was only subsequent creditors who were entitled to enforce their claims against these stockholders, since it is only they who could, by any legal presumption, have trusted the company upon the faith of the increased stock. First National Bank of Deadwood v. Gustin Minerva Consolidated Mining Company [42 Minn. 327] 44 N. W. 198 [6 L. R. A. 676, 18 Am. St. Rep. 510]; 2 Morawetz on Corporations, §§ 832-3; Coit v. N. C. Gold Amalgamating Co. [C. C.] 14 F. 12." Handley v. Stutz, 139 U. S. 417, 435, 11 S. Ct. 530, 537, 35 L. Ed. 227, 237.

[1, 2] In the present action it appears that the claim upon which the respondent recovered judgment against the Elkhorn Oil Company accrued long prior to the dates on which the appellants herein acquired their stock in said corporation. Either respondent, or one of his predecessors in interest in said claim, was an existing creditor at the time appellants purchased stock in the Elkhorn Oil Company. Respondent stands in no better position than his immediate assignor, or any other prior owner of said claim, in asserting any right thereunder. Neither respondent, nor any of his predecessors in interest, therefore, extended credit to the corporation upon the faith that appellants had paid full value for their stock. This action, therefore, is not available to respondent under the general rules of law above stated. The fact that the account for goods sold the corporation has been merged into a judgment does not change the rights of the parties, nor give to the holder of said judgment any rights to maintain a creditor's action that were not possessed by the holder of the claim when it consisted of a mere account, even if said judgment had been rendered after the appellants had made their respective purchases of stock. Respondent advances the contention that the judgment is a new debt, and therefore as owner thereof he was not an existing creditor of the corporation at any date prior to the date of the rendition of the judgment. We think this claim is without merit.

[3] Respondent, however, further contends that while the general rule is as above stated, it has no application to the parties to this action by reason of the fact that the appellants purchased their stock from the Elkhorn Oil Company under a permit which expressly provided that "holders of shares of stock sold at less than par are liable, if said corporation should become insolvent, to the collection from them of the unpaid residue of the par value of the stock upon a creditor's bill filed for that purpose by the judgment creditors of the corporation." This permit was dated December 12, 1922, and it is presumed that it was issued on that date. It was therefore in effect at the time the appellant Tompkins purchased all of his shares of stock from the company, and also when the appellant Hall purchased at least a portion of his shares.

The Corporate Securities Act, under which said permit was issued (Stats. 1917, p. 673), provides in section 4 thereof that—

"The commissioner shall issue to the applicant a permit authorizing it to issue and dispose of securities, as therein provided, in this state, in such amounts and for such considerations and upon such terms and conditions as the commissioner may in said permit provide."

By subdivision 6, § 2, of this act the word "security" includes all shares of stock or other interests or rights into which the capital stock is divided. It is by virtue of section 4 of the Corporate Securities Act that the commissioner of corporations in this state is empowered to authorize the sale of stock in a corporation for less than its par value. If, therefore, in granting a permit to a corporation to issue and sell its stock for less than its par value, the commissioner shall further provide in such permit, in case of the insolvency of the corporation, that those stockholders who purchase their stock below par thereby assume an obligation to become responsible for the debts of the corporation to the extent of the difference between the par value of the stock purchased and the price which they paid for the same, it would appear that the commissioner acted within the express powers granted him under section 4 of said act. To require the appellants to comply with this works no unjust hardship upon them for the reason that this obligation to protect pro tanto the interest of the creditors is one of the conditions of their purchase, and was knowingly and voluntarily assumed by them at the time they made their respective purchases. It is distinctly set forth in the permit under which they purchased their stock and which they are supposed to have read before they made their purchase. If they failed to familiarize themselves with the terms of the permit, then they have no just cause to complain, for it is only by virtue of the permit that the company is authorized to make a sale of its shares of stock. This provision of the permit, making stockholders who purchase stock for less than its par value liable to the creditors of an insolvent concern, being legally a part of the permit under which the defendants purchased their stock, the defendants are conclusively presumed to have assented to it and made it a part of their contract of purchase. It is, therefore, a binding obligation upon them.

Appellants devote a considerable part of their argument to the discussion of the question as to whether the appellants are liable where the evidence shows that they paid for the stock its full market value, and that the transaction was free from fraud. We fail to see how this argument can have any weight in this action where the findings of the court upon these issues were against appellants. But even had the findings upon these issues been in their favor, this claim of appellants could not have availed them, as their purchases were governed by the terms of the permit, issued by the corporation commissioner, which, as we have already seen, cast upon appellants obligations to pay the claims of the corporation's creditors to the extent of that part of the par value of their stock remaining unpaid.

The judgment is affirmed.

We concur: PRESTON, J.; SEAWELL, J.

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205 Cal. 345

HULSMAN et al. v. IRELAND et al. ★
(L. A. 8110.)

Supreme Court of California. Oct. 1, 1928.

Rehearing Denied Oct. 29, 1928.

1. Husband and wife ⚷268(1)—Wife engaged in restaurant business could only bind community for meat purchased by acting as agent of husband (Civ. Code, § 167).

Wife conducting restaurant and confectionery business with partner could only bind community for meats purchased and consumed in business by acting as agent of husband, since otherwise he would not be liable for her contract under Civ. Code, § 167.

2. Husband and wife ⚷21, 25(1)—One spouse may act as agent for the other.

Either spouse has power to act as agent for the other.

3. Husband and wife ⚷23¾, 25(6)—Agency of one spouse for the other may be proved by circumstances as well as by direct evidence.

Agency of one spouse for the other may be proved by circumstances as well as by direct evidence.

4. Husband and wife ⚷23¾, 25(6)—Agency of one spouse for the other may be shown by proof of ratification of acts done without previous authority.

Agency of one spouse for the other may be shown by proof of ratification of acts done without previous authority.

5. Husband and wife ⚷23½, 268(1)—Husband held to have ratified wife's acts in engaging in restaurant business with partner as his agent, so that husband was personally liable for meats purchased and consumed in business (Civ. Code, § 167; Code Civ. Proc. § 388).

In action for goods sold, evidence showing that, before venture got under way, husband returned home and found wife engaged in restaurant business with partner, and that he assisted her, had knowledge of her use of community estate therein, and identified himself with business, and remained with it as long as it lasted, and did what was known to the business as "flooring," *held* to show ratification of acts of wife as agent, so that husband was personally liable for meats purchased and consumed in business under Civ. Code, § 167, and Code of Civ. Proc. § 388.

★Rehearing denied.

6. Husband and wife ⚷21—Creditor could sue husband as undisclosed principal, although he may not have known of principal's existence at time wife incurred debt.

Creditor could sue husband as undisclosed principal when found, although he may not have known of existence of principal at time debt was incurred by wife as agent.

Langdon, J., Waste, C. J., and Shenk, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; M. L. Short, Judge.

Action for goods sold by B. W. Hulsman and another, copartners doing business as the Market Company, against Louis E. Ireland and others, individually and as copartners, doing business as Tubells Company. From the unfavorable portion of the judgment, plaintiffs appeal. Portion of judgment appealed from reversed, with directions.

Superseding opinion in 264 P. 1104.

William Ellis Lady, of Los Angeles, for appellants.

J. W. Morin, of Pasadena, for respondents.

PRESTON, J. This appeal presents a question respecting community property rights between a husband and wife and third persons. Appellants argue strenuously for their position, but admit their inability to find authority to support it. Respondent, of course, does not aid them in this difficulty, but contends that the appeal must be dismissed "without hesitation." However, notwithstanding this situation, we are of the opinion that appellants are correct in the contention put forth, for which we have found a measure of authority.

Plaintiffs, as a copartnership, sue defendants individually and as copartners doing business under the firm name of Tubells Company. Defendants Rufus W. Russell and Elizabeth B. Russell are husband and wife. The business conducted under the fictitious name was that of a restaurant and confectionery in Los Angeles. The claim of plaintiffs is for a balance of approximately $8,000 for meats furnished to and consumed in said business between July 1, 1921, and March, 1922. The justice of the claim is not disputed. Plaintiffs had judgment against defendants Ireland and Elizabeth B. Russell. Defendant Rufus W. Russell had judgment in his favor and for his costs. The appeal is by plaintiffs from so much of the judgment as exonerates said Rufus W. Russell from personal liability for said debt. The facts necessary to present the appeal may be taken from findings Nos. 7 and 7½ of the second cause of action, which read as follows:

"(7) The court further finds that some time prior to the 1st day of July, 1921, defendant Louis E. Ireland and defendant Elizabeth B. Russell entered into an arrangement between themselves whereby they would form a copartnership under the style and firm name of Tubells Company for the purpose of operating, opening, and conducting a restaurant or confectionery business at 821 West Seventh street in the city of Los Angeles; that defendant Louis E. Ireland was to receive one-half of all profits and defendant Elizabeth B. Russell was to receive the other one-half of all profits that might accrue from said business; that defendant Louis E. Ireland contributed a large amount of the partnership capital that was to and which did go into said business, and a large amount of the remaining portion of the partnership capital that was to and which did go into said business, and being at least the sum of $12,000 cash, and not contributed on behalf of defendant Louis E. Ireland, was obtained by Elizabeth B. Russell borrowing $7,500 thereof from the National Bank & Trust Company of Pasadena some time during the spring of 1921 and before the formation of said partnership arrangement and giving her promissory note to evidence the same, which said promissory note was not secured in any manner, and by her borrowing the sum of $4,500 from said National Bank & Trust Company of Pasadena during the month of September, 1921, and giving her promissory note to evidence the same, and securing it by pledging bonds belonging to the said Elizabeth B. Russell and Rufus W. Russell, and being community property of said parties; that said bonds were in a safety deposit box to which both defendants Russell had access; that prior to the opening of said business defendant Rufus W. Russell objected to defendant Elizabeth B. Russell entering into said partnership; that he knew that she did not have separate property of her own with which to make the contribution to said partnership capital which he knew she had made thereto; that he knew that she had contributed partnership capital for and prior to the opening of said business in the month of July, 1921, and that, after the formation of said partnership and the opening up of said business, defendant Rufus W. Russell accepted employment with said partnership and continued to be so engaged until some time during the month of March, 1922, as set out in finding 7½; that defendants Rufus W. Russell and Elizabeth B. Russell at all times herein mentioned were and now are husband and wife and residing together as such husband and wife, and until some time during the spring or summer of the year 1922 said defendants Rufus W. Russell and Elizabeth B. Russell gave all their time and attention to the said restaurant and confectionery business after the formation thereof, the said Rufus W. Russell under conditions set out in finding 7½ except such thereof as was necessary for them to give to the conduct of their hotel business then conducted in the city of Pasadena known as the Crown Hotel, located on East Colorado street in said city; that defendants Rufus W. Russell and Elizabeth B. Russell at no time had any agreement between them respecting the disposition of their community property and their earnings, or concerning any other matter or thing relating to their property interests.

"(7½) The court finds that Rufus W. Russell

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

did not become a partner nor a party to the copartnership known as Tubells, but that the said firm of Tubells was a copartnership consisting of defendants, Louis E. Ireland and Elizabeth B. Russell, and no other persons. The court finds that at no time did Rufus W. Russell represent himself as a copartner in the said firm of Tubells, nor did he permit himself to be represented as a copartner in said firm, and the court further finds that at no time did the plaintiffs sell goods to Tubells, the copartnership upon any assumption that Rufus W. Russell was a copartner in said firm, and that at no time was credit extended by plaintiffs upon the assumption that Rufus W. Russell was a member of the firm."

[1-4] It is true that the complaint states a cause of action against the defendant Rufus W. Russell as a copartner with the other defendants under said fictitious name, but, if the facts show him to have been associated in business with the other defendants under said fictitious name, then a personal judgment against him for the debt would be proper (section 388, Code of Civil Procedure); therefore we are not required to actually find that the relationship of a copartner existed. The real problem is: Was the wife, in her actions in the premises, the agent of the husband, the head of the community, and, if so, is not the husband liable not only as head of the community but personally for her acts so done and performed? She could only bind the community as agent of the husband; otherwise he would not be liable for her contract (Civil Code, § 167), except for necessaries (Civil Code, § 174). The power of either spouse to act as agent for the other is undeniable. Arnold v. Loomis, 170 Cal. 95, 97, 148 P. 518; Corbit v. Kimball, 107 Cal. 665, 667, 40 P. 1029; Althof v. Conheim, 38 Cal. 230, 99 Am. Dec. 363. It requires even less proof to establish this agency than in other cases. Rauer's Law, etc., Co. v. Berthiaume, 21 Cal. App. 670, 132 P. 596, 833; Wagoner v. Silva, 139 Cal. 559, 73 P. 433. The agency may be proved by circumstances as well as by direct evidence. Puget Sound Lumber Co. v. Krug, 89 Cal. 237, 26 P. 902; Rauer's Law, etc., Co. v. Berthiaume, supra; Clendenin v. White, 62 Cal. App. 664, 217 P. 761. The agency may also be shown by proof of ratification of acts done without previous authority. Schader v. White, 173 Cal. 441, 160 P. 557.

Texas, a community property state, has had cases similar in principle to the one before us, and a reference to some of them may be proper here. In the case of Wetzel v. Simon, 87 Tex. 403, 28 S. W. 942, a husband was trading under his wife's name in the mercantile business. Being unable to meet his debts and believing the goods to be the property of his wife, he caused her to execute a conveyance to creditors as an insolvent debtor. The court held that this assignment so executed was binding as against his attaching creditors, and, discussing the question, said:

> "The trial court found that the effects which purported to be transferred belonged to the community estate of N. Wise and his wife. The debts were created in carrying on the business, and were the debts of the husband, as representing the community, and not the debts of the wife. We apprehend that if the original stock of goods had been the property of the wife, since the profits of the business belong to the community estate, debts contracted in the purchase of new goods would be community debts. Such being the case, we are of opinion that when the husband directed the wife to sign the conveyance in her own name, and when, in pursuance of such direction, she did so execute it, it passed the title of the property with the same effect as if he had signed it himself in his own name and had delivered it with his own hand."

Neighbors v. Anderson, 94 Tex. 487, 61 S. W. 145, 62 S. W. 417, was a case where a husband and wife were living together on school land bought from the state, and the purchase was made by the wife. They both continued to live upon said land until litigation arose. The court held that the presumption was that the purchase was made with the consent of the husband, and hence that the obligation for the purchase money was a valid community property debt.

The question was next before the court in Richburg v. Sherwood, 101 Tex. 10, 102 S. W. 905, a case where the wife borrowed money upon her own notes without her husband's knowledge, and used same in purchasing a stock of merchandise for her sons in order that they might carry on the business for themselves. The court recognized the rule here contended for by the use of the following language:

> "By authority of the husband expressly given or implied from his acts, the wife may act as his agent, and may make contracts which would bind him and their community estate."

The court, however, held that the facts of that case rendered said rule inapplicable, saying in that respect:

> "This case does not come within either of the exceptions to the general rule that a married woman cannot make a binding contract. Mrs. Richburg did not purport to act for herself and her husband in making the note sued upon. She did not purchase the goods for the purpose of carrying on a business which would make the profits community property. She purchased the goods in order that her sons might enter into business and carry it on for themselves. The husband did not know of the purchase of the goods and the giving of the note when it occurred, and in no way signified his consent to or approval of the venture. The fact that he subsequently became aware of the transaction, and did not enter a protest, cannot affect this case, for Sherwood's rights had already accrued, if he had any, before the matter came to Richburg's knowledge. Sherwood knew that the wife was buying the goods for her sons, and he did not look to the husband, B. R. Richburg, for payment of the notes, but expected that they

would be paid out of the business by the sons. In such a transaction, there is no foundation for the proposition that the husband is bound because the wife, with his consent, acted as his agent in making the transaction, and that the community estate had been benefited by receiving the proceeds of the business. The cases cited by counsel for appellee do not apply to the facts of this case. They announce proper rules for the cases in which the decisions were made, because facts existed by which the wife was shown to have acted with the consent of her husband, and with the purpose that she should transact the business for their common benefit."

Hall v. Decherd, 62 Tex. Civ. App. 426, 131 S. W. 1133, is in the same category as the case last above cited, being a case where the wife purchased a piano for her two stepchildren, and it was held that the purchase was not for the benefit of the community estate, and therefore the husband was not liable.

However, we think the case of Althof v. Conheim, supra, a case by our own court, recognizes the principle that is applicable here. In that case defendants were husband and wife. The wife resided in San Francisco and carried on a business in her own name while the husband resided in another state. The wife, desiring to purchase a lot in Oakland, borrowed of plaintiff $520 to make the purchase. She took the deed in her own name. The husband afterwards arrived in the state, and he and his wife took possession of the lot and resided on it during all of the time involved. They sold a portion of it and retained the balance, both uniting in such sale and in the receipt of the purchase money. The prayer of the complaint was for judgment against both of them for the amount loaned by plaintiff, and that it be declared a lien upon the lot. The court said:

> "If the wife had no previous authority from the husband to contract the debt to the plaintiff, he adopted and ratified the transaction by using and occupying the lot, selling a portion of it, and appropriating the proceeds to his own use. Whilst dealing with the property as his own, which was in part paid for with the plaintiff's money, borrowed by the wife for that purpose, the law will presume either that the wife had authority to contract the loan, or that the husband has since ratified the transaction and agreed to be bound by it. He will not be allowed to say that he ratifies so much of it as inures to his advantage, by accepting the benefit of a purchase made by his wife partly with the plaintiff's money, but repudiates so much of it as requires the sum advanced by the plaintiff to be refunded. He must take the transaction cum onere, if he adopts it at all. In ratifying the purchase by his wife, he ratifies her engagement to the plaintiff as well, and in adopting one he adopts the other."

The case of Roullard v. Gray, 30 Cal. App. 757, 159 P. 457, while in some respects similar, does not contain the elements of ratification here present.

[5] So, in the case before us, the test of the question involved is: Would the community estate presided over by the husband have been benefited had profits resulted from the venture herein described? We think it is too clear for controversy that such profits would have redounded to its benefit. It is no answer to this contention to say that defendant Ireland and the wife, being partners, profits could not result direct to the husband. If dividends had been declared or profits accumulated and later distributed, the result would be the same as if the profits were directly paid to him. The evidence shows that, before the venture got under way and before the restaurant was operated, the husband returned home and found his wife engaged in this enterprise; he assisted her, had knowledge of her use of the community estate therein, and identified himself with the business and remained with it as long as it lasted. He did what was known to the business as "flooring," which could of itself have done nothing except to create the impression that he was a part of the same and the wife an agent. This presents such a clear case of ratification of the acts of the wife as to leave us in no doubt that her action had his express consent. To allow him to stand by and take the profits, had there been any, without assuming the burdens, would be to support a principle which would work an injustice to creditors dealing in good faith with one spouse as the representative of the other.

[6] There is likewise no merit in the point that plaintiffs may not have known whether the wife was or was not the agent of the community estate. A creditor may sue an undisclosed principal when found, although he may not have known of the existence of such principal at the time the debt was incurred. 21 R. C. L. p. 890, § 63; Schader v. White, supra; Karns v. Olney, 80 Cal. 90, 22 P. 57, 13 Am. St. Rep. 101.

We are also satisfied that the findings themselves require a judgment for the plaintiffs in this case as against all the defendants individually. That portion of the judgment appealed from is therefore reversed, with directions to the court below to enter judgment in favor of plaintiffs and against the defendant Rufus W. Russell for the sum of $7,912.76, together with interest thereon from October 1, 1923, and for their costs.

We concur: RICHARDS, J.; CURTIS, J.; SEAWELL, J.

LANGDON, J. I dissent. The amended complaint named Ireland and Mr. and Mrs. Russell, individually and as copartners doing business under the firm name of Tubells Company, alleging that they had entered into an agreement to form, and did form, a partnership, and that defendant Ireland had contributed one-half of the capital used in the partnership business and the defendants

Russell had contributed the other half out of community funds, and that the profits were to be divided, one-half to defendant Ireland and the other one-half to defendants Russell, as community property. The answer denied that Rufus Russell had entered into said partnership at any time or in any manner, denied that he had any interest therein or was to receive any of the profits thereof, except that he was employed in said business as a servant under the direction of defendant Ireland for some time. This presented a clear-cut issue of fact, which was resolved by the trial court in favor of the defendant Rufus Russell. Whether Russell entered into the partnership directly or through an agent is immaterial, the ultimate fact found is that he did not enter into a partnership. The finding of the trial court on this subject is set forth in the majority opinion, and is to the effect that he did not do so. This is also a finding to the effect that he did not become a partner by ratification.

As all these matters are questions of fact and as the most that can be said for the appellant is that conflicting inferences might be drawn from the evidence appearing in the record, the findings should be binding upon appeal. The majority opinion, in the face of a finding upon undisputed evidence and possible conflicting inferences, holds, practically as a matter of law, that the mere fact that Rufus Russell was the husband of Elizabeth Russell and by law entitled to the control of community property which might be acquired by her business ventures, makes him a partner with any third person with whom she cares to associate herself in any partnership business. Since by virtue of his status as her husband he has no power to control her entrance into partnership ventures, it would indeed be far-reaching in its consequences and inequitable in its operation to lay down as a rule that as a matter of law he is bound thereby. As admitted in appellants' briefs and in the majority opinion, there is no direct authority for such a holding in this state, and I do not wish to subscribe to it as an initial pronouncement.

We concur: WASTE, C. J.; SHENK, J.

205 Cal. 328

GREEN et ux. v. GENERAL PETROLEUM CORPORATION. (L. A. 8316.)★

Supreme Court of California. Oct. 1, 1928.

Rehearing Denied Oct. 29, 1928.

1. Evidence 🔑9—It is common knowledge that inner earth contains powerful gaseous forces, frequently found in proximity to petroleum deposits.

It is a matter of common knowledge that the inner earth contains powerful gaseous forces, frequently found in proximity to and in connection with deposits of petroleum substances.

2. Common law 🔑9—Injury without liability is contrary to general rule of liability.

Though an injury may exist without liability under some circumstances, such a result is contrary to the general rule of liability.

3. Negligence 🔑28—Person exercising due care in lawful business is not insurer against consequences of his acts, which reasonable care and foresight could not have prevented.

When a person is engaged in a lawful business in exercise of due care, the law does not make him an insurer of others against those consequences of his acts which reasonable care and foresight could not have prevented.

4. Negligence 🔑63—One conducting lawful and proper business does not have obligation of saving others harmless from consequences of inevitable accident.

The law does not impose on one conducting a lawful and proper business the obligation of saving harmless others from the consequences resulting from occurrence of inevitable accident.

5. Negligence 🔑2—Person doing something without legal right, or negligently doing something he may rightfully do, is liable for resulting injury.

Where one person does something he has no legal right to do, to the prejudice of another, or doing something he may rightfully do, does it negligently, or neglects something he should do, and another is injured thereby, the one doing the act or omitting to do it is liable for injury suffered by the other.

6. Nuisance 🔑3(2)—Discovery and production of oil properly carried on and maintained is not nuisance per se.

Discovery and production of oil is a legitimate and lawful business, and when properly carried on and maintained is not a nuisance per se.

7. Adjoining landowners 🔑8—Person proceeding under known conditions in conduct of lawful enterprise, with knowledge that injury may result, will be required to compensate for injury resulting (Civ. Code, § 3514).

In view of Civ. Code, § 3514, to effect that one must so use his own rights as not to infringe on rights of another, person who, in conduct and maintenance of enterprise lawful and proper in itself, deliberately does an act under known conditions and with knowledge that injury may result to another, proceeds, and injury is done to other as direct and proximate consequence of the act, he will in all fairness be required to compensate the other for damage done.

8. Negligence 🔑56(1)—There is absolute liability for consequential damage, caused directly and proximately by contemplated act or thing, without interposition of external or independent agency.

Where an injury arises out of or is caused directly or proximately by contemplated act or thing, without the interposition of any ex-

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★Rehearing denied.

ternal or independent agency, which was not or could not be foreseen, there is an absolute liability for consequential damage, regardless of any element of negligence.

9. Mines and minerals 🔑121—Adjoining property owner held entitled to recover damages for oil and mud thrown on premises in eruption of oil well.

Though oil well was drilled with proper precautions to prevent explosion of gas, and without negligence in any other respect, adjoining property owner was nevertheless entitled to recover damage resulting when mud and oil was thrown on premises in eruption of well.

10. Mines and minerals 🔑125—Measure of damages to realty from gas well eruption is cost of restoration, if not exceeding value; otherwise, value of property itself.

Proper measure of damages for injury to realty from mud and oil in eruption of gas well on adjoining property is cost of restoration in case such cost is less than value of the property; otherwise, value of property itself is proper measure of damages, without regard to any increased value of property by reason of discovery of oil.

11. Mines and minerals 🔑118—Amount recoverable for physical discomforts in eviction from residence covered with mud and oil by gas well is for discretion of court or jury.

Amount in money necessary to compensate for physical discomforts suffered by reason of eviction from residence, covered with mud and oil in eruption of oil well on adjoining property, must be left to sound judgment, experience, and discretion of court, in view of facts of particular case.

12. Mines and minerals 🔑125—$2,500 for eviction from residence, covered with mud and oil in eruption of oil well, held not excessive.

$2,500 damages as compensation for eviction from residence covered with mud and oil, in eruption of oil well on adjoining property, *held* not excessive.

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action by Horace W. Green and wife against the General Petroleum Corporation. Judgment for plaintiffs, and defendant appeals. Affirmed.

Superseding opinion in 262 P. 377.

A. L. Weil and Forrest A. Cobb, both of San Francisco (Harris F. Shaw, of San Francisco, of counsel), for appellant.

Swaffield & Swaffield, of Long Beach, for respondents.

WASTE, C. J. Plaintiffs instituted an action to recover damages for injuries to their property, occasioned by the "blowing out" of an oil well during drilling operations by defendant. The trial court, sitting without a jury, gave judgment in favor of plaintiffs, and defendant appealed.

Respondents were the owners of certain improved real property in a residence district outside the city of Long Beach, in Los Angeles county, which they occupied for a number of years as a residence. Appellant had leased the adjoining land and was engaged in drilling a well for the discovery and production of oil. In January, 1922, it had reached a depth of about 2,592 feet. Under the law of this state, in drilling oil wells all water must be shut off before drilling into the oil zone; the work being done under the supervision of the state oil and gas supervisor. The usual method was followed in this case, and the well was cemented at 2,298 feet, or about 300 feet from the bottom of the hole. Just as the drilling crew finished bailing out the water for the purpose of testing the cement job, the well erupted, blowing off the control valves and wrecking the derrick. A stream of oil, gas, mud, and rocks shot into the air and onto respondents' property, which was located about 200 feet from the well. This mixture continued to pour forth from the well for more than 24 hours, covering respondents' property with the deposit to a depth of from 4 to 7 inches, destroying the trees, lawns, and garden, and greatly damaging respondents' dwelling and personal property.

The complaint contained two causes of action—one based upon liability without negligence, due to trespass on plaintiffs' property; the other based upon negligence on the part of the defendant in performing the drilling operations. The trial court expressly found that the defendant had used and exercised ordinary care in the drilling of the well, and was not guilty of negligence in any particular. The evidence amply supports this finding. It was established that the drilling crew were skilled and experienced men; that the best standard of equipment was used, and that prior to the drilling of the well a careful cross-section of the logs of all other wells in that vicinity had been made, from which it was computed that no oil or gas would be encountered in the well for at least 200 feet below the point where the "blow-out" occurred. The court, however, sustained plaintiffs' first cause of action, and held defendant liable in damages for the trespass and injury to the premises. The appeal presents for our determination the question whether, under the existing circumstances of injury without negligence, appellant is liable for the damages suffered by respondents, and, if so, what is the measure of damages.

[1] Appellant contends that it was absolved from all liability for the damages to respondents' property under the finding of the trial court that it had exercised due care and caution in its drilling operations. Respondents rely upon the application of the doctrine, "sic utere tuo ut alienum non lædas," to the facts in the case. It is matter of common

knowledge that the inner earth contains powerful gaseous forces, frequently found in proximity to and in connection with deposits of petroleum substances. It was a known fact that a tremendous pressure of gas underlay the particular locality in which appellant was carrying on its drilling operations. It proceeded with full knowledge of the situation. As other "blow-outs" of gas had occurred in the field, it installed on the casing head of its well devices adapted to hold such a flow. It endeavored to compute the precise depth at which oil and gas would be encountered, but penetrated the danger zone sooner than was anticipated, with the resulting damage to respondents' property.

Appellant asserts that there were no preliminary indications that a "blow-out" was imminent, and that the well was the "wildest" ever encountered by its drillers in their experience. Assuming that to be so, the fact does not materially affect the consideration of the case, for we are not now dealing with an unforeseen event, or such a happening as, amounting to an "act of God," serves to relieve from responsibility for injury occasioned thereby. In this case, the primary inquiry leads to but one conclusion, and that is that the construction of the well, an enterprise lawful in itself, was the direct and proximate cause of the gas blow-out. The well itself brought the gas, and its accompanying débris, to the surface. If the appellant had actually and intentionally penetrated the volume of gas in the depths of the earth, so that the gas flowed into the well, no one would dispute that the sinking of the well was the cause of that result. It so happened that the gas was nearer the surface than appellant anticipated, and, by its own natural force, broke through. The result was as much the direct and proximate consequence of the sinking of the well as if the volume of gas had been intentionally liberated, as it would have been, had the drilling continued. The well brought to the surface of the earth an uncontrollable element, productive of injury to property located in proximity to the drilling operations carried on by the appellant.

[2-5] Appellant apparently does not contend that respondents must go without redress if their legal rights have been invaded. Its exact contention is that the respondents have no legal rights in the matter, for the reason that the rule of liability without negligence has no place in the law of this state, but, on the contrary, has been expressly repudiated by the decisions of this court. Before it can be held liable for the damage suffered by the respondents, it argues, former adjudications of the court must be overturned. We do not share in that view. That an injury may exist without liability under some circumstances is certain. But such a result is contrary to the general rule of liability. Sussex, etc., Co. v. Midwest Refining Co. (C. C. A.) 294 F. 597, 34 A. L. R. 249. The cases decided by this court correctly apply the law to established facts, but no case exactly like the one now before us has previously been presented for consideration. The rule is laid down in the decisions that a defendant is not liable unless he has been guilty of negligence. It has many variations. For instance, there is found in our Reports the declaration that, when a person engaged in a lawful business exercises due care, the law does not make him an insurer of others against those consequences of his acts which reasonable care and foresight could not have prevented. The rule thus stated was applied in a case involving the duty of a master to a servant. Thompson v. Calif. Const. Co., 148 Cal. 35, 82 P. 367.

Neither is it to be doubted that, where a defendant's business is lawful and proper in its conduct, the law does not impose the obligation of saving harmless others from the consequences resulting from the occurrence of inevitable accident. Such a situation was involved in Sutliff v. Sweetwater Water Co., 182 Cal. 34, 186 P. 766. Appellant contends that the rule that one is not liable for injury to another in the absence of negligence is positive, and that no exceptions to it are recognized in California. All apparent exceptions, it asserts, can, for the most part, be identified as relating to nuisances per se, and, in any event, are cases in which the necessary and direct consequence of the act is an invasion of the property of another. In other words, to render the doer liable in damages, appellant contends the act must, of itself, be unlawful or have been negligently done. Citation of authority is, of course, unnecessary to support the doctrine that, where one person does something he has no legal right to do, to the prejudice of another, or, doing something he may rightfully do, does it negligently, or neglects doing something he should do, and another is injured thereby, the one doing the act, or omitting to do it, is liable for the injury suffered by the other. See Perkins v. Blauth, 163 Cal. 782, 786, 127 P. 50.

[6-9] The discovery and production of oil is a legitimate and lawful business, and, when properly carried on and maintained, is not a nuisance per se. Under normal conditions, the drilling operations cause no invasion of the adjacent lands. The fact, therefore, that the well of appellant was properly put down and carefully cared for, appellant contends, eliminates the only factor in the case which would justify a judgment for respondents in the absence of negligence. We do not think so. The present case does not arise from either the conduct of a nuisance per se, or from an inevitable calamity or act of God, but presents a situation to which the doctrine of "sic utere tuo ut alienum non lædas" may be applied in its broad and fundamental import. That ancient maxim of juris-

prudence is incorporated, in substance, in the statutory law of this state. The Civil Code provides (section 3514):

> "One must so use his own rights as not to infringe upon the rights of another."

Where one, in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should, in all fairness, be required to compensate the other for the damage done. The instant case offers a most excellent example of an actual invasion of the property of one person through the act of another. The fact that the act resulting in the "blowout" was lawful, and not negligently done, does not, in our opinion, make the covering of respondents' property with oil, sand, mud, and rocks any less an actual invasion of and a trespass upon the premises.

It ought to be, and we are of the view that it is, the rule that, where an injury arises out of, or is caused directly and proximately by the contemplated act or thing in question, without the interposition of any external or independent agency which was not or could not be foreseen, there is an absolute liability for the consequential damage, regardless of any element of negligence either in the doing of the act or in the construction, use, or maintenance of the object or instrumentality that may have caused the injury. In our judgment, no other legal construction can be placed upon the operations of the appellant in this case than that, by its deliberate act of boring its well, it undertook the burden and responsibility of controlling and confining whatever force or power it uncovered. Any other construction would permit one owner, under like circumstances, to use the land of another for his own purpose and benefit, without making compensation for such use. We do not conceive that to be the law.

Appellant's contention that the doctrine of liability without negligence does not exist in this state rests primarily upon its conception of what this court has held in former decisions, in cases involving inevitable calamities, nuisances per se, and the like. Declarations in the form of statements of general principles in those cases must be viewed in the light of the facts under consideration. Neither appellant nor respondents have brought to our attention a decision in a case exactly like this one. We have made an independent examination, and find none. The nuisance per se and inevitable calamity cases have served, for the greater part, to lead us to the conclusion that the rule that injury may exist without liability is, as has been so well stated by another court, "contrary to the general rule of liability where injury is caused; and since, in a sense, it is a preference of the rights of one property owner or user over that of another; and since the law is a jealous guardian of the right to lawfully use property without interference or diminution; and since the rule of 'sic utere ut alienum non lædas' is of broad and fundamental importance—the rule which allows such injury without liability therefor is an exception which is and should be narrowly limited and carefully confined." Sussex, etc., Co. v. Midwest Refining Co., supra, at page 601. The defendant in that case claimed, as does the appellant here, that the legal use of land by the owner is subject to and limited by the right of other property owners to develop the natural resources of their lands in a lawful and prudent manner.

> "This contention means," said the court (page 602), "and is intended to mean that a landowner has a legal right to develop the natural resources of his land without liability for damage caused to other landowners thereby, provided he pursues this development in a manner to cause as little damage as possible. We think it clear either that such statement of the rule is too broad or that the application thereof is limited by certain practical and legal considerations. * * * But, elastic as this rule is, both reason and authority have declared certain limitations beyond which it cannot extend. One of these limitations is that it is 'unreasonable' and unlawful for one owner to physically invade the land of another owner. There can be no damnum absque injuria where there is such a trespass."

On this phase of the question we are of the view that the judgment of the lower court must be affirmed. It is unnecessary for us to enter into a prolonged discussion of the cases cited by the respective parties, a few of which we have so briefly noted, or to analyze those most strongly relied on by either side to the controversy. So far as the former decisions of this court are to be regarded, none of them, when rightly understood, extends the doctrine of nonliability without negligence to a case like the present. Neither do they prevent the application of the rule relied on by the respondents to the instant case.

[10] The trial court made special findings awarding the respondents damages amounting to $9,180.80, segregated into the following items: For injuries to personal property, $164; for injuries to the realty, $6,516.80; for the eviction of the respondents from their residence, $2,500. Appellant concedes the allowance for the damages to the personalty to be correct, but contends that the court did not apply the proper measure in arriving at the amount of damages to the realty and for the eviction. In the matter of the injury to the realty, the court specially found, by specific items, what it would cost to restore the premises to their original condition, and allowed the aggregate amount as damages. Appellant does not dispute the accuracy of

the court's figures, but contends that the discovery of oil in its well gave a new value to the property of the respondents—a value as oil property, greatly in excess of its previous value as residential property—and that the restoration of the property to its original condition will add nothing to its value for its new use. Wherefore, the value being greater after the "blow-out" than it was before, appellant argues, the respondents suffered no loss by reason of the injury to the realty. We are not impressed with appellant's argument on this point. The rule to be applied in this case is: If the cost of repairing the injury by removing the débris deposited by the appellant, and otherwise restoring the premises to their original condition, amounts to less than the value of the property prior to the injury, such cost is the proper measure of damages; and if the cost of restoration will exceed such value, then the value of the property is the proper measure. Salstrom v. Orleans, etc., Mining Co., 153 Cal. 551, 558, 96 P. 292. From the evidence and the findings, which are sufficient for all purposes, it appears that the trial court understood and acted within the scope of the rule.

[11, 12] In response to the general issue tendered as to the eviction of the respondents, the trial court found that, by reason of the eruption of appellant's well, the premises of respondents were "rendered wholly uninhabitable and wholly useless for residential purposes, and plaintiffs were compelled to immediately remove themselves and their belongings from their said home, and were thereby evicted, ousted, and ejected therefrom, and were deprived of the use and enjoyment thereof for residential purposes," for which eviction the court awarded damages in the sum of $2,500. The testimony of the two respondents as to the circumstances under which they were compelled to flee from their home, its uninhabitable condition after the eruption, and the manner in which they were deprived of its use, was admitted in support of the general issue, and amply supports the finding. The premises could have been restored to their original condition. The cost of such restoration was fixed by the court. If that work had been done, it does not appear but that respondents could have resumed occupancy of the premises. Their recovery was limited to compensation for the damages naturally and necessarily resulting to them from the injury alleged in the complaint. No special damages, such as cost of removal from the premises, loss of rentals of the premises, or cost of renting another home, were alleged or proved. We are not, however, left to speculation as to the basis on which the trial court fixed the amount of the damages allowed for eviction. The law affords redress by giving damages against a wrongdoer for the annoyance and discomforts suffered in such cases as this. Baltimore, etc., R. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 329, 2 S. Ct. 719, 27 L. Ed. 739.

We must assume that the trial court allocated the full amount of the damages awarded for the eviction as compensation for the physical discomforts suffered by the respondents, and for the deprivation of the use and comforts of their home. The amount in money necessary to compensate the plaintiffs in such cases is not to be estimated by witnesses or the "actual amount" established by testimony or calculated by any arithmetical rule. It must be left to the sound judgment, experience, and discretion of court or jury to fix the amount in view of the facts in each particular case. Gempp v. Bassham, 60 Ill. App. 84, 87; Fox v. City of Joliet, 150 Ill. App. 491, 495; Judson v. Los Angeles, etc., Gas Co., 157 Cal. 168, 172, 106 P. 581, 26 L. R. A. (N. S.) 183, 21 Ann. Cas. 1247. See, also, Fairbank Co. v. Nicolai, 167 Ill. 242, 247, 47 N. E. 360; Gavigan v. Atlantic Refining Co., 186 Pa. 604, 613, 40 A. 834; Berger v. Minneapolis Gaslight Co., 60 Minn. 296, 302, 62 N. W. 336. The damages awarded by the court to the plaintiffs for the eviction may have been liberal, but they do not appear to us so excessive as to justify our interfering with the allowance.

The judgment is affirmed.

We concur: TYLER, Justice pro tem.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.

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205 Cal. 383

PUGLIESE v. PUGLIESE. (L. A. 9549.)*

Supreme Court of California. Oct. 16, 1928.

Hearing Denied in Bank Nov. 8, 1928.

Appeal and error ⚿195—Objection to form of pleading held too late on appeal.

Where plaintiff, originally having a good complaint on file, undertook to supplement its averments by subsequent pleadings erroneously described as amended complaint and supplemental complaint, an objection to the form of the pleading was too late on appeal.

Department 2.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Anita Pugliese against Frank Pugliese. From an interlocutory decree of divorce, defendant appeals. Affirmed.

See, also, 200 Cal. 652, 254 P. 266.

E. M. Torchia and C. W. Pendleton, both of Los Angeles, for appellant.

Clyde W. Smith, of San Pedro, for respondent.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied in bank.

RICHARDS, J. The plaintiff herein instituted an action for divorce against the defendant, charging cruelty and praying for a decree of divorce, for the custody of the three minor children of the marriage, for the assignment to the plaintiff of her equitable share of the community property, and for the payment of reasonable alimony, counsel fee, and costs. The complaint is sufficient in form and substance to justify the relief prayed for therein. A demurrer to the complaint upon both general and special grounds was presented on behalf of the defendant, which in due course was overruled; whereupon an answer was filed denying, in the main, the allegations of plaintiff's complaint which charged the defendant with cruelty. Thereafter the plaintiff presented and filed a document which she designated "Amended Complaint" and which, after repeating the averments of her original complaint, proceeded to set forth certain additional acts of cruelty on the part of the defendant occurring after the commencement of the action and which would have been the proper subject of a supplemental complaint. To this so-called amended complaint the defendant presented a demurrer, which the trial court apparently treated as having application to that portion of the amended complaint which embraced the matters occurring since the institution of the action, and the court, apparently considering the added matter to have been defectively stated, sustained the demurrer to the amended complaint; whereupon the plaintiff presented and filed another document which she denominated "Supplemental Complaint," but which was evidently intended to constitute a supplement to the original complaint, setting forth with more of detail the defendant's subsequent acts of cruelty. To this so-called supplemental complaint the defendant filed a general demurrer which the court overruled; whereupon an answer was filed to the so-called supplemental complaint. The cause then proceeded to trial, at the conclusion of which the trial court found its findings of fact and conclusions of law in the plaintiff's favor, and also filed and caused to be entered an interlocutory judgment decreeing the plaintiff entitled to the divorce, to the custody of the minor children, to a designated share of the community property of the parties, together with an award of alimony and counsel fee. The defendant in due time gave notice of intention to move for a new trial, which motion came on for hearing before the court and was denied; whereupon the defendant appealed from the interlocutory decree of divorce and presented and caused to be settled a bill of exceptions in support of said appeal, specifying therein a number of particulars wherein the evidence was alleged to be insufficient to justify the findings and judgment of the trial court.

The appellant urges for the first time upon his appeal the contention that the judgment should be reversed for the reason that there was no sufficient pleading in the way of a complaint on file to justify the trial court in entering said or any judgment in this action. That the contention of the appellant in that regard is without any semblance of real merit is made plain by an examination of the record. The plaintiff had originally a good complaint on file. She undertook to so supplement its averments as to introduce matters occurring after the commencement of the action, and in so doing she erroneously described her pleading as an "Amended Complaint." When the court sustained a demurrer to this so-called amended complaint, the plaintiff presented what she again erroneously designated a "Supplemental Complaint," when it was in reality nothing more than a supplement to the original complaint. The trial court so treated it, and the cause went to trial without further objection on the part of the defendant to the form of the plaintiff's pleading; nor did the defendant urge any such objection upon his motion for a new trial or in his bill of exceptions presented in the course of said motion and on this appeal. His present objection to the form of the plaintiff's pleading comes entirely too late.

The only other point made by the appellant is that there was no sufficient corroboration of the plaintiff's testimony with respect to the defendant's alleged cruelty. An examination of the record shows that this contention has no merit, since the plaintiff's testimony was amply corroborated by the testimony of her eldest daughter, while several other witnesses produced on behalf of the plaintiff gave testimony as to the constant suffering of the plaintiff and the fear of the defendant entertained both by herself and her minor children.

There appearing to be no error on the face of the record, the judgment is affirmed.

We concur: LANGDON, J.; SHENK, J.

205 Cal. 284

BASS et al. v. HUETER et al. (S. F. 12440.)

Supreme Court of California. Sept. 29, 1928.

1. Limitation of actions 🔑65(1)—Absent peculiar circumstances, reasonable time within which plaintiff must perform act upon which right of action depends, is period coincident with that provided in limitations statute.

Unless there are peculiar circumstances affecting question, reasonable time within which plaintiff must perform act upon which his right of action depends is period coincident with that provided in statute of limitations for barring the action.

2. Limitation of actions 🔑67—Parties could not prevent statute from running against note by not giving notice fixing maturity.

Where maturity of note was fixed "three months after notice after one year from date," parties could not prevent statute of limitations from running by failing to give notice required.

3. Bills and notes 🔑129(1)—Parties' intention regarding when notice fixing maturity of note should be given must be determined from note.

Intention of parties as to time when notice fixing maturity of note should be given must be determined by an inspection of note itself.

4. Evidence 🔑448—Where terms of note are plain regarding notice fixing maturity, no resort to extraneous evidence may be had to determine intention.

Where terms of note were plain and certain on subject of when notice fixing maturity of note should be given, no resort to extraneous evidence could be had to determine intention of parties.

5. Bills and notes 🔑129(1)—Clause, fixing maturity of note three months after notice after one year, showed intention that payee could fix maturity by notice one year after date.

Clause in note, fixing maturity thereof "three months after notice after one year from date," showed intention of parties that payee of note could fix maturity by notice given after one year from its date.

6. Bills and notes 🔑134—Provisions of contemporaneous pledge agreement could be resorted to to determine intention regarding notice fixing maturity of note.

Provisions of pledge agreement executed contemporaneously with note could be resorted to in order to determine intention of parties regarding time of giving notice fixing maturity of note.

7. Bills and notes 🔑134—Provisions of contemporaneous pledge agreement did not show intention to postpone giving notice fixing maturity of note indefinitely.

Where clause in note fixed maturity thereof "three months after notice after one year from date," provisions of agreement executed contemporaneously with note relating to pledge of stock of corporation as security, which recited terms of note that it should be payable "after three months' notice after one year from date" with alternative "at any time prior to maturity at option of pledgor," and providing that pledgor should have right to vote pledged stock at all meetings of stockholders held until note should be paid, *held* not to show an intention of parties to postpone maturity of note indefinitely after expiration of 15 months' period.

8. Limitation of actions 🔑67—Where clause in note fixed maturity 3 months after notice after 1 year from date, action thereon commenced nearly 20 years after date of note was barred by statute.

Where clause in note sued on fixed maturity thereof 3 months after notice after 1 year from date and notice fixing maturity was not given until nearly 20 years after it could have been given, evidence *held* to show as matter of law that action on note was barred by statute of limitations.

Department 2.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action upon a claim against an estate by Charles J. Bass and others against Ernest C. Hueter and another, as executors of the last will and testament of Ernest L. Hueter, deceased. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

W. H. Morrissey and Brobeck, Phleger & Harrison, all of San Francisco, for appellants.

W. E. Cashman, W. H. Metson, and Chickering & Gregory, all of San Francisco, for respondents.

SHENK, J. This is an appeal from a judgment of nonsuit in an action on a claim against the estate of Ernest L. Hueter, deceased. The plaintiffs alleged that on or about the 17th day of October, 1903, Ernest L. Hueter borrowed from Ellen Bass the sum of $18,000 and agreed in writing to repay the same, as evidenced by a promissory note of which the following is a copy:

> "18,000. 17th day of October, 1903.
>
> "I promise to pay to Ellen Bass or order, the sum of eighteen thousand (18,000) dollars, with interest thereon at the rate of six (6%) per cent. per annum, three months after notice after one year from date.
>
> "Ernest L. Hueter."

Ellen Bass died on June 17, 1904. Her estate was administered upon and on September 5, 1905, was distributed to the plaintiffs herein. Ernest L. Hueter died on November 9, 1923. His will was admitted to probate and the defendants were appointed as executors. Thereafter on April 4, 1924, a notice on behalf of said distributees, the plaintiffs herein, was caused to be served upon the defendants as such executors to pay said promissory note. Upon the failure to pay the note and the rejection of a claim based thereon against the estate of Hueter, this action was brought.

By answer the defendants, among other things, pleaded the statute of limitations as a complete bar to any relief demanded by the plaintiffs. At the trial it appeared that no notice or demand for payment had ever been given or made upon Ernest L. Hueter during his lifetime either by Ellen Bass, the payee of the note, during her lifetime, nor by or on behalf of the plaintiffs herein until the aforesaid notice of April 4, 1924.

[1, 2] The defendants' motion for a nonsuit was made and granted on the ground that no special circumstances appeared to relieve the plaintiffs from the bar of the statute, and that therefore the statutory period of limitations had long since run. Whether the trial court was right in so deciding is the crucial point on this appeal. The determination of the point rests primarily upon the effect to be given the clause in the note fixing the maturity thereof "three months after notice after one year from date." By the use of this language the intention of the parties was clear that upon the expiration of one year from October 17, 1903, the payee of the note could notify the maker that the note would be due three months thereafter.

It was said in Williams v. Bergin, 116 Cal. 56, 47 P. 877, with the citation of many cases:

> "The rule is well settled that when the plaintiff's right of action depends upon some act which he has to perform preliminarily to commencing suit, and he is under no restraint or disability in the performance of such act, he cannot suspend indefinitely the running of the statute of limitations by a delay in performing such preliminary act, and that if the time within which such act is to be performed is indefinite or not specified, a reasonable time will be allowed therefor, and the statute will begin to run after the lapse of such reasonable time."

And it has been uniformly held that unless there are peculiar circumstances affecting the question, a reasonable time is a period coincident with that provided in the statute of limitations for barring the action. Vickrey v. Maier, 164 Cal. 384, 129 P. 273; Thomas v. Pacific Beach Co., 115 Cal. 136, 46 P. 899. Where, under the contract of the parties, a notice is required to be given or a demand required to be made, a party cannot prevent the statute from running by failing to give the notice or make the demand. Harrigan v. Home Life Ins. Co., 128 Cal. 531, 58 P. 180, 61 P. 99; 16 Cal. Jur. 492. The general rule is too well settled to require further citation of authority, especially with reference to obligations for the direct payment of money such as we have in this case.

[3, 4] It has been noted that the promissory note in question was dated October 17, 1903. By the terms thereof the notice required could have been given on and after October 17, 1904. It was not given until April 4, 1924, or nearly 20 years after it could have been given, and the statute had long since run unless circumstances were present and continued which excused the delay. Such circumstances may appear on the face of the written obligation. At least the intention of the parties is to be determined by an inspection of the document itself. If the terms of the instrument be plain and certain on the subject, no resort to extraneous evidence may be had to determine the intention of the parties.

[5-7] There is nothing on the face of the note here in question which would indicate that it was the intention of the parties that the maturity of the note should be delayed indefinitely after the expiration of one year and three months. It is clear that it was intended that the payee of the note could fix the maturity of the note by notice given after one year from its date. The plaintiffs call attention to the fact that contemporaneously with the execution of the note a pledge agreement was entered into between the parties wherein the maker of the note, as pledgor, agreed to pledge 2384 shares of the capital stock of the Bass-Hueter Paint Company as security for the payment of the note and to that end to indorse certificates for that amount of stock and place the same in the hands of a third party as pledge holder; that in this agreement the terms of the note that it should be payable after "three months' notice after one year from date" were recited with the alternative "at any time prior to maturity at the option of the pledgor"; that the pledgor should have the right to vote the pledged stock "at all meetings of the stockholders of said company which may be held until said note shall have been paid"; and that a sale of the stock was to be allowed only if the principal and interest of said note was not paid "when due according to the terms thereof." Accordingly, it is urged that the provisions of this agreement are consistent only with a purpose to postpone payment. The provisions of this agreement may, of course, be resorted to in order to determine the intention of the parties. But we cannot agree that the terms of the agreement evidence any intention to postpone the maturity of the note indefinitely after the expiration of the 15 months' period. On the contrary, the agreement is entirely consistent with the purpose expressed in the note and the law would read into the provisions of both instruments the obligation to give the required notice within a reasonable time after it could be given by the payee or owner of the note.

[8] It remains to be seen whether the evidence in the record dehors the note was sufficient to justify the conclusion that the holder of the note was laboring under any restraint or disability which would excuse the delay in the performance of the act necessary to mature the note within a reasonable time. Ellen Bass, the payee, died before the expira-

tion of the one year from the date of the note. She, therefore, had no opportunity to give the notice. Edith B. Lindsay, one of the plaintiffs herein, was appointed executrix of her will. By order of court, duly entered on September 5, 1905, the estate was distributed. After distributing specific items of property, the residue, including "any other property not now known or discovered, which may belong to the said estate," was distributed to the surviving children of the defendant, the plaintiffs herein. Edith B. Lindsay, one of the plaintiffs, testified that in December, 1923, she found the note and the pledge agreement in an old trunk containing some of the effects of her deceased mother, but that by inadvertence the note had been destroyed. The pledge agreement was offered in evidence, but it did not contain a copy of the note. The contents thereof were proved by the testimony of Mrs. Lindsay to the effect that she had seen the note in December, 1923, and remembered the form thereof. Mrs. Lindsay further testified that she had a conversation with her mother shortly prior to June, 1904, in which her mother requested her to look for the papers with regard to what Ernest L. Hueter owed her; that she made a search for the same, but was unable to find them; that about two months after her mother's death, and after she had been appointed executrix of her mother's estate, she had a conversation with Ernest L. Hueter in which she stated to him that she was unable to account for $18,000 of the money owing to her mother, and that Mr. Hueter replied:

> "Show me the papers. If you will produce any papers showing that I owe you any money, I will pay it."

No effort was thereafter made by Mrs. Lindsay or any one else, so far as the record discloses, to obtain the payment of said indebtedness during the lifetime of Ernest L. Hueter. In December, 1923, Mrs. Lindsay addressed a letter to the firm of Morrison, Dunne & Brobeck at San Francisco, in which she inquired about the pledge agreement of October 17, 1903, and received a reply that all the papers, books, and office records of Mr. Morrison's firm had been destroyed in the conflagration of 1906 and that the documents sought undoubtedly had been destroyed at that time; that search had nevertheless been made among Mr. Morrison's papers for the document without success. Mr. Morrison had died about two years prior to this correspondence between Mrs. Lindsay and the firm of Morrison, Dunne and Brobeck.

From the foregoing it is observed that no step was taken by any one claiming an interest in said estate or the alleged indebtedness represented thereby to enforce payment during all the time from October 17, 1904, until after the death of the maker of the note in November, 1923, a period of over 19 years. It further appears from the record that Mrs. Lindsay was actively engaged in the settlement of her mother's estate in 1904 and 1905, with notice of a claimed indebtedness in favor of her mother's estate in the sum of $18,000 but did nothing, as executor of her will or as distributee and co-owner of the note, to ascertain the status of the claim other than as above outlined. The trial court decided that the defense of the statute of limitations had been successfully interposed. We think the record on this point presented a question of law and that it cannot be said that the court was unjustified in granting the motion for nonsuit.

The plaintiffs rely on the cases of Neale v. Morrow, 150 Cal. 414, 88 P. 815, and Vickrey v. Maier, 164 Cal. 384, 129 P. 273, as supporting their contention that the documents themselves evidence an intention that the maturity of the note should be postponed until a notice had been actually served upon the maker. In each case the general rule which we conclude is applicable to the present case was recognized, but it was determined that from the form of the documents themselves it was in the contemplation of the parties that the time of payment should be indefinitely postponed. The Neale Case was an action on a promissory note payable "five days after actual demand." The note was one of fifty notes for $5,000 each executed in favor of an insurance company, the whole to constitute a guaranty fund required by a statute of this state which provided that the notes should remain with the company as part of the assets thereof and be liable for all of its debts next after its assets from premiums and other sources, exclusive of capital stock, until the net earnings of the company over and above certain items would be equal to the original amount of such guaranty fund and of the capital stock. The statute further provided that when this fixed capital was attained all notes in the fund remaining in the company's control should be surrendered to the makers thereof, but that until that time no guaranty note should be withdrawn from the fund unless another note of equal solvency should be substituted therefor, and not then unless with the unanimous approval of the board of directors then in office, and of all the other parties liable on the rest of the notes comprising the guaranty fund. Interest at the legal rate was to run only after actual demand. In the meantime a commission of 5 per cent. per annum was required to be paid to the maker of each note while the same was outstanding, and if the maker should pay the note the company was to pay the maker 12 per cent. on the amount so paid until the said amount be repaid to the maker by the company. The contingency provided by the statute which would justify the collection or surrender of the note, to wit, the acquisition of a fixed capital in the amount required by the statute, never happened. In fact, the company became insolvent and the note sued on had to be resorted to in order to satisfy those for whose benefit the guaranty fund notes had been accumulated. There is no possible doubt that the parties to the note sued on in that case contemplated that the maturity of the note should be postponed until such time as the statute required.

The case of Vickrey v. Maier, supra, also relied on by the plaintiffs, does not support their contention. It involved the construction of a contract for the purchase and sale of personal property at a fixed price at the option of the seller, and the action was one in effect "to enforce performance of a contract to buy personal property." The court applied the same rule as is applicable in the case of a sale of real property. It was decided that under the contract there in question the parties contemplated that there might be a delay in the exercise of the option therein provided for and that the action was not barred.

Other points are made by the plaintiffs. Discussion of them is made unnecessary by reason of the determination of the main question.

The judgment is affirmed.

We concur: RICHARDS, J.; LANGDON, J.

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205 Cal. 292

In re LUCKENBACH'S ESTATE.★

LUCKENBACH et al. v. LUCKENBACH (PIRAUX, Intervener).

(L. A. 10383.)

Supreme Court of California. Sept. 29, 1928.

Rehearing Denied Oct. 29, 1928.

1. Wills 🔑55(10)—Devise of entire estate to testator's wife to exclusion of brothers and sisters, with provisions for others if wife predeceased him, held not unnatural disposition indicating mental incompetency.

Will leaving testator's entire estate to his wife, who had been his companion for 36 years, to exclusion of brothers and sisters whom he had not seen for many years nor regularly corresponded with, and containing provisions for a former business associate, his secretary and latter's son, daughters of his brother and his wife's sister, two lodges and a church, with residue in trust for a brother, three sisters, and four sisters-in-law, and remainder to a home for boys, to take effect only if wife did not survive him, *held* not an unnatural disposition indicating mental incompetency.

2. Wills 🔑166(2)—Evidence held insufficient to sustain finding of fraud or undue influence invalidating will leaving entire estate to testator's wife.

In will contest, evidence of testator's having stealthily handed contestant a $20 bill when his wife, to whom he left entire estate, could not see bill passed, his remarks to such contestant as to his intention to provide for her when she could no longer work, and his statement that he would provide for his brothers and sisters, *held* insufficient to sustain a finding of fraud or undue influence invalidating will.

3. Wills 🔑55(1), 166(12)—Few isolated, detached, trivial, and inconsequential incidents remote from date of will are of little weight on questions of mental capacity and undue influence.

A few isolated and detached, trivial and inconsequential incidents, happening at a time remotely distant from date of execution of will, are to be given little weight in considering testator's mental status and freedom of action.

4. Wills 🔑55(10)—Bequest of income for education of, and payment at age of 18 to, beneficiary 35 years old when will was executed, held not to warrant inference of mental incompetency.

Bequest of sum in trust, to pay income to one who was 35 years old and had finished her education when will was executed "for her education" and during her life "after she has attained the age of 18 years," *held* not to warrant inferences, even in considering propriety of nonsuit against will contestants, that testator insanely believed such beneficiary and all his relatives, including contestants, to be much younger than they were, in view of creation of trusts for three other persons in practically same phraseology by will, which was lengthy and drawn by attorney.

5. Wills 🔑81—Inappropriate language of bequest of income to one 35 years old when will was executed for her education and during her life after attaining age of 18, would not affect validity thereof.

Inappropriate language of bequest, in trust to pay income to one who was 35 years old when will was executed for her education and during her life after attaining age of 18 years, would not affect validity of such provision or her rights thereunder.

6. Fraud 🔑50—Fraud cannot be presumed.

Fraud must be proved and cannot be presumed.

7. Trial 🔑139(1)—To justify submission of fact question, there must be substantial proof of fact alleged.

To justify submission of any question of fact to a court or jury, there must be proof of a substantial character that the fact is as alleged.

8. Wills 🔑401—Judgment of nonsuit in will contest must be affirmed, notwithstanding presumptions in contestants' favor, where evidence would require reversal of judgment for contestants.

Where evidence in will contest would require reversal had court below refused to grant nonsuit and declared will invalid, judgment of nonsuit must be affirmed, though every presumption fairly arising from evidence in contestants' favor must be indulged and benefit of all evidence tending to sustain their averments given them.

★Rehearing denied.

In Bank.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Will contest by Anton H. Luckenbach and others against Lena Luckenbach, as executrix of the estate of John Luckenbach, deceased, and another, in which Katherine Piraux intervened as a contestant. From a judgment of nonsuit, contestants appeal. Affirmed.

Thomas P. White, of Los Angeles, and Ossian Cameron and Edward H. S. Martin, both of Chicago, Ill., for appellants.

Hewitt, McCormick & Crump and Hewitt, Ford, McCormick & Crump, all of Los Angeles, for respondent.

SEAWELL, J. This appeal was taken by the contestants of the will of John Luckenbach, deceased, from a judgment of nonsuit entered against them in a contest instituted after the admission of said will to probate.

Contestants are two brothers and two sisters of the decedent. As grounds for revoking the probate of said will, which devised and bequeathed the testator's entire estate to his wife, Lena Luckenbach, respondent herein, if she should survive him, and appointed her executrix, contestants alleged that the decedent was incompetent to make a will and of unsound mind. They further alleged, upon information and belief, that he did not know the contents of the will, that it was not executed in the manner required by law, and was fabricated and forged by altering a will of said decedent. In addition, it was alleged that the execution of the will was procured by the fraudulent promise of testator's wife that if he would devise all his property to her she would, after his death, provide and care for all of his brothers and sisters according to their needs, which promise she made with intent to deceive and without any intention of performing it. The tenth and last ground of contest is designed to set forth facts constituting undue influence on the part of said wife. It is therein alleged that for 10 years immediately prior to his death John Luckenbach was afflicted with disease of both body and mind and was under the domination and control of said Lena Luckenbach, a woman of strong and domineering mind; that said Lena Luckenbach, with the intention of procuring said John Luckenbach to execute the said purported will, and taking undue and unfair advantage of his necessities, fears, and distress of mind and body, many times before the execution of the will falsely stated to John Luckenbach, and caused him to believe, that his brothers and sisters, particularly the petitioners, already had their present and future financial needs well provided for and would not and could not preserve or take care of any property which they might receive from his estate at his death, and had no affection for him, and were anxiously awaiting his death to obtain his property and squander the same; and, further, threatened him and caused him to believe that if he did not will and devise all of his property to her, the said Lena Luckenbach, she would cause him great trouble in his lifetime and make life miserable for him, and by means of such statements, threats and demands influenced him to execute said will.

In her answer Lena Luckenbach specifically denied all allegations as to the invalidity of the will, and also alleged that the property was the community property of decedent and herself, and that she, as surviving wife, would be entitled to the whole thereof if decedent died intestate.

Decedent died on January 9, 1926, a resident of the county of Los Angeles, leaving an estate appraised at $663,852.40. His will here attacked was dated December 18, 1924. He was about 58 years of age at the time of his death and left surviving him his said wife, Lena Luckenbach, whom he had married in Green Bay, Wis., in 1890. No children were born to the couple, and decedent's parents had predeceased him by many years. In addition to his wife, he left surviving him three brothers and four sisters, residing in the states of Illinois and Wisconsin. Two of said brothers, Anton H. and Simon Luckenbach, and two of the sisters, Mary O'Brien and Katherine Piraux are the contestants herein; Katherine Piraux having joined in the contest by petition in intervention. Two other sisters and another brother have not joined in the contest.

[1] The evidence adduced to establish the testator's unsoundness of mind and mental incompetency falls far short of the requirements of the law. In that connection contestants rely upon an alleged unnaturalness in the disposition of decedent's property and upon statements made in a certain legacy in his will, which, they contend, indicate that decedent was affected with an insane delusion regarding them, of which insane delusion said will is a product.

We find nothing unnatural in the disposition made by the testator of his property. In the event that his wife survived him, he bequeathed his entire estate to her. While the other provisions of the will did not take effect, since the testator's wife survived him, nevertheless a brief review of said provisions is important in the consideration of the testator's mental condition. He first directed that his entire estate be converted into money. After providing that $50,000 should be set aside for the erection of a mausoleum for the bodies of himself and his wife, and providing for the upkeep of said mausoleum, the testator created a trust fund of $10,000, the income from which was to be disbursed by the trustee named for the education of a son of the testator's secretary until he attained the age of 21, said income then to be paid to him until he attained the age of 30, when the trust was to terminate. A similar trust fund was created for another son of the testator's secretary, and a trust of $5,000 for Martha Angus Carroll, whose relation to the testator does not appear. He then bequeathed $20,000 to a trustee to pay the income to a daughter of his wife's sister for life. Next follows the provision upon which contestants lay great stress and insist that it indicates that the testator was the victim of an insane delusion with reference to them. In said provision he bequeathed $10,000 to a trustee to pay the income to Edith Luckenbach, daughter of his brother Anton, "*for her education*, the disbursement thereof to be directed by my said trustee, *and after she has attained the age of eighteen years*, to pay said net income unto her during her natural life." (Italics supplied.) At the time of the execution of the will, Edith Luckenbach was 35 years of age. She had pursued a student's life and had taken degrees at Harvard and Columbia Colleges, which facts, it is claimed, should have been known to the decedent, as she had visited him upon one occasion at his home during the month of August, 1924, a few months before the execution of the will. The said provision will be more fully considered hereafter.

A legacy of $25,000 was bequeathed to a former business associate and $50,000 to his secretary, whose sons he remembered in previous paragraphs of the will. Said legacies were made "because of the faithfulness and loyalty of the legatees." To the Grand Lodge of Free and Accepted Masons of the State of California was bequeathed $100,000, to be expended for the care of orphans or the aged in Masonic homes; to the Benevolent and Protective Order of Elks, Lodge 99, $100,000, to be used for the charity work of the order; and to the Christ Episcopal Church of Green Bay, Wis., $2,000.

The residue of the estate, which was considerable in magnitude, was bequeathed to the Pacific Southwest Trust & Savings Bank, in trust to pay the interest semiannually in equal shares to William Luckenbach, a brother of decedent, but not a contestant herein; Anna Luckenbach, a sister of decedent, but not a contestant; Katherine Piraux, a sister and a contestant; Josephine Luckenbach, a sister of decedent who predeceased him; and four sisters of decedent's wife. Not more than $200 a month was to be paid to any of said persons. Any surplus above the sum of $200 per month was to be paid to the McKinley Industrial Home Society of Los Angeles, and at the termination of the trust upon the death of all beneficiaries, the said residue was to go to said society, for the benefit of the McKinley Home for Boys. The will also contained a provision for the forfeiture of the legacy of any person who should institute any contest thereof.

On its face said will furnishes no indication of being the product of a disordered mind, but, rather, would appear to be the well thought out and carefully considered scheme of a highly rational person, conscious of a duty to society to assist in the maintenance of its weaker members, desirous of showing his appreciation of loyalty and devotion given him by a business associate and faithful secretary, and mindful of the welfare of members of his own and his wife's family. The fact that he placed the claims of his wife above those of the other legatees, by limiting the above provisions to take effect only in the event that his wife did not survive him, does not render the will unnatural, especially in view of the circumstances of the parties and the relationship between decedent and his brothers and sisters, as indicated by the evidence offered on behalf of contestants.

Decedent started out in the jewelry business in Green Bay, Wis., some time after 1887, with a small capital of $2,000, partially borrowed from his mother and sisters and partially from other sources. In 1890 he married respondent, whom he had known from childhood. It appears that she assisted her husband in conducting his business. The business proved prosperous and several years later was sold. They left for Los Angeles, Cal., with approximately $30,000, and there entered into the jewelry business from which decedent amassed his fortune. The other members of the family all remained in either Wisconsin or Illinois. There is little evidence in the record as to the relationship between John Luckenbach and his brothers and sisters between the time he left for California and 1911. After that date it appears that he visited members of his family whenever his business required his presence in the Middle West and when going on or returning from trips to Europe with his wife. He saw them in 1911, 1913, 1916, and 1917. Decedent's relation with his brothers and sisters was friendly and cordial, but there is no evidence in the record tending to show that their affections were exceptionally deep-seated or any greater than that which exists between brothers and sisters who have been long separated and meet infrequently. None of contestants saw decedent after 1917, which was seven years before the execution of the will and nine years before his death, and no regular correspondence appears to have been carried on with any of the brothers and sisters. Simon Luckenbach testified that he had not seen decedent nor heard from him through the mails since 1911. Anton last wrote in 1919, asking him if he would make him a loan of $5,000, but received no reply.

The state of health and financial condition of certain of the brothers and sisters is relied upon as rendering unnatural the disposition of the testator's property to his wife to the exclusion of said brothers and sisters. The youngest was 54 and the oldest over 70 years of age, and all, with the possible exception of Anton, seem to have possessed very limited means. Mary O'Brien, one of the contestants, testified to a visit with decedent in Chicago in 1917, at which date she was working to support herself, in the course of which she and decedent discussed the fact that she was afflicted with rheumatism, and decedent told her that when she was no longer able to work he would take care of her. In 1919 she married, and at the date of the execution of the will she was being supported by her husband. Contestant Simon, a shoe salesman, was a sufferer from stomach trouble when decedent saw him in 1911. Decedent suggested that if he would go up in Masonry he would assist Simon financially. Contestant Katherine Piraux had been supported by her adult sons for many years, as had Margaret Woelz, one of the sisters who did not join in the contest.

For many years before his death, decedent had regularly sent monthly remittances to his sisters Anna and Josephine and to his oldest brother, William. He also paid Josephine's funeral expenses. At the date of his death and for some time prior thereto, he was contributing $50 per month to Anna and to William, and upon several occasions during his visits he had given Mary O'Brien, then Mary Luckenbach, gifts of money. Other contributions to the support of said brothers and sisters seem neither to have been received nor expected. Anna and William, who were the chief recipients of decedent's bounty during the lifetime, have not joined in the contest. The facts show that distance and the lapse of time had gradually weakened any intimacy or close association existing between the decedent and the members of his family. We cannot declare a testamentary disposition unnatural because the testator leaves his entire estate to his wife, who has been his companion for 36 years, to the exclusion of brothers and sisters whom he had not seen for many years preceding his death and with whom he had carried on no regular correspondence.

[2, 3] Although there is absolutely no evidence in support of the allegations of contestants' petition that Mrs. Luckenbach promised to provide for her husband's brothers and sisters, the testator may well have acted with the expectation that she would do so. It appears in evidence that the monthly checks to Anna, William, and Josephine were frequently signed by Mrs. Luckenbach, and that if letters accompanied the checks they were written by her. It further appears from the testimony of contestants that Mrs. Luckenbach continued to make the monthly payments after the death of her husband until the will contest was instituted. Contestants offered as evidence directed to the allegation of undue influence an incident related by contestant Mary O'Brien, to the effect that in a stealthy manner decedent handed her a $20 bill as he was leaving Chicago in 1911, at the depot, when Mrs. Luckenbach was ahead of them and in a position where she could not see the bill passed. Said incident is practically of no value in view of evidence as to Mrs. Luckenbach having joined her husband in extending aid to his relatives, and the further testimony of Mary O'Brien herself that Mrs. Luckenbach was aware of the gifts made by her husband and had mailed money to Mary O'Brien before the marriage of said Mary O'Brien. Nor are the remarks of the testator to said Mary O'Brien, in 1917, as to his intention to provide for her when she was no longer able to work, nor the further statement, made in 1917, testified to by Anton Luckenbach, that he would provide for his brothers and sisters and not work for the "other fellow," when given the fullest effect possible, sufficient under any analysis of the facts, considered either alone or together with the other circumstances relied upon, to sustain a finding of fraud or undue influence. A few isolated and detached, trivial and inconsequential incidents, happening at a time remotely distant from the date of the execution of the will, are to be given little weight in considering the mental status of the person under investigation or the further testamentary essential, freedom of action.

[4, 5] There remains only to consider the provision of the testator's will in regard to Edith Luckenbach. As stated above, said provision bequeathed $10,000 to a trustee to pay the income to Edith Luckenbach *"for her education, the disbursement thereof to be directed by my said trustee, and after she has attained the age of eighteen years,* to pay said net income to her during her natural life." (Italics supplied.) At the time of the execution of the will Edith Luckenbach was 35 years of age and had finished her education in the ordinary sense of the term. She had visited the decedent a few months before the will was drawn. Contestants argue that the inclusion of this provision indicates that the testator must have believed said Edith to be at least 17 years younger than she actually was, and that such a belief reveals unsoundness of mind incompatible with testamentary capacity. They further argue that it is reasonable to infer and must be inferred, in considering the propriety of the nonsuit, that believing Edith Luckenbach to be younger than she actually was, the testator insanely believed all his relatives to be younger than their years and possessing the added strength and capacity to support themselves which youth would be likely to give them. We are unable to accede to the view that such extravagant inferences have any place in the determination of legal rights, even in considering the propriety of a nonsuit. The said provision is contained in a portion of the testator's will in which he creates trusts for three other persons, the income to be paid for their education until they shall attain the age of either 18 or 21 years. The phraseology of the provision for Edith

Luckenbach is practically identical with that of the other trust provisions. The will is a lengthy document, and apparently was drawn by an attorney. The only reasonable inference which may be drawn in view of all the circumstances, even in considering whether a nonsuit should have been granted, is that the inappropriate language, which, however, would not affect the validity of the provision or the rights of Edith Luckenbach thereunder, inadvertently crept into the instrument, and either was not noticed by the testator, or was not deemed by him of sufficient importance to be changed. Nor does the testimony of the witness Palmer affect our conclusion.

The testator was only about 58 years of age at the date of his death. Absolutely no evidence was introduced to support the allegations of the petition that decedent, for 10 years immediately preceding his death, was afflicted with disease of mind and body. There is a reference to an eczema on his hands with which he was afflicted at times, but otherwise not a shred of evidence that at the time of his death, or at any other time, he suffered with any disease whatsoever. Absolutely no evidence as to improper execution of the will or proof relating to the charge that it was forged was attempted to be introduced. Nor was any evidence introduced in support of the allegations of the petition charging Mrs. Luckenbach with undue influence in stating to her husband that his relatives were anxiously awaiting his death to obtain and squander his property and making other false statements. Rather the proof would indicate that she was well disposed towards said relatives.

[6-8] The evidence relied upon is wholly insufficient to support an adjudication pronouncing said will invalid. As this court said in Estate of Bryson, 191 Cal. 521, 217 P. 525:

> "Adopting, as we must, the rules of construction that apply to cases of nonsuit, by indulging every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence, and giving to contestant the benefit of every piece of evidence which tends to sustain his averments, as fully stated in Berger v. Lane, 190 Cal. 443 [213 P. 45], and cases cited, it is clear that he has completely failed to make out a prima facie case. The rule of law is that fraud must be proved and cannot be presumed, and its application to the facts of this case is sufficient alone to defeat contestant's case. The inferences and presumptions spoken of above must fall within the realm of rationality. There is nothing in contestant's case which amounts to more than mere conjecture, surmise, or suspicion. To justify the submission of any question of fact to a court or jury there must be proof of a *substantial character* that the fact is as alleged."

If the court below had refused to grant a nonsuit and the will had been declared invalid, on the basis of the evidence here offered, we would be required to reverse the judgment on appeal, as being against the law. This being the case, the judgment of nonsuit must be affirmed. Estate of Unger, 188 Cal. 714, 206 P. 1003; Estate of Wall, 187 Cal. 50, 200 P. 929; Estate of Chevallier, 159 Cal. 161, 168, 113 P. 130; Estate of Morey, 147 Cal. 495, 502, 82 P. 57.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; LANGDON, J.; CURTIS, J.

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205 Cal. 354

C. GANAHL LUMBER CO. v. THOMPSON et al. (L. A. 9055.)

Supreme Court of California. Oct. 1, 1928.

1. Mechanics' liens ⚷132(1)—Where owners did not file notice of completion of building within 10 days, claimant filing claim 97 days after actual completion had no valid lien (Code Civ. Proc. § 1187).

Where owners failed to file notice of completion of building within 10 days thereafter, claimant, who furnished materials, filing claim of lien 97 days after actual completion, had no valid lien under Code Civ. Proc. § 1187, since claim of lien should have been filed within 90 days.

2. Mechanics' liens ⚷132(7)—Owner's notice of completion tardily filed is not "equivalent" of completion, so as to afford lien claimant 30 days thereafter in which to file claim (Code Civ. Proc. § 1187).

Owner's notice of completion of building tardily filed cannot be said to be "equivalent" of completion within meaning of Code Civ. Proc. § 1187, so as to afford lien claimant 30 days thereafter within which to file his claim of lien.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Equivalent.]

3. Mechanics' liens ⚷132(7)—Owner's notice of completion, to be "equivalent" of completion authorizing filing of lien claim within 30 days, must be filed within 10 days after completion (Code Civ. Proc. § 1187).

Notice of completion of building filed by owner, to be "equivalent" of completion within meaning of Code Civ. Proc. § 1187, requiring claimant to file claim of lien within 30 days thereafter, must be filed within 10 days after actual completion.

4. Mechanics' liens ⚷313—Inadvertent insertion of building owner's name in body of contractor's bond did not relieve surety of liability thereunder (Code Civ. Proc. § 1183).

Inadvertent insertion of building owner's name in body of building contractor's bond, given under Code Civ. Proc. § 1183, did not serve to relieve surety of liability thereunder.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

5. Principal and surety 🔑59—Contracts of suretyship must be so interpreted as to give effect to parties' intention as it existed at time of contract, and technical rules of construction give way to intention (Civ. Code, §§ 1636, 2837).

Under Civ. Code, § 2837, relating to interpretation of contracts of suretyship, general rule is that contracts of suretyship must be so interpreted as to give effect to intention of parties as it existed at time of contracting, so that technical rules of construction must give way when intention of parties is ascertainable and lawful, under section 1636.

6. Bonds 🔑48—In construing bond to carry out intention of parties, court may transpose or reject insensible words.

In construing a bond so as to carry out intention of parties, court may transpose or reject insensible words.

7. Mechanics' liens 🔑313—That surety's name did not appear in recital of building contractor's bond did not affect his liability thereunder (Code Civ. Proc. § 1183).

That surety's name did not appear in recitals of building contractor's bond, given under Code Civ. Proc. § 1183, did not affect its validity or his liability thereunder, where bond was otherwise properly executed and signed by him and bond and circumstances clearly showed an intention to charge him.

8. Mechanics' liens 🔑313—Failure of building contractor to sign bond as principal did not affect liability of surety thereon (Code Civ. Proc. § 1183).

Failure of building contractor to sign bond, given under Code Civ. Proc. § 1183, as principal, did not affect liability of surety thereon.

Shenk, Curtis, and Preston, JJ., dissenting in part.

In Bank.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action to foreclose mechanic's lien by the C. Ganahl Lumber Company against W. Thompson and another, copartners doing business as Thompson & Stowell, and others. From adverse portions of the judgment, plaintiff appeals. Affirmed in part, and reversed in part, with directions.

Superseding opinion in 265 P. 511.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for appellant.

Walter M. Campbell, of Los Angeles, for respondents Milton M. Longshore and Faith M. Longshore.

Richard Kittrelle, of Los Angeles, for respondent W. G. McWhinnie.

WASTE, C. J. This action was instituted to foreclose a materialman's lien and to recover on a statutory bond given by the contractors. The appeal is taken on the judgment roll alone. It appears from the findings that the defendants Longshore, as owners, entered into a contract with the defendants Thompson & Stowell, as contractors, for the erection of a building on the owners' lot in the city of Redondo Beach. Defendant McWhinnie, as surety, purported to execute a bond to insure the performance of the contract as provided for in section 1183 of the Code of Civil Procedure. The building was completed September 21, 1923, at which time the owners moved in, took possession, and occupied the premises. The occupancy was accompanied by a cessation of labor. Notice of completion was not filed within 10 days after completion, as required by section 1187 of the Code of Civil Procedure, but was filed by the owners on November 30, more than 2 months thereafter. This notice specified November 15 as the date of completion. On December 27 the appellant filed its claim of lien for materials furnished and used in the construction of the building and subsequently brought this action to foreclose.

The trial court entered judgment for plaintiff against the contractors for the amount due for the materials furnished, together with interest and costs, but denied it the right to foreclose its lien. It also denied plaintiff judgment against the surety on the contractors' bond. From the adverse portions of the judgment, plaintiff has appealed.

[1] The trial court found, and the appellant concedes, that the building was completed and occupied by the owners on September 21, 1923. As the owners failed to file their notice of completion within 10 days thereafter, it was incumbent upon all persons to file their claims of lien within 90 days after actual completion of the building. Code Civ. Proc. § 1187; Schwartz & Gottlieb v. Marcuse, 175 Cal. 401, 415, 165 P. 1015; Bird v. American Surety Co., 175 Cal. 625, 631, 166 P. 1009; Robison v. Mitchel, 159 Cal. 581, 585, 114 P. 984; Simons Brick Co. v. Hetzel, 72 Cal. App. 1, 9, 236 P. 357; Emigh-Winchell Hdw. Co. v. Pylman, 38 Cal. App. 508, 509, 176 P. 722. This the appellant failed to do, for it deferred such action until December 27, 1923, 97 days after actual completion. It has, therefore, no valid lien.

[2, 3] Even if it be assumed, without deciding, that the owners by reason of their tardy filing of the notice of completion are estopped to deny that the building was completed on November 15, 1923, as recited in such tardy notice of completion, it would avail the appellant nothing, for its claim of lien would not, even then, have been filed within 30 days after such completion as required by section 1187. A notice of completion, tardily filed, cannot, as contended by appellant, be said to be the "equivalent" of completion within the meaning of section 1187, so as to afford a lien claimant 30 days thereafter within which to file his claim of lien. The Code section, both expressly and by necessary implication, re-

quires that such notice of completion, to be the "equivalent" of completion, must be filed within 10 days after completion. The language of the section may not reasonably be construed to include, as the "equivalent" of a completion, a notice thereof filed at any time thereafter. In other words, such notice to be the equivalent of completion must be filed in accordance with the mandatory provision of the Code section, viz., within 10 days after actual completion. Any other construction of this provision of the section would be strained and unwarranted. In the language of Buell & Co. v. Brown, 131 Cal. 158, 162, 63 P. 167, 168:

> "We are not required to give a strained construction to the statute in order to enable plaintiff to collect its debt from parties who never agreed to pay it and who never requested the delivery of the materials."

The case at bar is distinguishable from Hubbard v. Lee, 10 Cal. App. 477, 482 (6 Cal. App. 602, 92 P. 744), 102 P. 528, claimed by the appellant to be "directly in point." In the cited case the owner had neglected not only to file for record the notice of completion as required by the statute, but had repeatedly stated and represented to the materialman and lienor that the buildings were not completed, and that he had not accepted them and would not accept them until certain other work was done. The lienor *relying on these representations* delayed the filing of his lien, and the owner was thereafter held to be estopped by reason of such representations to deny the timeliness of the filing of the lien.

[4-8] The trial court held that plaintiff was not entitled to judgment against defendant McWhinnie as surety on the contractors' bond, "for the reason that said instrument is not a good, sufficient, and valid bond." An examination of the bond appearing in the findings discloses that it was not properly drawn, in that the name of one of the owners of the property appears in the body of the instrument as "surety," whereas the signature of defendant McWhinnie appears at the end thereof where it is usual and customary for a surety or obligor to sign his name. In our opinion the apparent inadvertent insertion of the owner's name in the body of the bond does not serve to relieve the defendant McWhinnie of liability thereunder. Section 2837 of the Civil Code provides that—

> "In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts."

The general rule is that contracts must be so interpreted as to give effect to the intention of the parties as it existed at the time of contracting. It follows, therefore, that technical rules of construction must give way when the intention of the parties is ascertainable and lawful. Civ. Code, § 1636; 6 Cal. Jur. 252, § 163. Without question it was the intention of all the parties concerned herein, including the defendant McWhinnie, that he should be liable in the event the conditions specified in the bond as creating liability should arise. In construing a bond so as to carry out the intention of the parties, a court may transpose or reject insensible words. 4 Cal. Jur. 352, § 2, and authorities there cited. Inasmuch as the defendant McWhinnie signed his name at the end of the bond as obligor, the improper insertion of the owner's name in the body of the instrument should be disregarded. It is no defense that defendant McWhinnie's name does not appear in the recitals of the bond, for the fact that an obligor's name is not recited in the body of the bond, or is incorrectly recited therein, does not affect its validity or his liability thereunder if the bond is otherwise properly executed and signed by him and if the bond and circumstances clearly show an intention to charge him. 4 R. C. L. 51, § 8. Nor does the failure of the contractors to sign the bond as principals affect the liability of the surety thereon. Kurtz v. Forquer, 94 Cal. 91, 93-94, 29 P. 413.

For the foregoing reasons the judgment is affirmed, except in so far as it purports to deny relief to the appellant as against the defendant McWhinnie. In this latter respect the judgment is reversed, with directions to the court below to enter judgment for the plaintiff as against the defendant McWhinnie; the appellant to recover costs against the respondent McWhinnie, and respondents Longshore to recover costs against the appellant.

We concur: SEAWELL, J.; LANGDON, J.; RICHARDS, J.

SHENK, J. (concurring and dissenting). I concur in the conclusion of the foregoing opinion concerning the sufficiency of the bond as against the defendant McWhinnie, but I dissent from that portion of the opinion which holds that the plaintiff's claim of lien was not filed within time. It is undisputed that the claim of lien was filed within 30 days after the filing of the notice of completion by the owners. But it is held that, because the owners did not file the notice of completion within 10 days after the date of completion, as such date is now asserted by them (but contrary to the completion date inserted in the notice of completion), therefore the filing of said notice of completion could not be deemed an equivalent of completion as provided in section 1187 of the Code of Civil Procedure. Ordinarily no one is in as good a position to know when a building is completed as the owner. At least he is in a better position to know than lien claimants. Being in that position, he is bound so to direct his course of action as not to mislead lien claimants with reference to the time when claims of liens must be filed. If the owner occupies the premises and there is a cessation of labor, as in the present case, the lien claimants are put upon notice that they must file their liens within 90 days, if no notice of completion is filed within that time. But if, as here, within said 90 days, the owner files of record a verified notice of completion, lien claimants should be entitled to rely on the record of such filing as indicating the statutory equivalent of completion, and the owner should be estopped to deny the verity and effect of his affirmative step in so filing his notice of completion. Otherwise his action might, and in this case undoubtedly did, operate to the prejudice of the lien claimant. In other words, the owner should not be permitted to rely on his own disregard of the statute in failing to file the notice of completion within the statutory time when such disregard of the statute has resulted in misleading the lien claimant. That an estoppel will lie against an owner when he makes inconsistent claims as to the date of completion has been decided in the case of Hubbard v. Lee, 10 Cal. App. 477, 102 P. 528, relied upon by the plaintiff. The oral representations of the owner in that case were of no greater force, in my opinion, than the solemn act of the owners in this case in verifying and recording their notice of completion. As a practical matter the lien claimant should be permitted to rely on the filing of the notice of completion as the thing which starts running the 30-day period, if the notice of completion is filed within the 90-day period. He may gain his information from the records of the county recorder either by the publication of filings of notices of completion in the various trade and other journals, or by inspecting the records himself. See Hughes Mfg., etc., Co. v. Hathaway, 174 Cal. 44, 161 P. 1159. If no notice of completion is filed within the 90-day period, he must of course place his claim of lien on record within that period in order to protect his rights, and no question of estoppel would arise by reason of the failure of the owner to file a notice of completion within that time.

We concur: CURTIS, J.; PRESTON, J.

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94 Cal. App. 222

PEOPLE v. SULLIVAN et al. (Cr. 1054.)

District Court of Appeal, Third District, California. Oct. 1, 1928.

Criminal law ⟹1182—Defendants having neither filed briefs nor appeared when case was called, conviction will be affirmed (Pen. Code, § 1253).

Where defendants, convicted of robbery first degree, filed no brief on appeal, and no appearance was made for them when case was called for hearing, though transcript on appeal was filed, judgment of conviction and order denying motion for new trial will be affirmed, under Pen. Code, § 1253.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

James Sullivan and another were convicted of robbery, first degree, and they appeal. Affirmed.

George E. Foote and Daniel Dennis, both of Sacramento, for appellants.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendants were convicted in the superior court of Sacramento county of a felony, to wit, the crime of robbery of the first degree. The transcript on appeal was filed in this court September 5, 1928. No brief has been filed in behalf of appellants. The cause was regularly placed on the calendar for oral argument on October 1, 1928. No appearance was made for appellants at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code, the judgments and the order are affirmed.

In re CATE. (Civ. 4702.)★

District Court of Appeal, Second District, Division 2. California. Sept. 26, 1928.

Rehearing Denied Oct. 26, 1928. Hearing Granted by Supreme Court Nov. 22, 1928.

1. Attorney and client ⟹61—Application for reinstatement is but an application for admission or readmission to the bar.

An application for reinstatement as attorney at law constitutes an application for admission to the bar or for readmission.

2. Evidence ⟹22(1)—Court takes judicial notice that state bar has effected organization and held first meeting (State Bar Act, §§ 7, 47).

Court in view of the provisions of the State Bar Act (St. 1927, p. 38; Deering's Consol. Supp. Gen. Laws, Act 591) §§ 7, 47, takes judicial notice of the fact that the state bar has effected organization, and that it has held its first meeting.

3. Statutes ⟹205—All provisions of law must be considered to ascertain import and effect of certain section thereof, if constituting aid to ascertainment of such meaning (State Bar Act, § 26).

In order to ascertain the import and effect of language of State Bar Act (St. 1927, p. 38; Deering's Consol. Supp. Gen. Laws, Act 591) § 26, to the effect that the board of governors shall have power to pass on all petitions for reinstatement, all other provisions of the act must receive consideration if such provisions constitute an aid in ascertaining meaning of such provision.

★For opinion on rehearing, see 271 P. 356. Hearing granted by Supreme Court.

4. Attorney and client 🔑61—Power conferred on board of governors to pass on petitions for "reinstatements" must be exercised in accordance with provision governing "admissions" (State Bar Act, §§ 24, 26).

Power conferred on board of governors created pursuant to the State Bar Act (St. 1927, p. 38; Deering's Consol. Supp. Gen. Laws, Act 591), to pass on all petitions for reinstatement to practice law by virtue of section 26, must be exercised in the mode and with the limitation prescribed by section 24, relative to admission to practice law within state; the word "admissions" occurring in section 24 including the word "reinstatements."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Admission.]

5. Attorney and client 🔑61—Disbarred attorneys after reinstatement become members of state bar and entitled to practice law (State Bar Act, §§ 3, 7, 24, 47).

Disbarred attorneys after reinstatement become members of the state bar and entitled to practice law, since by virtue of reinstatement they are brought within terms of the State Bar Act (St. 1927, p. 38; Deering's Consol. Supp. Gen. Laws, Act 591) § 24, thus satisfying the provisions of sections 3, 7, 47, thereof.

6. Attorney and client 🔑61—Court of Appeal, though deprived of jurisdiction of proceedings for reinstatement by legislative enactment, nevertheless has inherent powers in such matters (State Bar Act).

Though the Supreme Court, according to the provisions of the State Bar Act (St. 1927, p. 38; Deering's Consol. Supp. Gen. Laws, Act 591), has final jurisdiction over proceedings for reinstatement and Court of Appeal under the strict terms thereof is deprived of all jurisdiction in such matters, nevertheless it has inherent power in such matters without regard to legislative enactment.

7. Constitutional law 🔑52, 79—Attorneys are part of judicial branch and not subject to control of executive or Legislature.

Attorneys at law, being officers of courts, are a part of the judicial branch of government, and neither the executive or Legislature, short of express constitutional authorization, can exercise control over them, so far as their existence or conduct relate particularly to their status or duty as attorneys.

8. Attorney and client 🔑61—Applicant for reinstatement will be committed to procedure of law providing for hearing by board of governors of state bar (State Bar Act).

Though Court of Appeal possesses inherent power to reinstate an attorney at law, applicant will nevertheless be committed to procedure provided by the State Bar Act (St. 1927, p. 38; Deering's Consol. Supp. Gen. Laws, Act 591), providing for hearing of such application by the board of governors of the state bar.

Application by Clyde E. Cate for reinstatement as an attorney at law. Petition denied.

See, also, 197 Cal. 796, 241 P. 95.

Alfred E. Cate, of Los Angeles, for petitioner.

Hewitt, McCormick & Crump, of Los Angeles, for respondent Los Angeles Bar Association.

WORKS, P. J. On July 29, 1927, there went into effect an epoch-making enactment of the Legislature, known as the State Bar Act (Stats. 1927, p. 38, Deering's Consol. Suppl. Gen. Laws, p. 861, Act 591). Long before that time the petitioner in the present proceeding, who had been disbarred in 1918, filed in this court his application for reinstatement as an attorney at law, and the proceeding inaugurated by the application is still pending. We are now asked to order his reinstatement; all evidence having been taken which was deemed necessary pursuant to the application, and a referee in whom was reposed the duty of taking the evidence having presented his findings thereon. The question arises whether we have jurisdiction, considering the provisions of the State Bar Act, to make the order which the proceeding contemplates. The new enactment provides (section 9) for a board of governors of the state bar, to which is confined (section 20) the duty of governing the bar and of discharging the powers and duties by the act conferred. Along with the power to disbar, suspend, or reprove members of the legal profession, the governors, as the act provides, "shall have power to pass upon all petitions for reinstatement" after disbarment (section 26). This power to pass upon petitions for reinstatement appears, under the letter of the section, to be all-inclusive, and, unless there is somewhere to be found a state of the law which permits us to continue in the exercise of a jurisdiction once attached, admitting for the present that the Legislature has plenary power over the matters covered by the State Bar Act, our former jurisdiction over the present proceeding is ousted, and an exclusive jurisdiction to dispose of petitioner's desire for a reinstatement is vested in the state bar.

Section 26 of the act contains the following language:

> "Nothing in this act contained shall be construed as limiting or altering the powers of the courts of this state to disbar or discipline members of the bar as this power at present exists."

There is in the act, however, no express and direct limitation placed upon the power of the board of governors, conferred by section 26, to "pass upon all" petitions for reinstatement. The fact that the Legislature imposed no such limitation, while it expressly assumed to leave with the courts their ancient jurisdiction to "disbar or discipline" delinquent members of the bar, is somewhat persuasive toward the view that the lawmaking body intended that petitions for rein-

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statement should be under the exclusive jurisdiction of the governors.

[1, 2] Other parts of the act which seem to induce to the same conclusion may profitably be examined. Section 3 provides:

> "The first members of the state bar shall be all persons now entitled to practice law in this state."

Section 7 reads:

> "After the organization of the state bar, as herein provided, all persons who are admitted to practice in accordance with the provisions of this act shall become by that fact members of the state bar."

These are the only provisions of the act which prescribe the qualifications for membership in the state bar, and it seems obvious that no one can be or become a member who is not qualified as specified in the two sections. The language governing the admission "to practice in accordance with the provisions of this act," to employ a part of the verbiage of section 7, is found in section 24. It is not necessary here to quote the latter section, nor to attempt to state its provisions. It is enough to say for the present that the plan formulated in the language of the section includes, merely of itself and in its letter, no such method of admission as we are now asked to apply in the case of petitioner here, for it is undoubtedly the law that an application for reinstatement is but an application for admission to the bar, or for "readmission" as the Supreme Court has construed the word "reinstatement." In re Stevens, 197 Cal. 408, 241 P. 88. Section 47 of the State Bar Act reads:

> "No person shall practice law in this state subsequent to the first meeting of the state bar unless he shall be an active member thereof as hereinbefore defined."

This language imports, if we take merely the letter of the act, that, if we should readmit petitioner to the bar, he could not practice law. Our order to that purpose would therefore be futile. In view of the provisions of sections 7 and 47 of the act, we take judicial notice of the fact that the state bar has effected its "organization" and that it has held its "first meeting."

If we look only to the provisions of the State Bar Act expressly providing for reinstatements, it seems obvious that our jurisdiction over the present application has been terminated and that we have no power to grant the petition which petitioner has lodged with us. There are many other and very important considerations, however, which require a minute examination before we can conclude the proceeding.

We have already observed that section 24 of the State Bar Act provides a complete scheme for "admissions" to the bar, and the quoted word is employed throughout the section; that is, so far as the mere letter is concerned, the section has no application to "reinstatements." Did the Legislature, despite the rule that reinstatements are but readmissions to the bar, intend by section 24 to place reinstatements and admissions in different classes? If it did, strange consequences will follow. Under such a condition the language of section 26 of the act, conferring authority upon the board of governors of the state bar to "pass upon all petitions for reinstatement" would place the board under the same disability which is above said to confront the courts if they should ever exercise jurisdiction over an application for reinstatement and should grant it; that is, the letter of the statute would prevent the reinstated person from either becoming a member of the state bar or practicing law.

Counsel for respondent Los Angeles Bar Association, so it appears clearly from their brief, take a position in the present proceeding from which necessarily flow the dire consequences just mentioned. They head a division of their brief thus:

> "From and after the going into effect of the State Bar Act the board of governors have had exclusive power to pass upon all petitions for reinstatement of disbarred attorneys."

They then quote the portion of section 26 of the State Bar Act to the effect that the governors shall have power to "pass upon all" petitions for reinstatement. It is also said in the brief that "the power heretofore exercised by the courts" over petitions for reinstatement "has been taken away from them and vested in the board of governors; subject, however, to the possible qualification that the Legislature could not deprive the courts of authority to refuse to admit unworthy applicants." The claim of respondent is said toward the close of the brief to be "that the Legislature has deprived the courts of authority to reinstate disbarred attorneys and vested the authority to pass on applications for reinstatement in the board of governors." If we take alone the language of section 26 concerning the power "to pass upon" all petitions for reinstatement, and disregard all other portions of the State Bar Act, and, as well, lay aside all question as to the inherent power of courts over admissions and reinstatements, the attitude of counsel seems justified, for the term "pass upon," when standing alone, probably means "to decide, to determine, to dispose of." After a somewhat cursory examination, we have been unable to locate judicial definitions of the term, and we have thought it unnecessary to make an intensive search, for the reason that the question now under discussion may receive a more thorough and exhaustive consideration if we proceed upon the assumption that it is the equivalent of "to decide, to determine, to dispose of." Another reason for the assumption is that counsel evidently believe that the expression is so to be understood. It seems proper, in considering their views, to proceed from the basis upon which those views are founded.

[3] It is obvious, under well-settled rules of statutory construction, that all the provisions of the State Bar Act must receive consideration in an endeavor to ascertain the import and effect of the language of section 26 to the effect that "the board shall have power to pass upon all petitions for reinstatement," if, indeed, other provisions of the act are to be found which aid to an ascertainment of the meaning of that particular part of section 26.

We have already taken the tentative view that the provision now under scrutiny provides for the reinstatement or readmission of disbarred attorneys after a method which does not admit of their becoming members of the state bar or of their practicing law. That view now requires a circumspect exploration, and it will best proceed from a quotation of section 24 of the State Bar Act, which reads:

> "With the approval of the Supreme Court, and subject to the provisions of this act, the board shall have power to fix and determine the qualifications for admission to practice law in this state, and to constitute and appoint a committee of not more than seven members with power to examine applicants and recommend to the Supreme Court for admission to practice law those who fulfill the requirements. With the approval of the Supreme Court the board shall have power to fix and collect fees to be paid by applicants for admission to practice, which fees shall be paid into the treasury of the state bar; provided, however, that until otherwise fixed and determined, the requirements for admission to practice under this act shall be the same as those now prescribed by the Supreme Court for admission to practice in this state and shall be enforced as the same now are enforced through the state board of bar examiners."

[4] We have observed above that the only members of the state bar are to be those who at the time of the passage of the State Bar Act were "entitled to practice law" (section 3), and those who, after the organization of the state bar, "are admitted to practice in accordance with the provisions of this act" (section 7). Now, it will be noted that the language of section 26, to the effect that the board of governors "shall have power to pass upon all petitions for reinstatement," is not a provision regulating admissions to the bar, and in making this assertion we are ascribing no weight whatever to the fact that section 7 deals altogether with admissions, while the language quoted from section 26 refers to reinstatements; that is, we attach no importance to the mere difference between the words employed in the two places. What we do mean is this: The language of section 26 with respect to reinstatements clothes the governors with a mere power, without prescribing in the slightest degree the manner of its exercise. Section 24, on the other hand, provides a complete scheme for the regulation of procedure in the ordering of "admissions," as a perusal of it will amply demonstrate. It seems obvious to us, for reasons which we shall now proceed to set down in numbered paragraphs, that the power conferred upon the governors to "pass upon all petitions for reinstatement" by section 26 must be exercised in the mode and with the limitations prescribed by section 24.

1. Reinstatements of disbarred attorneys have always been regarded as in the nature of admissions, as already pointed out. Those who have been disbarred are out of the profession and seek again to enter it. It is quite logical, therefore, to believe that the procedure regulating proceedings for reinstatement should be similar to that provided for the admission of those who, never having been lawyers or having been admitted in other states, seek an entrance into the California bar for the first time. In truth, we shall endeavor to demonstrate below that, as compared with original petitions for admissions to the bar, applications for reinstatement should be more closely scrutinized, that the requirements preceding reinstatement should be the more exacting, and that proceedings for reinstatement require the greater and the more jealous solicitude of the courts, as well as of the board of governors of the state bar.

2. Section 24 of the act provides that, subject to the approval of the Supreme Court, the governors "shall have power to fix and determine the qualifications for admission to practice law in this state," but nowhere in the act is there to be found any such provision as applying to reinstatements, if they are to be differentiated from admissions. It is as necessary that there be rules fixing the qualifications to be shown before reinstatements as that there be rules to the same purpose affecting admissions. We have not overlooked the fact that section 27 of the State Bar Act provides that the governors "shall have power to formulate and declare rules and regulations necessary or expedient for the carrying out of this act," but we think this language cannot be looked to as a means whereby to provide machinery for the exercise of the power over reinstatements conferred by section 26. As the means for the exercise of the power must be found outside of section 26, it is more in accord with the tenets of statutory construction and interpretation to see it in the special provisions of section 24, which fit the case exactly, than in the general language of section 27, which, with a due and proper precaution, provides for a multitude of unforeseen contingencies which may arise in the discharge of the duties conferred by the act. The Legislature foresaw, it is clear to us, the necessity for rules fixing qualifications necessary to reinstatements, for they perceived the need for such rules in providing for "admissions,"

a kindred—really the same—subject. As the lawmaking body did see the first-mentioned necessity, it is fair to say that they anticipated it in the provisions of section 24.

3. What is said in the last preceding paragraph of this opinion applies to other provisions of section 24, and a few special remarks may be applied to those provisions. With the approval of the Supreme Court, the governors may "constitute and appoint a committee of not more than seven members with power to examine applicants" for admission to the bar. No such machinery is provided by section 26 respecting reinstatements, nor is it erected by any other part of the act. It is true, looking now to section 30, that the governors "shall have power to create such local administrative committees as it may deem advisable," but the same objections affect the applicability of this language to the exercise of the power over reinstatements as are above stated concerning section 27. Section 24 provides also that with the approval of the Supreme Court the governors "shall have power to fix and collect fees to be paid by applicants for admission to practice, which fees shall be paid into the treasury of the state bar." We think the Legislature must have intended this language to apply to applicants for reinstatement. It would be unreasonable to suppose, power having been given to exact the payment of fees where original admissions are sought, that the Legislature intended the existence of no such power where applications are made for admissions, or readmissions, in the form of reinstatements.

4. Perhaps the most eloquent reason remains to be stated why the Legislature did not intend that petitions for reinstatement should be passed upon by the governors without directions from or interference by the courts. We have already seen that section 24 contemplates the exercise by the Supreme Court of plenary control over the machinery required to be operated before "admissions" may result. The approval of the court is necessary to the adoption of rules prescribing the qualifications and to the fixing of fees to be charged applicants. It is further provided by the section that, after applicants for admission have been examined, the committee conducting the examinations is to "recommend to the Supreme Court for admission to practice law those who fulfill the requirements." This language evidently leaves to the governors the exercise of merely an advisory and preliminary function, for the provision plainly contemplates that the court shall make all orders for admissions. The act nowhere provides in express terms, however, that the orders shall be so made. This, we may remark in passing, is a pregnant omission, for it seems to be a concession to the inherent power of the courts to order admissions to the bar, a subject upon which we shall have more to say below. It is to be observed also that section 26 of the act gives to the Supreme Court a supervisory control over the matter of disbarments and suspensions of lawyers. The section provides that orders for disbarment or suspension shall be made by the governors of the bar, but forbids that such orders shall become final until the end of a period during which the person affected by any such order may petition the Supreme Court to reverse or modify it. Section 26 also provides:

> "Nothing in this act contained shall be construed as limiting or altering the powers of the courts of this state to disbar or discipline members of the bar as this power at present exists."

We step aside, again, from our present purpose to observe that here is a plain concession to the inherent power of courts to discipline offending attorneys at law. To resūme: We see in thē State Bar Act, then, a sedulous care upon the part of the Legislature to leave to the courts their ancient jurisdiction to make orders admitting to the bar and to discipline recalcitrant lawyers. It is unthinkable, with these provisions before us and considering the language of section 26 upon which respondent bar association relies, that the Legislature intended to vest in the governors sole and exclusive power to "pass upon" petitions for reinstatement, admitting for the moment that the lawmaking body is empowered to grant such a revolutionary power. That the claim of right to exercise this exclusive jurisdiction cannot stand seems plain, when we compare proceedings for "admission" with those for "reinstatement," regarding them for the purposes of argument as distinct and different things. It is only in exceptional cases that an applicant for admission is met with the claim that he is morally unfit to become a lawyer. Such a situation is seldom presented in cases in which law students ask for admission to the bar for the first time, and it presents itself with perhaps less frequency when those apply for admission who have already been practitioners in other jurisdictions. On the other hand, the condition occurs in every case in which a disbarred lawyer asks for a reinstatement at the bar. Every disbarment results from some act or acts of moral turpitude which have operated to place the erring lawyer beyond the pale. When he asks to be reinstated, the question at once arises whether he has rehabilitated himself and is once again clothed with the moral attributes he was supposed to possess when he first became a lawyer. It seems plain, then, as we hinted earlier in this opinion, that petitions for reinstatement require even a more careful scrutiny than do applications for admissīon. We are forced to conclude that the Legislature intended no attempt to withdraw from the courts the exercise of a jurisdiction so necessary to their very existence.

5. A glance at section 26 of the State Bar

Act, in which is contained the grant of power to the governors to "pass upon" petitions for reinstatement, will furnish further reason for the view that the Legislature did not intend to clothe the governors with an exclusive jurisdiction over such matters. It is profitable to consider the context of the grant to the governors. It is made in a sentence which reads:

> "The board of governors shall have power, after a hearing for any of the causes set forth in the laws of the state of California warranting disbarment or suspension, to disbar members or to discipline them by reproval, public or private, or by suspension from practice, and the board shall have power to pass upon all petitions for reinstatement."

Then follow provisions requiring the governors to keep transcripts of evidence in all cases involving disbarment or suspension, to make findings and decision thereon, and to file with the clerk of the Supreme Court a certified copy of each decision ordering a disbarment or a suspension, together with the transcript of evidence taken and the findings thereon. Next comes the provision, which we have already mentioned, allowing each respondent in such a proceeding the right to ask the Supreme Court to review the decision disbarring or suspending him, and, in case a review is not asked or if it is asked and the decision of the governors is affirmed, requiring the Supreme Court to order the disbarment or suspension. It is hardly believable that the Legislature, having so carefully provided for the action of the Supreme Court in finally disposing of proceedings resulting in disbarments or suspensions, intended that those who are disbarred may be returned to the profession without the sanction of that tribunal or of any other court.

It appears from the State Bar Act that the Legislature has provided a complete plan, in which the Supreme Court prominently figures, for the control of lawyers and would-be lawyers from admission to disbarment, if we except the power to administer reprovals. There is no doubt that this latter power is vested in the governors of the bar without the power of the courts to interfere, so far as the Legislature has the authority to make such a grant, and we interject this latter remark because we have no present desire to admit or to deny the authority. The question is not before us. Respondent bar association contends that after disbarment the courts are done with the former lawyer until after he shall have procured a re-entry into the profession through the exercise of a power residing exclusively in the governors, when the Supreme Court resumes its disciplinary authority over him. He enters the profession in the first instance only with the sanction of the courts. After he has been weighed in the balance and found wanting, after he has been excluded from the profession for his delinquencies, he may enter again without the sanction of the courts. From the entire language of the State Bar Act, we think no such anomaly was intended by the Legislature. We conclude that the word "admissions," wherever it occurs in section 24 of the act, includes the word "reinstatements," and that the power conferred upon the governors, by section 26, to "pass upon" petitions for reinstatement can be exercised only pursuant to the provisions of section 24, and under all the limitations prescribed thereby and affecting admissions generally.

[5] Through this course of reasoning we reach the conclusion that disbarred attorneys who are reinstated become members of the state bar and may practice law. By it they are brought within the terms of section 24 of the State Bar Act and the provisions of sections 3, 7, and 47 are satisfied.

[6] Having arrived at the determination that the Supreme Court, according to the provisions of the State Bar Act, has final jurisdiction over proceedings for reinstatement, and that the strict terms of the act deprive us of all jurisdiction over such matters, even in a proceeding instituted before the act took effect, a cursory glance might indicate that our labors in the present proceeding are at an end, but we fear that they are not. Respondent bar association, as a part of its contention as to the effect of that part of section 26 which provides that the governors of the state bar shall have power to pass upon petitions for reinstatement, insists that the action of the Legislature excludes the jurisdiction of the courts, for the reason that the legislative department has plenary power to regulate the admission, discipline, disbarment, and reinstatement of attorneys at law. This is a contention that the courts of the state have no inherent powers in such matters, and this specific point is made in the briefs. Despite the fact that the Legislature has conceded to the Supreme Court the jurisdiction finally to decide whether petitioner shall be reinstated, the question yet remains whether this court has inherent power to order his reinstatement, if we should determine that he is entitled to the order. Indeed, the larger question remains whether the Supreme Court itself has inherent power to deal with admissions, disbarments, and suspensions, as the contention of respondent bar association is that in this state an authority over such matters rests in the Legislature which is exclusive of the power of all courts. We do not assume to decide this question for the Supreme Court, and merely state the extreme to which the contention of respondent proceeds, for the purpose of indicating the transcendent importance of the question presented. As we think courts have the inherent power mentioned, and are convinced that the Legislature has no authority over such matters, except as regulatory enactments passed by it receive the approval and sanction of the

courts, and as the point made by respondent disputes a jurisdiction which we think reposes inherently in this court, we are impelled to state the reasons for our conclusion. If the courts do possess the inherent power in question, no attempt to challenge their authority should ever be allowed to pass unnoticed.

[7] At the outset of the discussion of the point presented it is to be remembered that attorneys at law are officers of the courts, and that they are so important to the exercise of the functions of the judicial branch of government that the courts cannot exist as operative institutions without them. These basic principles lead to the view that they are a part of the judicial branch, and that neither the executive nor the Legislature, short of express constitutional authorization, can of right exercise control over them so far as their existence or conduct are concerned when related strictly to their status or duty as attorneys as distinguished from their status or duty as citizens. These views are entertained by most of the courts of the country. A few courts are opposed to them, but only, we think, as the result of a riot of unreason and to the sacrifice of sacred principles which lie at the very base of the existence and maintenance of the judicial branch. Our first labor in solving this important question is to examine authorities coming from other jurisdictions. We shall then consider California cases which are claimed by counsel to show an abdication here of some of the most important and wholly necessary duties and privileges of the judicial branch of government.

We shall first turn to those opinions of the courts which decide or which have expressed obiter to the effect—for we desire to produce a variety of judicial utterances upon the subject—that the judicial branch has inherent power to admit to the bar. In an early case, in which a woman had applied for admission, the court expressed itself thus:

> "In courts proceeding according to the course of the common law, a bar is almost as essential as a bench. And a good bar may be said to be a necessity of a good court. This is not always understood, perhaps not fully by the bar itself. On the bench, the lesson is soon learned that the facility and accuracy of judicial labor are largely dependent on the learning and ability of the bar. And it well becomes every court to be careful of its bar and jealous of the rule of admission to it, with the view of fostering in it the highest order of professional excellence. The Constitution makes no express provision for the bar. But it establishes courts, amongst which it distributes all the jurisdiction of all the courts of Westminster Hall, in equity and at common law. Putnam v. Sweet, 2 Pin. [Wis.] 302. And it vests in the courts all the judicial power of the state. The constitutional establishment of such courts appears to carry with it the power to establish a bar to practice in them. And admission to the bar appears to be a judicial power. It may therefore become a very grave question for adjudication here, whether the Constitution does not intrust the rule of admissions to the bar, as well as of expulsion from it, exclusively to the discretion of the courts. * * * We do not understand that the circuit courts generally yielded to the unwise and unseemly act of 1849, which assumed to force upon the courts as attorneys, any persons of good moral character, however unlearned or even illiterate; however disqualified, by nature, education or habit for the important trusts of the profession. We learn from the clerk of this court that no application under that statute was ever made here. The good sense of the Legislature has long since led to its repeal. And we have too much reliance on the judgment of the Legislature to apprehend another such attempt to degrade the courts. The state suffers essentially by every such assault of one branch of the government upon another; and it is the duty of all the co-ordinate branches scrupulously to avoid even all seeming of such. If, unfortunately, such an attack upon the dignity of the courts should again be made, it will be time for them to inquire whether the rule of admission be within the legislative or the judicial power." In re Goodell, 39 Wis. 232, 20 Am. Rep. 42.

Somewhat later the Supreme Court of Wisconsin said, in a case involving the fortunes of the same applicant for admission:

> "It may admit of serious doubt whether, under the Constitution of this state, the Legislature has the absolute and exclusive power to declare who shall be admitted as attorneys to practice in the courts of this state; or whether the courts themselves, as a necessary and inherent part of their powers, have not full control over the subject. It was said by the Chief Justice, on the previous application, that it was a grave question whether the Constitution does not intrust the rule of admission to the bar, as well as of expulsion from it, exclusively to the discretion of the courts, as a part of their judicial power." In re Goodell (Wis.) 81 N. W. 551.

One of the leading cases upon this subject is to be found among the decisions of the Supreme Court of Illinois. The state Legislature had passed an act containing the following provision:

> "And every applicant for a license who shall comply with the rules of the Supreme Court in regard to admission to the bar in force at the time such applicant commenced the study of law, either in a law office or a law school or college, shall be granted a license under this act, notwithstanding any subsequent changes in said rules."

An application for admission was made by one possessing the qualifications prescribed by the rules of the Supreme Court existing at the time the statute was enacted. In the meantime, however, the court had adopted new rules touching admissions, and the applicant, at the time his application was made, did not possess the qualifications fixed by these amended rules. In passing upon the application, the court said, after discussing some questions involving the effect of the statute:

"Another fatal objection to the provisions in question is that the Legislature, in their enactment, overlooked the restraint imposed by the Constitution and assumed the exercise of a power properly belonging to the courts. A provision which has been incorporated in each successive Constitution of this state is found in the present Constitution as article 3, in the following language: 'The powers of the government of this state are divided into three distinct departments,—legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.' "

After this reference to a constitutional provision which in effect is no different from section 1 of article 3 of our own Constitution and which is like provisions of the Constitutions of the states of the Union generally, and after discussing at length a question to which we shall refer later, the court said further:

"This court has never acknowledged the power of the Legislature to prescribe the amount of learning which shall qualify an attorney to practice in our courts. Section 3 of the same act, to which the provision in question is an amendment, and which is the same as section 10 of the act of 1845, has always provided that 'any person producing a license or other satisfactory voucher proving that he hath been regularly admitted an attorney at law in any court of record within the United States and obtaining a certificate of good moral character, as required in the preceding section, may be licensed and permitted to practice as a counsellor and attorney at law in any court in this state without an examination.' Each state has its own rules, and in some states inferior courts of record are permitted to grant licenses, and in others the requirements have always been below ours. The effect of enforcing such a statute would be to degrade the profession, and fill its ranks with those not qualified by our rules. This court has refused to recognize that section as valid, and has required that the course of study in the other state shall be at least equal to that prescribed by our rules, or that the applicant should have been engaged in active practice under the license for a specified period. Again, the statute has always provided that the license may be obtained from some two justices of this court, while the rules have required that the motion shall be made to, and granted by, the court. Two justices are a minority, and not a court, and no motion to admit has been granted except by a majority of the court. In Dahnke v. People, 168 Ill. 102, 48 N. E. 137 [39 L. R. A. 197], we held that, although it was the duty of the county board to erect and keep in repair a suitable court house, when the board has provided rooms they are under the control of the courts. We said: 'It rests with the judges of the courts to arrange among themselves how they will occupy the several courtrooms thus provided for them by the county board. The county board has no right to dictate to the judges as to what particular room each judge shall occupy. To make the judges of our courts depend upon a legislative or political body for the rooms in which they shall hold their sessions, in the manner indicated in this record, would be to destroy the dignity and independence of the judiciary.' The courts have an undoubted right to order and control their courtrooms, and to maintain their independence as a branch of the government. Each department of the government derives its power from the same source, and each is of equal dignity and independence, under our Constitution. In Wisconsin, it was held that the judicial power extended to the selection of the court's own janitor, and in its separate and independent sphere of action the power could not be taken from the court, and given to the legislative or executive department, or any officer of either. In re Janitor [of] Supreme Court, 35 Wis. 410. None of the decisions of this court cited by counsel for applicants touch this question in any way. With the exception of two cases, they are proceedings for the disbarment of attorneys, and the power of the Legislature to protect the public against persons unfit to practice law and to pass laws for that purpose has never been denied. One of the remaining cases is Robb v. Smith, 3 Scam. [Ill.] 46, relating to the right of one not admitted by the court as an attorney to commence or prosecute a suit for another, and is of the same class. One case only is an application for admission, and that is the case of the late Myra Bradwell (In re Bradwell, 55 Ill. 535). There the court spoke of the attorney holding his commission from two members of the court, but the decision was the decision of the court, and not of two justices. The application was considered, and denied by the court, as such, because the Legislature had, in effect, prohibited her from practicing law. The court passed on her legal acquirements, and said they were satisfied with her learning and ability. The court did not concede the powers of the Legislature to decide that question. It was held that the court should not admit any person or class of persons not intended by the Legislature to be admitted. It was said that, if the Legislature should choose to remove the existing barrier, the court would cheerfully issue licenses equally to men and women. After an amendment providing that no person should be refused a license on account of sex, a license was granted to her. The Legislature did not undertake by the amendment to deprive the court of passing upon her learning and fitness to practice law. That power belongs to the court by virtue of its being a court of justice, and one of the departments of state into which, under the Constitution, the power falls. Without such power by which the courts can protect themselves against ignorance and want of skill, they cannot properly administer justice. The doctrine of that case is the same as of the others. It was competent for the Legislature to remove the barrier, and to protect Mrs. Bradwell in her civil rights, against discrimination on account of sex. * * * It would be strange, indeed, if the court can control its own courtroom, and even its own janitor, but that it is not within its power to inquire into the ability of the persons who assist in the administration of justice as its officers."

The court says again, a little later in its opinion:

"The function of determining whether one who seeks to become an officer of the courts, and to conduct causes therein, is sufficiently acquainted with the rules established by the Legislature and the courts, governing the rights of parties and under which justice is administered, pertains to the courts themselves. They must decide whether he has sufficient legal learning to enable him to apply those rules to varying conditions of fact, and to bring the facts and law before the court, so that a correct conclusion may be reached. The order of admission is the judgment of the court that he possesses the requisite qualifications, under such restrictions and limitations as may be properly imposed by the Legislature for the protection and welfare of the public. The fact that the Legislature may prescribe the qualifications of doctors, plumbers, horseshoers, and persons following other professions or callings, not connected with the judicial system, and may say what shall be evidence of such qualifications, can have no influence on this question. A license to such persons confers no right to put the judicial power in motion or to participate in judicial proceedings. The attorney is a necessary part of the judicial system, and his vocation is not merely to find persons who are willing to have lawsuits. He is the first one to sit in judgment on every case, and whether the court shall be called upon to act depends on his decision. It is our duty to maintain the provision of the Constitution that no person, or collection of persons, being one of the departments of the government, shall exercise a power properly belonging to another; and if the Legislature by inadvertence, as in this case, assumes the exercise of a power belonging to the judicial department, it should only be necessary to call their attention to the restraint imposed by the Constitution."

In concluding its lengthy opinion the court said:

"It is conceded that when the rule was made, November 4, 1897, the court had full power to make it, and to fix the standard of admission. It was a valid rule of the court, acting within its unquestioned jurisdiction, and the question is whether the Legislature could rightfully encroach upon a power belonging to the judicial department, and set aside the rule. The Constitution answers the question in the negative." In re Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519.

The court of last resort of another jurisdiction has thus announced the law, following its statement with the citation of a long list of authorities:

"With scarcely an exception it has been held that both in the admission to and suspension from practice of the law, courts act judicially in the exercise of an inherent power, and not in a mere administrative or ministerial capacity, and in the execution of the will of some other branch of the government." In re Application for License to Practice Law, 67 W. Va. 213, 67 S. E. 597.

The Supreme Court of one of the other states says:

"A practicing attorney is an officer of the court in which he is admitted to practice. The power to admit applicants to practice law is judicial and not legislative, and is, of course, vested in the courts only. 4 Cyc. 900. The act of admission is a judicial determination, and is not for a term of years but for life, or until the attorney shall have been disbarred by a court of competent jurisdiction." Hanson v. Grattan, 84 Kan. 843, 115 P. 646, 34 L. R. A. (N. S.) 240.

The Supreme Court of Wisconsin has said again, in a comparatively late case:

"It has been aptly said by this court, that a bar is as essential, almost, as the bench and a good bar is essential to a good bench and a good bench to a good bar. Matter of Goodell, 39 Wis. 232, 20 Am. Rep. 42. To that end it is recognized, in general, that the position of attorney is 'subject to strict oversight and summary power of the court'—Matter of Mosness, 39 Wis. 509, 20 Am. Rep. 55—within the limits of reasonable legislative regulation, and that of judicial discretion where there is no written law on the subject. While using due caution to avoid doing injustice to any one who holds, even de facto, the position of member of the bar, the court should firmly perform its high judicial duty to protect itself, its bar, and the public from the danger of any one holding the high and honorable position of attorney at law who is not legally as well as morally qualified therefor. To that end the court has ample power, which may be exercised quite summarily, the boundaries of due process of law not being transcended, as the decisions of this court referred to, bear witness. They are in harmony with the general trend of authority [citing several cases]." Vernon County Bar Ass'n v. McKibbin, 153 Wis. 350, 141 N. W. 283.

In the last case we shall cite upon the particular branch of the subject now under the glass another Supreme Court says:

"The courts are, of course, a separate and independent division of the government, and, within their constitutional rights, not subject to control by the Legislature. Article 3, Constitution of Arizona. We think there is no more important duty, nor one whose performance is more necessary to the proper functioning of the courts, than to see that their officers are of proper mental ability and moral character. The Legislature may, and very properly does, provide from time to time that certain minimum qualifications shall be possessed by every citizen who desires to apply to the courts for permission to practice therein, and the courts will require all applicants to comply with the statute. This, however, is a limitation, not on the courts, but upon the individual citizen, and it in no manner can be construed as compelling the courts to accept as their officers all applicants who have passed such minimum standards, unless the courts are themselves satisfied that such qualifications are sufficient. If they are not, it is their inherent right to prescribe such other and additional conditions as may be necessary to satisfy them the applicants are indeed entitled to become such officers. In other words, they may not accept less, but may demand more, than the Legislature has required." In re Bailey, 30 Ariz. 407, 248 P. 29.

We have quoted from these opinions without comment, for the purpose of presenting a general survey of the question to which they relate. Particular language in two of them, however, requires a brief notice. It is said in Vernon County Bar Association v. McKibbin, in the midst of a plain and explicit statement that the courts possess the inherent jurisdiction to admit and control lawyers, that the power is exercisable "within the limits of reasonable legislative regulation, and that of judicial discretion where there is no written law on the subject." The meaning of the portion of the quoted language which precedes the comma will be made plain when we come to consider the rule, quite generally adopted by the courts, that they will enforce, upon principles of comity between the three branches of government, those reasonable legislative enactments which are an aid and not a hindrance to the judicial branch in the exercise of its functions and which do not in essence impinge upon the constitutional judicial prerogative. The quoted language following the comma, in the light of its context and in the light of the rule just mentioned, imports that the "judicial discretion" mentioned is exercisable upon particular points or questions which are not covered by "written law" which has received the approval of the judicial branch, and which, through that sanction alone, has been put into operative effect.

A few words are necessary concerning some inaccuracies of expression in the opinion pronounced in Re Bailey. In the quotation which is made above from the opinion, some language is used which bears the possible construction that the Legislature may prescribe rules fixing minimum qualifications for applicants for admission to the bar which the courts are bound to follow. This construction is not compatible with what is said in the first few lines of the quotation, and it is not possible when we consider a part of the opinion which is not included in the quotation. After referring to several authorities, the court writes this pregnant sentence:

> "It is therefore held by the best-considered cases, where this point has been specifically passed on, that the requirements prescribed by the Legislature are merely restrictive of the rights of the applicant, and that they did not, and cannot, compel the courts to admit any one to practice."

Some of the expressions in the opinion in this Arizona case, indeed, sporadic statements contained in other decisions to which we have referred, inspire us to remark that the power to admit, control, and disbar lawyers is either wholly legislative or wholly judicial. There is no such thing, we think, under American constitutional limitations upon the powers of the respective branches of government, as the splitting up of jurisdiction over indivisible subjects, so that one of the three branches of government may rove over a part of the subject and another branch may traverse the remainder. This remark would seem to be trite. In the matter of power over attorneys at law, the judicial branch is either wholly slave to the legislative branch or wholly free from its domination. It cannot be "half slave and half free." More will be said upon this particular subject later.

We now come to a consideration of another line of authority which bears upon the general question which confronts us. Most of the cases which we have already cited proceed upon the theory that, as an act of grace and upon principles of comity the courts, out of regard for the general welfare, will sanction and put into effect such legislative enactments affecting the admission and control of attorneys as may be reasonable aids to them in the discharge of their duties in that behalf. This concession does not admit a *power* in the Legislature as one of the coordinate branches of government, and as illustrating that truth the courts have not hesitated to ignore unreasonable legislation upon the subject.

We have already stated the circumstances out of which arose the opinion in the earliest Wisconsin case from which we have quoted. The court said further in its opinion:

> "The Legislature has, indeed, from time to time, assumed power to prescribe rules for the admission of attorneys to practice. When these have seemed reasonable and just, it has generally, we think, been the pleasure of the courts to act upon such statutes, in deference to the wishes of a co-ordinate branch of the government, without considering the question of power. * * * [I]t is a pleasure to defer to all reasonable statutes on the subject. And we will decide this motion on the present statutes, without passing on their binding force."

The court then denied the application on the ground that there was no warrant for the admission of women to the bar. In re Goodell, 39 Wis. 232, 20 Am. Rep. 42.

Early in the year following that in which this Wisconsin case was decided, the Supreme Court of that state rendered an opinion in another interesting case. The Legislature had passed a bill providing that any person who had been admitted to practice law in Illinois "shall be admitted and licensed to practice as an attorney and counselor at law in all the courts of this state," upon making application to that end. A motion for the admission of one who came within the terms of the act was presented to the Supreme Court. In denying the application, the court said:

> "The office of attorney and counselor of the courts is one of great official trust and responsibility in the administration of justice; one liable to great abuse; and has always been exercised, in all courts proceeding according to the course of the common law, subject to strict oversight and summary power of the court. It would be an anomaly, dangerous to the safe administration of justice, that the office should

be filled by persons residing beyond the jurisdiction of the court, and practically not subject to its authority. We take it, that members of the bar of this state lose their right to practice here by removing from the state. After they become nonresidents, they can appear in courts of this state ex gratia only. Our courts cannot have a nonresident bar. This all appears to us to be so very plain, that it is difficult to believe that chapter 50 of 1855 was intended to do more than to authorize the appearance here, as counsel in the trial and argument of causes, of gentlemen of the bar of other states. If intended to do that, it was probably unnecessary. If intended to do more, it was clearly without the power of the Legislature." In re Mosness, 39 Wis. 509, 20 Am. Rep. 55.

Several years after Miss Goodell had suffered the rebuff administered in the opinion In re Goodell, 39 Wis. 232, 20 Am. Rep. 42, the Legislature of Wisconsin passed a statute expressly qualifying women for admission to the bar. She again made application and the court, which at last admitted her, thus referred to its earlier opinion in passing upon the application:

> "[I]t was * * * remarked by the Chief Justice that the Legislature had, from time to time, assumed the power to prescribe rules for the admission of attorneys, and, when those rules have seemed reasonable and just, it has generally been the pleasure of the courts to act upon such statutes, in deference to the wishes of a co-ordinate branch of the government, without considering the question of power. A majority of the court are disposed to pursue the same course now, and act upon the statute above cited, waiving, for the present, the question whether or not the courts are vested with the ultimate power, under the Constitution, of regulating and determining for themselves as to who are entitled to admission to practice." In re Goodell (Wis.) 81 N. W. 551.

It is said in one of the opinions from which we have already quoted:

> "It is generally conceded, however, that it is competent for the Legislature to prescribe the qualifications for admission and the grounds for disbarment, as well as the procedure therein. It is not within the power of the Legislature, however, to admit an attorney to practice in the courts of the state or to disbar a practicing lawyer. * * * Originally the courts alone determined the qualifications of candidates for admission, but to avoid friction between the departments of government the courts of this and other states have generally acquiesced in all reasonable provisions relating to qualifications enacted by the Legislature." (Hanson v. Grattan.

The Supreme Court of Wisconsin has said in a comparatively late case from which we have quoted above:

> "There is no question but that the Legislature has power to regulate admission to the bar by prescribing a standard therefor, and it is the duty, as it should be the pleasure, of the court to give full effect to all reasonable efforts in that regard. Further, in case of the Legislature having, as here, prescribed conditions of eligibility to admission to practice law, which are reasonable, want of such conditions should be regarded as insurmountable." Vernon Co. Bar Ass'n v. McKibbin.

It will be observed that in this extract the court ascribes to the Legislature a "power" to regulate admissions to the bar, but the entire opinion shows that the word was employed as referring to a power exercisable only under the sanction of the court. It is especially to be noted that the court quotes with approval from In re Goodell, 39 Wis. 232, 20 Am. Rep. 42.

The Supreme Court of Pennsylvania uses this forceful language:

> "Nothing is clearer in the Constitution than the separation of the legislative and judicial branches of our state government. Neither possesses the powers of the other, and any power inherent in the one cannot be exercised by the other. Judicial powers and functions are to be exercised by the judiciary alone, and a century ago in Commonwealth ex rel. Brackenridge v. Judges of Common Pleas, 1 Serg. & R. 187, it was held that the admission of an attorney to practice before a court is a judicial act. This has never been doubted or questioned since, and, if the act of 1909 is an encroachment upon the judiciary, it must be regarded as a vain attempt by the Legislature to exercise a power which it does not possess." Hoopes v. Bradshaw, 231 Pa. 485, 80 A. 1098.

The act mentioned in the opinion in that case conferred the right of those admitted to the bar by the Supreme Court to practice in the lower courts of the state. Notwithstanding the positive expressions contained in the foregoing quotation, the Supreme Court upheld the statute upon the ground that it merely determined a reasonable effect to be given to orders or decrees of the court.

Departing now from this particular line of cases, we observe that a few decisions have conceded to the legislative branch of government the right, under the police power, to pass certain measures within a limited range and which affect in some measure the relationship between lawyers and the courts.

In the case which is probably the most thoroughly considered of all those declaring that the courts have inherent power over the admission and control of attorneys, it is said:

> "It may be readily admitted that such all-pervading [police] power does, in some respects, reach the practice of the law, and gives to the Legislature some power concerning it. The Legislature may enact police legislation for the protection of the public against things hurtful or threatening to their safety and welfare. They may prescribe reasonable conditions which will exclude from the practice those persons through whom injurious consequences are likely to result to the inhabitants of the state." In re Day, supra.

In another of the opinions from which we have already quoted, In re Day and other cases are cited to support the following statements:

> "But notwithstanding the jurisdiction of the courts over the subject it has been generally conceded that the Legislature may in the exercise of its police power, prescribe reasonable rules and regulations for admissions to the bar, which will be followed by the courts. But the Legislature may not impose unreasonable rules or deprive the courts of their inherent power to prescribe other rules and conditions of admission to practice." In re Application for License, etc., supra.

We turn now to a line of cases upon another specific point, that relating to the inherent power of courts to disbar erring lawyers. We think there is no dissent in any of the decisions from the proposition that such a power exists in full vigor. It is said in an opinion which was rendered seventy years ago:

> "All courts have the power to control and regulate, to a certain extent, the conduct of their officers, and to inflict on them for their official misconduct, such punishment as the law prescribes. If a court have knowledge of the existence of such official misconduct on the part of any of its officers, it not only has the power, but it is its duty, to institute an appropriate proceeding against the offender, and to bring him, if guilty, to condign punishment. And it is much to be regretted that this duty which the law devolves upon the courts of the country is so little regarded, and that the obligations which it imposes are so frequently overlooked or neglected. The official misconduct of an attorney at law may be inquired into in a summary manner by the court, and if guilty of such misconduct, his name may be stricken from the roll of attorneys admitted to the practice of law at the bar of the court. * * * The power to remove an attorney from the bar ought to be exercised with great caution and discretion, but it is a power incidental to all courts, and unless it be clearly exceeded or abused by a circuit court this court should not interpose, as it can not decide with the same means of information that the court below was in the possession of." Rice v. Commonwealth, 18 B. Mon. (Ky.) 472.

It is said by the supreme court of another state:

> "At common law, attorneys were, as now, under the statute, officers of the court; and as such they were liable to be punished in a summary way, either by attachment or having their names struck out of the roll of attorneys, for any ill practice attended with fraud and corruption, and committed against the obvious rules of justice and common honesty. Bac. Abr. 'Attorneys,' 474. This is an inherent power residing in the court without the aid of statutory enactment. The exercise of the power may be, as it often is, regulated by statute, but the statute does not create it. Its existence is necessary and incidental to the court for its own protection, to secure the proper administration of justice, to maintain the prestige of the profession for integrity, to conserve the public good, and to protect clients from malpractice attended with fraud and corruption. * * * It is, therefore, laid down by the text-writers upon this subject, as deducible from the practice and decisions of the courts in such cases, that a court has the inherent right to exercise this summary jurisdiction over its attorneys, as officers of the court, to require and compel them to deal justly and honestly with their clients, and to punish them by fine and imprisonment for contempts or misconduct in their office, and, in cases where the malpractice or misconduct in their professional capacity showed them to be unfit persons to practice the law, to strike their names from the roll." State v. Winton, 11 Or. 456, 5 P. 337, 50 Am. Rep. 486.

In this opinion the court remarks that the "power" to disbar "may be regulated by statute," but the immense weight of authority, some of which has already been cited, demonstrates that the regulation must be reasonable, and that the courts enjoy the sole right to say whether it is reasonable or not. This limitation, in truth, operates to curb all attempts of the legislative branch, in whatever direction, to control or regulate the power of the courts over their officers.

In a case coming from another state, the question was involved whether one disbarred as a lawyer could qualify for the office of district attorney. In disposing of the question, the court said:

> "As we read the brief of appellant, he virtually concedes that his election to the office of state's attorney does not entitle him to appear in the courts of record of this state as such state's attorney, when he could not appear in matters not pertaining to such office; but, inasmuch as we consider this admission, if well founded, to be fatal to the claims of appellant, we will not pass it without full consideration. Did the framers of the Constitution intend to indirectly take from the courts, in favor of a certain excepted class of persons, a right which the statutes of the territory had recognized as resting in the courts—a right recognized for centuries, by all countries and states having laws based on the English common law, as the inherent right of the court, a right necessary in the very nature of courts and the duties devolving upon them, a right which, if lost, would soon bring the courts of our land into contempt—the right to say who shall as attorneys be recognized as officers of the courts, together with the right to expel such persons whenever they have been adjudged unworthy or unfit for this important trust? This right of the courts is as much the law of our land, and of as much dignity as such, as any law found in the Constitution or statutes. It is not dependent upon either the Constitution or statutes for its existence, but exists fully in all courts of record unless expressly restricted or taken away by express legislation, and it is a serious question whether it lies within the power of the Legislature to more than regulate this right of the court, whether the Legislature can more than prescribe certain qualifications for admission, leaving to the proper court to fix others if it sees fit, and whether the Legislature can more than fix certain grounds for disbarment, leaving to the court the right to disbar for other reasons within sound judicial discretion. 3 Am. &

Eng. Ency. Law, pp. 287, 300, 301; 4 Cyc. 900. No one has ever contended that our Supreme Court, in which our statutes have left this right of admission and disbarment, had not full power to exercise such right the same as to reach any other judicial determination, or that the effect of its decision or judgment had in any manner been restricted." Danforth v. Egan, 23 S. D. 43, 119 N. W. 1021, 139 Am. St. Rep. 1030, 20 Ann. Cas. 418.

The inherent power of courts to disbar is so universally recognized that we forbear to burden this lengthy opinion with further quotation from the cases which uphold it. Other authorities upon the subject which may be examined with profit are State v. McClaugherty, 33 W. Va. 250, 10 S. E. 407; State v. Stiles, 48 W. Va. 425, 37 S. E. 620; State v. Hays, 64 W. Va. 45, 61 S. E. 355; Hoopes v. Bradshaw, 231 Pa. 485, 80 A. 1098; In re Platz, 42 Utah, 439, 132 P. 390; Vernon County Bar Ass'n v. McKibbin, 153 Wis. 355, 141 N. W. 283; In re Bailey, 30 Ariz. 407, 248 P. 29.

The cases which we have cited, to various points which aid to a solution of the general question presented to us, are among those which support the view that courts have an inherent power to admit applicants to the bar, to regulate the conduct of lawyers, and to disbar them. The cases establish the rule that the courts also possess the power to conduct such investigations as may be required in a proper exercise of their inherent jurisdiction, irrespective of statutory attempts to regulate procedure, and, indeed, in defiance of unreasonable legislative provisions upon the subject. The sole power to determine whether such statutes are reasonable resides in the courts, and they derive their force only from the sanction of the courts. Strictly speaking, a power in the Legislature in such matters does not exist. At least, such is the undoubted effect of the cases to which we have directed attention.

We must now enter upon a minute exploration of the grounds upon which respondent bar association contends that the salutary rules stated in the last preceding paragraph of this opinion have no application in California. Indeed, they cite a few cases from other states in opposition to the mass of authority to which we have already adverted. These must first receive our attention.

One of the authorities upon which respondent relies is Cooper's Case, 22 N. Y. 67, to a specific consideration of which we shall come later. For the present we shall say that the case involved the right of a law student of Columbia College to be admitted to the bar. One of the faculty of the law school, Prof. Theodore A. Dwight, filed a brief in the case, and upon a part of this brief respondent bar association relies. This reliance must be dealt with before we consider the opinion in Cooper's Case itself. Prof. Dwight says:

"At common law, the court had no power to appoint an attorney or counselor. The rules regulating the appointment are merely statutory. This appears from the history of the English law."

To this statement many English text-books are cited by the professor and a few English cases. In connection with its dependence upon the view of Prof. Dwight, respondent refers to a dissenting opinion of one of the judges of the court which decided In re Application to Practice Law, supra, and remarks that he "points out that the courts at common law did not possess authority to admit attorneys."

If it be granted for the moment that Prof. Dwight and the dissenting justice mentioned are correct in their view as to the state of the English law, the circumstance is one of negligible interest, a truth which has been shown admirably by an opinion from which we have already quoted copiously. After referring to a constitutional provision similar to section 1 of article 3 of our Constitution, the court remarks that the question presented by it had been argued by counsel, and that the history of the exercise of the power of admitting to the bar in England had been very carefully set forth. The opinion then proceeds:

"That history is very interesting, but is of little benefit in determining whether the power is one properly belonging to courts or to the Legislature. The difference in the principles underlying the systems of government is such as to render a conclusion inapplicable, even if it should be found that parliament had exercised such power. Judge Cooley, in his great work on Constitutional Limitations, points out that while it is natural that we should recur to the powers of parliament, and incline to concede, without reflection, that whatever the Legislature of the country from which we derived our laws could do might also be done by the legislative authority in this country, we should bear in mind the important distinction that parliament may exercise all the powers of government, while the Legislature can exercise but one. Cooley, Const. Lim. 102. He says further (page 104): 'So long as the parliament is recognized as rightfully exercising the sovereign authority of the country, it is evident that the resemblance between it and American Legislatures in regard to their ultimate powers cannot be traced very far. The American Legislatures only exercise a certain portion of the sovereign power. The sovereignty is in the people; and the Legislatures which they have created are only to discharge a trust of which they have been made a depository, but with well-defined restrictions. Upon this difference it is to be observed that while parliament, to any extent it may choose, may exercise judicial authority, one of the most noticeable features in American constitutional law is the care taken to separate legislative, executive, and judicial functions. But the grant of the judicial power to the department created for the purpose of exercising it must be regarded as an exclusive grant, covering the whole power, subject only to the limitations which the Constitutions impose and to the incidental exceptions before referred to. While, therefore, the American Legislatures may exercise the legislative powers which the parliament of Great Britain wields, except as restrictions are imposed, they are at the same time excluded from other functions which may be, and sometimes habitually are, exercised by the parliament.' Whatever the English practice may have been, the question must be what the nature of the power is, and whether it is one which naturally pertains to the courts. If it is judicial in its nature, the Legislatures are expressly prohibited from exercising it." In re Day, supra.

But there is ample authority to support the view that Prof. Dwight and the dissenting justice have not formed a correct estimate of the state of the English law.

"The history of the admission of attorneys in England, however, does not justify the claim that it is the exercise of the legislative function, but utterly refutes it. In that country, the legal profession has been divided into classes which do not exist here. One class embraced what were known as 'attorneys' when their practice was in the courts of common law, 'solicitors' when it was in chancery, and 'proctors' in the admiralty and ecclesiastical courts; all of whom, at all times, must have been admitted to the courts upon examination regarding their fitness, and this power no other department of government ever sought to control. Originally, no one could appear by attorney without the special warrant of the king, issuing out of chancery or under seal, granting the privilege. The king was considered the fountain of justice, and, as he could not in person decide all controversies and remedy all wrongs, the injured parties were referred to the proper forum, and writs were framed in his name to his judges. Suits were begun in that way, and when he granted the privileges in question it was as a part of that system, and not in a legislative capacity. In a civilized country, where the rights of persons were to be determined in accordance with established rules, either statutory or promulgated by the courts, the employment of persons acquainted with those rules became a necessity, both to the parties and the court. Persons unlearned in the law can neither aid a litigant nor the court, and parliament, at different times, extended the right of the litigant to appoint an attorney to represent him in court. Maugh. Attys. Append. 6, 7. In 1292, Edward I made an order by which he appointed the lord chief justice of the court of common pleas and the rest of his fellow justices of that court, that they, according to their discretion, should provide and ordain from every county certain attorneys and apprentices of the best and most apt for their learning and skill, who might do service to his court and people, and those so chosen only, and no other, should follow his court and transact the affairs thereof; the said king and his council then deeming the number of seven score to be sufficient for that employment, but it was left to the discretion of the said justices to add to that number or diminish it, as they should see fit. 1 Pol. & M. Hist. Eng. Law, 194; Dugd. Orig. J. 141. The profession of attorney was placed under the control of the judges, and the discretion to examine applicants as to their learning and qualifications, and to admit to practice, was exercised from that day by the judicial department of the English government, and no legislation sought to deprive the court of the power in that respect, or to invest it in any other branch of the government. Parliament legislated upon the subject, but the legislation was of a character to exclude persons unfit to practice, who threatened the public welfare through ignorance or untrustworthiness. The statutes always recognized that the admission of attorneys was a matter essentially belonging to the courts and a matter of judicial discretion, and only sought to protect the public against improper persons. The first of these acts was St. 4 Hen. IV, c. 18, passed in 1402. The attorneys had increased to the number of 2,000, and the act, reciting that damages and mischiefs ensued from the great number of attorneys unlearned in the law, ordained and established that all attorneys should be examined by the justices, and by their discretion their names put in the roll, and the other attorneys put out by the discretion of said justices, and their masters for whom they were attorneys should be warned to take others in their places, so that in the meantime no damage nor prejudice should come to their said masters. Maugh. Attys. Append. 9. In 1413, by St. 1 Hen. V, undersheriffs, sheriffs, clerks, receivers, and bailiffs were excluded from practicing as attorneys, because 'the king's liege people dare not pursue or complain of the extortions and of the oppressions to them done by the officers of sheriffs.' In 1455, by St. 33 Hen. VI, c. 7, parliament limited the number of attorneys for Suffolk, Norfolk, and Norwich, reciting that the number had increased more than 80, 'most of whom, being not of sufficient knowledge, came to fairs, etc., inciting the people to suits for small trespasses.' In 1605, by St. 3 Jac. I, c. 7, it was attempted to further regulate attorneys to the same end. Maugh. Attys. Append. 13. Parliament did not, by any of these acts, undertake to determine the amount of learning which would qualify a person for admission. The courts from time to time made their rules regulating the admission of attorneys, and on occasion provided for the appointment of a committee or board of examiners. Maugh. Attys. Append. 14, 16. Blackstone says (3 Comm. 26): 'These attorneys are not formed into a regular corps. They are admitted to the execution of their office by the superior courts of Westminster Hall. No man can practice as an attorney in any of those courts but such as is admitted and sworn an attorney of that particular court. An attorney of the court of king's bench cannot practice in the court of common pleas, nor vice versa. So early as St. 4 Hen. IV, c. 18, it was enacted that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty.'

"It is argued that the power to admit is legislative because the similar power to disbar was granted by an act of parliament. By St. 3 Edw. I, c. 29, it was provided that, if any counsel should be guilty of deceit or collusion in the king's court, he should be imprisoned for a year and a day, and thenceforth should not be heard to plead in that court for any man. 3 Bl.

Comm. 29; Weeks, Attys. § 14. This no more tends to show that the power is legislative than the fact that the Legislature provides punishment for stealing shows that the trial and conviction of a thief is a legislative proceeding. It is a function of the Legislature to fix punishment for transgressions against the public, and disqualification for office or the deprivation of a license is not infrequently annexed to such punishment. Neither does it follow, because this court has at different times mentioned the statute as authorizing a disbarment proceeding, that such a proceeding is legislative, or that the Legislature might either disbar an attorney or prescribe a conclusive rule of evidence against him. The Legislature provides for the punishment of misdemeanors, and that a person charged with such offense shall be tried by some court, but the trial in the court is a judicial proceeding, and whether he shall be found guilty or not is beyond the control of the Legislature.

"The other class of professional practitioners in England were those who gave counsel in legal matters and conducted causes in courts as advocates. They came to the bar through the inns of court. These were colleges in which students resided and pursued their studies from a very early date. Lawyers gathered about the court at Westminster, and hospitia curiæ were established, which were occupied by the lawyers and contained schools of law. On the suppression of the Knights Templars, the Pope granted their estates to the Knights Hospitallers of St. John of Jerusalem, who leased the buildings in London to the students of the law. The place was called 'The Temple,' from its former occupants, and the societies of the Inner Temple and Middle Temple were formed. The buildings included the Inner Temple and the Middle Temple, and there were added Lincoln's Inn, on the site of a palace of an Earl of Lincoln, and Gray's Inn, the former residence of the Lords Gray of Wilton. After the suppression of the Knights Hospitallers by Henry VIII, the society held the Temple buildings of the crown by lease, and in 1608 they were granted by letters patent of James I to the chancellor of the exchequer (a judicial officer), the recorder of London, and the benchers and treasurers of the Inner and Middle Temples, for 'lodging, reception, and education of the professors and students of the law.' At these inns the students of law attended in great numbers, and were instructed in the law and practice. From time to time rules were made for the government of these inns by the judges, or with their concurrence, and the advice and consent of the king or queen and the benchers or societies themselves. Dugd. Orig. J., 312, 316, 317, 320. The societies submitted for ages to be governed by the rules so made, and in every instance their conduct was subject to the control of the judges as visitors. They were voluntary societies, to which mandamus would not lie, but the ancient and usual way of redress for any grievance was by appealing to the judges. Booreman's Case, March, 177; Rex v. Benchers of Gray's Inn, 1 Doug. 353; Rex v. Benchers of Lincoln's Inn, 4 Barn. & C. 855. The origin of their power to call to the bar is lost in the past, but they acted substantially as a board of examiners, subject to the control of the judges as visitors, and their act was accepted by the courts. The time of study was reduced from longer periods to five years before any student could be called to the bar, unless he was a master of arts or a bachelor of laws of the Universities of Oxford, Cambridge or Dublin; in their case, it might be diminished to two years. He was then called a 'barrister.' In the old books they were styled apprentices, as in the foregoing order of Edward I, and were not qualified to execute the full office of an advocate until they were of 16 years' standing (3 Bl. Comm. 27), when they might be advanced to the degree of serjeant. The benchers of the inn, who governed the society, were elected from the barristers according to seniority. There is nothing in all this which tends to support the view that the admission of any class of the legal profession was ever regarded as a legislative act." In re Day, supra.

The decision of the Court of Appeals in Cooper's Case, supra, was an oddity in the law when it was pronounced, although a few courts have since adopted the doctrine announced in it, and it has been condemned in some of the best-considered cases upon the subject to which it relates. It is necessary now to pay some attention to the decision.

An act of the Legislature had been passed which provided that law students holding diplomas of the law school of Columbia College "shall be admitted to practice as an attorney and counselor at law in all the courts of this state." Cooper, armed with the diploma requisite under the terms of the act, with an affidavit of age and citizenship and with the certificate of a practitioner at the bar that he was of good moral character, applied to the Supreme Court of the state for admission to the bar. The application was denied, and Cooper prosecuted an appeal to the Court of Appeals, where the order denying him admission was reversed. The mere fact that the applicant was finally admitted is not strange, for admissions have been ordered in other states upon similar evidence, partially under statutes relating to the effect to be given to the diplomas of law schools, which diplomas the courts have been willing to accept as sufficient evidence of mental qualifications. It will be observed that Cooper presented evidence also of age, citizenship, and moral character. The decision in Cooper's Case is, however, or certainly was at the time it was rendered, unique in the extreme reasons announced as grounds for a submission to the legislative will. Indeed, we think few later cases can be found in which a surrender so abject has been made upon reason so completely subversive of the rights and duties of the judicial branch of government. We shall quote neither connectedly nor at length from the opinion of the Court of Appeals. Such excerpts as we shall make will be followed, as we make them, by such comment as we think applies to them.

"Barristers and counselors at law were never appointed by the courts at Westminster, but were called to the bar by the Inns of Court, which were voluntary unincorporated associations." This statement is disputed by the quotation which we have last above made from In re Day, and, even if the statement were correct, it must be remembered that it is shown by In re Day, upon a citation of authority concerning a point which is well understood, that "from time to time rules were made for the government of these inns by the judges, or with their concurrence," and that the inns "submitted for ages to be governed by the rules so made, and in every instance their conduct was subject to the control of the judges as visitors." Indeed, the judges stood behind the Inns of Court and were their monitors and governors. Indirectly, but controllingly, they provided for calls to the bar, and actually they made the orders for admissions. Costigan, in his Cases on Legal Ethics, says, page 8: "At the head of the profession, and exercising a general control over it, are the serjeants-at-law and the judges." And again (page 9): "These Inns of Court are colleges which train the students in the law and call them to the bar. Each has its independent, its collegiate life; but in all, as in modern colleges of the same university, the customs and the system are similar. All are in some sort subordinate to the judges and the serjeants, just as the modern college is subordinate to the rulings of its visitor or to the statutes of the university." Lord Mansfield said (see Costigan, p. 44) in The King v. Benchers of Gray's Inn, 1 Doug. 353, that the only power the inns have "concerning the admission to the bar, is delegated to them from the judges, and, in every instance, their conduct is subject to their control as visitors."

We proceed with quotations from the opinion in Cooper's Case. After mentioning the State Constitution, in the respect of its effect upon previously existing statutes, the court said, italics ours:

> "Indeed, the specific provision of the Constitution on the subject of attorneys, *in the connection in which it stands*, bears much more the aspect of being designed to take power from the courts than to confer it upon them."

The opinion then proceeds, the italics this time being those of the court:

> "The entire section reads as follows: 'They (i. e., the judges) shall not hold any other office of public trust. All votes for either of them, for any elective office except that of justice of the Supreme Court or judge of the Court of Appeals, given by the Legislature or the people, shall be void. *They shall not exercise any power of appointment to public office.* Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this state.'"

The court then goes on, without the citation of authority, to declare that attorneys at law are public officers, and draws the deduction which naturally follows from such a declaration in the light of the italicized portion of the constitutional provision. The court, however, in drawing the deduction, departs from what it had said about the "connection" in which the provision as to attorneys stands. The conclusion is reached wholly from the italicized sentence, entirely aside from the connection mentioned, for, if attorneys are public officers, the italicized sentence was enough to settle the question. It may be worth while to note that the "connection" mentioned is wholly one of juxtaposition and not of substance. The section, down to and including the italicized sentence, refers to the judges and places various limitations upon their powers. The remainder relates to attorneys, and is as separate from what precedes it as if it were in a different section. It has been decided in this state that an attorney is not a public officer (In re Galusha, 184 Cal. 697, 195 P. 406) in the sense in which that term was undoubtedly intended in the New York Constitution. All these considerations are of importance here, as the provision of the Constitution to which the New York court refers was the principal factor in the discussion leading to the conclusion which the court finally reached.

Cooper's Case has not escaped notice by at least one tribunal which adopts the view that an inherent power rests in the courts to deal with the admission and discipline of attorneys. It is said in an opinion to which we have frequently referred:

> "In the state courts the power of the Legislature to prescribe the amount of learning upon which the court must admit to the practice of law has never been recognized, as far as counsel have discovered, with the single exception of In re Cooper, 22 N. Y. 67. * * * In that case the Legislature enacted a statute admitting to practice on diploma of the Columbia College, and it was held that the act was valid. Counsel for applicants in this case contend that the subject is legislative, and not judicial, in its character, and the act of admission is ministerial. Their chief reliance is that Case of Cooper. The first question there considered by the Court of Appeals was whether the admission of attorneys was a judicial proceeding. The Supreme Court had denied admission, and Cooper had appealed. It was suggested that the power of admitting attorneys was executive or administrative, rather than judicial, and this objection, if well founded, would be fatal to the appeal. Upon a full consideration of that question, it was held that the admission of attorneys was a judicial proceeding and the exercise of an appropriate judicial function. The appeal was entertained on that ground. The power being judicial in its nature, our Constitution prohibits its exercise by the Legislature. The court based its decision upon the ground that, although the appointment of attorneys had usually been intrusted in that state to the courts, and was judicial in its nature, yet it was not a necessary or inherent part of their judicial power, but was

subject to legislative action, and had been derived from statute. In that state the power to admit to practice was exercised before the Revolution by the Governor. By the Constitution of 1777, the appointment of attorneys was given to the courts, but the provision was dropped from the Constitution of 1846, which provided: 'Any male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this state.' Article 6, § 8. In view of the history of admission and this particular condition of affairs, the act was sustained. The consequences have been greatly deplored by eminent men, abundantly able to judge of the injustice to the public resulting from the rule then established, under which other special laws were passed." In re Day, supra.

As we have already observed, respondent bar association bases its argument in part upon a dissenting opinion. In re Application for License to Practice Law, 67 W. Va. 213, 67 S. E. 597, 604. After all we have said above and shall say later, we find it unnecessary to traverse this dissenting opinion. We may observe, however, that the conclusion reached in it is based in some measure upon California cases to which we shall give consideration below.

In addition to the authorities relied upon by respondent outside of this state, there is at least one other which is in point. In it the question presented received a thorough consideration, and the court reached a conclusion opposed to the overwhelming weight of authority upon the subject. The case is In re Applicants for License, 143 N. C. 1, 55 S. E. 635, 10 L. R. A. (N. S.) 288, 10 Ann. Cas. 187, and was decided by a divided court, with two justices dissenting. The extent of the court's submission to the legislative will is indicated by the language of the annotator who wrote a note following the decision as reported in L. R. A. He remarks that, "aside from the above case, no case can be found wherein the court holds or recognizes the right of the Legislature to encroach upon the right of the court to require that the attorneys practicing before it shall be of good moral character." This note is quoted and commented on in Re Application for License to Practice Law, 67 W. Va. 213, 67 S. E. 597. We can see no difference, however, between a statute which is said to compel the courts to admit a certain class of persons to the bar, irrespective of their moral character, and one which attempts to require the admission of a class without regard to learning in the law. In our view, the case which the annotator criticizes goes to the lengths which logic requires that all cases should go which adhere to the view that courts have not all inclusive inherent power over admissions. The criticized case is the only consistent one of all those which are opposed to the great weight of authority upon the question here considered. In the case there is no halfway station at which the judges stopped. They went to the limit which reason and logic require.

We must now consider the California cases upon which respondent bar association relies. They are nearly all decisions of the Supreme Court, and it must be admitted that in them general language occurs which appears, on the surface, to support the contention of respondent. We shall make some specific comment upon each of them hereafter, but we direct attention to the fact, in advance, that it is not decided in any one of them that courts have not inherent power over the admission and discipline of attorneys at law, nor is the inherent power of courts over such matters considered or even mentioned in any of them.

Cohen v. Wright, 22 Cal. 293. This case was decided during the Civil War, and the sole question determined by it involved the constitutionality of a "test oath" statute passed by the Legislature—a statute similar to those enacted generally by the Legislatures of the Northern States during the period and which gave rise everywhere to litigation similar to that presented by the case now under scrutiny. In holding the statute constitutional, the court employed the language upon which respondent bar association relies. The court says, for instance:

> "The right to practice law is not a constitutional right, for it is not mentioned in that instrument, or recognized, or established by it. It is a mere statutory privilege, not even rising to the dignity of an office, except in a very limited sense. * * *"

This language is employed during the course of a discussion of one of the constitutional questions considered by the court, which question had no relationship whatever to the point now before us. The court had in mind, in using the words "statutory privilege," nothing bearing upon a possible conflict of power between the judicial and legislative branches of government. Uttered under such circumstances, the expression can hardly be allowed the disastrous potency respondent would ascribe to it.

The court says also:

> "The right to practice law is not an absolute right, derived from the law of nature. It is the mere creature of the statute, and when the license is issued and the official oath taken, which authorizes the attorney to exercise the right, it confers but a statutory privilege, subject to the control of the Legislature. Such is the legal effect of all statutory privileges, unless they are in the nature of contracts or vested rights of property."

These expressions were employed, as the last sentence of the quotation shows, in dealing with the question whether the right to practice law is property. So limited, as they must be in appraising the effect of the decision, they are utterly without value here.

The court says again:

> "The Legislature has power to repress whatever is hurtful to the general good, and to pass laws regulating the relations, contracts, intercourse and business of the people at large, and of its members to each other, and it is generally the exclusive judge of what is or is not hurtful, the only limitations upon this power being those prescribed by the Constitution. It has the power to regulate as well as to suppress particular branches of business deemed by it immoral and prejudicial to the general good. The duty of government comprehends the moral as well as the physical welfare of the state. * * * The practice of the law is a privilege to which the Legislature may attach such conditions as it may deem proper, and a breach of the condition is a forfeiture of the right."

This passage in the opinion concedes to the Legislature a power which is akin to that said in Re Day, supra, to be possessed by it, and nothing more—the authority, under the police power, to prevent the admission of unworthy persons to the bar—the only difference being that in Cohen v. Wright the language of the court would seem to concede the existence in the Legislature of the right to exercise a supervisory control, under the police power, over attorneys after admission. The language of the court, thus understood, can be said to reflect in no degree upon the general inherent power of the courts to admit attorneys and to discipline them. What was intended by the court is shown by a further extract from its opinion:

> "We have carefully considered the constitutional objections to this law, and we see nothing in the Constitution of this state prohibiting the Legislature from requiring public officers, or those exercising special privileges, like attorneys at law, to take an expurgatory oath of the character of that prescribed by this act, and it is clearly within their general legislative powers, unless so prohibited."

The opinion contains another passage which relates to this question of the exercise of the police power by the Legislature:

> "The powers and privileges of a lawyer are extensive, and of great importance to the public interests. The Legislature and the courts have always carefully guarded the profession against being degraded or corrupted, that it may command the confidence and respect of the public. The safety of the government and the security of popular rights depend, in a great degree, upon the purity of the bench and the bar. If treason is allowed to find its advocates among their members, the very existence of the government and the liberties of the people are endangered. It is therefore the solemn duty of the legislative authority to provide the necessary means to purge the profession of every taint or suspicion of treason. The Legislature of this state have attempted to perform that duty, by the passage of the act now under consideration, and it should be sustained by the courts, unless they have clearly exceeded their constitutional powers. It is not open to that objection, as we have shown, and is therefore valid, and must be enforced accordingly."

In the case the court was called upon to consider also the constitutionality of a provision of the statute which required parties to actions, before they might proceed, to take an oath similar to that required of attorneys. In deciding this point, the court used strong language which will serve to illustrate the view taken by it concerning the provision requiring an expurgatory oath by attorneys:

> "There is nothing in the Constitution which prohibits the Legislature from closing the doors of the courts against traitors and their aiders and abettors; or which requires that this shall not be done until after conviction of the crime, in a regular criminal trial; or that prohibits the Legislature from requiring of those litigating in the courts that they shall purge themselves, by their own oath, of the imputed offense, before they shall claim their aid. The treasonable acts may be so extensively and secretly committed, that the ordinary course of a criminal trial would be entirely ineffectual to stay the evil. The litigant has no just right to complain, for it is his own voluntary or willful act that closes the doors against him. The law warned him what the result would be, and although it may be severe, it is a consequence of his own voluntary violation of the fundamental rights of society. The law may be a very efficient means of preventing the spread of treason and rebellion. It brings one of the consequences of treasonable conduct directly home to those who have something at stake—something to lose if the government is overthrown—something to gain if it is sustained. Without it, traitors might recover, by the aid of the courts, the very means to destroy the government, by aiding and assisting the rebellion, and thus the government would be furnishing the instruments to assist in its own destruction."

So much for the portions of the opinion in Cohen v. Wright upon which respondent relies, but more remains to be said concerning the case. As we have already observed, the opinion, in terms, contains nothing upon the subject of the inherent power of the courts. Some parts of it, however, exhibit language showing that such a power exists, for instance:

> "Attorneys are officers of the court, and as such are subject to the control of the court before which they practice, which has power to summarily investigate the dealings and transactions between them and their clients in cases before it, as also to disbar them for misconduct and deprive them of the privilege of practicing their profession."

And the court says again:

> "The public have a right to demand that no person shall be permitted to aid in the administration of justice whose character is tainted with dishonesty, corruption, crime, and, we will add, disloyalty or treasonable acts. And his name will be stricken from the roll by the court,

by a summary proceeding, in such cases, whether provided for by statute or not, as it is a duty which the court owes to the public. * * * And this is done not as a punishment of the attorney, but as a measure necessary for the protection of the public. * * * And the court has power to require the attorney to purge himself upon oath of the imputed charge. * * * The name of an attorney who has fought a duel will thus be stricken from the roll, although no statute provided for such a case, and although the attorney had not been convicted of the offense. * * * A conviction of the crime charged is not necessary."

These extracts relate to the power to disbar, it is true, but the power to disbar necessarily presupposes the power to refuse to admit, on grounds similar to those from which disbarment may result.

Ex parte Yale, 24 Cal. 241, 85 Am. Dec. 62. In this case the Supreme Court had before it the identical question presented for its consideration in Cohen v. Wright, and did no more than adhere to the opinion announced in that case. Indeed, the court said in the later case that, "though a very elaborate opinion was rendered" in the earlier one, "it was considered proper to permit the questions to be again argued upon the motion and objection in writing, as there was no record in this court of the motion or proceeding upon which the opinion in the case of Cohen v. Wright was rendered." The opinion in the later case, however, contains some of the most striking language upon which respondent may rely in its dependence upon California cases, but nevertheless the terms employed by the court are subject to the limitations referred to above in our comments on Cohen v. Wright. We must now refer to some of the far-reaching expressions of the court—if we look to the letter of them—employed in deciding the exact question before it:

> "The manner, terms, and conditions of their [attorney's] admission to practice, and of their continuing in practice, as well as their powers, duties and privileges, are proper subjects of legislative control to the same extent and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute."

It will be observed, of course, that this entire passage goes beyond the question the court was called upon to decide, and, moreover, if it is to be allowed its full potency, we must cast aside much of the reasoning in Cohen v. Wright. In that case the court grounded its decision upon the authority of the Legislature, under the police power, to prevent "traitors" from continuing in the practice of the law. In Ex parte Yale we see language which apparently concedes to the lawmaking branch an absolute, unequivocal, and exclusive power to deal with lawyers from the inception of proceedings for admission to the close of proceedings for disbarment, and all this without any expressed intention to depart from Cohen v. Wright. In truth, there is practically an expressed intention to follow the "elaborate" opinion in that case, for the question considered was allowed to be presented a second time solely to establish a record upon which the decision in the former case might rest. It will be observed, particularly, that by the inclusion of the words "of their continuing in practice" in the extract above quoted from the opinion in the later case, the court, in terms at least, wipes out all that was said in Cohen v. Wright concerning the summary manner in which courts may handle disbarment matters "whether provided for by statute or not." That respondent does not ascribe this ruinous effect to Ex parte Yale is evident from certain concessions made in its brief. These concessions will be the subject of later comment. The Supreme Court said further, in Ex parte Yale:

> "There is no provision of the Constitution directly restricting the Legislature from exercising plenary control over the qualifications, admission, oath, or duties of attorneys at law, and in our opinion no such restriction arises by implication; and it therefore follows that the Legislature may lawfully require, as a condition to their admission to practice, or their continuance in practice, the taking of the oath prescribed in the act under consideration, or, at their pleasure, may dispense with all conditions and oaths."

This language is subject to the comment we have made upon the first quotation taken from the opinion, but especial attention must be directed to the final words contained in it, "or, at their pleasure, may dispense with all conditions and oaths." As this language is the veriest obiter, we do not hesitate to characterize it as showing the most abject bow to the legislative will to be found in the entire sum of pronouncements of the judicial branch of government in this country. To bring the question of the inherent power of courts over such matters to a sharp issue, how would any unit of the judicial branch regard a statute which directed the admission to the bar of all persons, irrespective of age, citizenship, residence, education, idiocy, insanity, or morality? Short of positive constitutional inhibition, such a statute could be enacted under the language of the opinion, and specific constitutional inhibition would be hard to find, as the organic law takes no note whatever of attorneys at law. The extreme language of Ex parte Yale is most helpful in showing to what straits we are brought by a concession to the legislative department of government of sole and exclusive power over the admission and discipline of lawyers. The opinion is no more extreme in its language than the principle is extreme in the consequences to which it leads. The power referred to is either legislative or it is judicial, and the answer is that it is judicial.

The solution of the question inheres in the provisions of the Constitution which divide government into three departments, and which erect insuperable barriers between them.

In the Matter of Mock, 146 Cal. 378, 80 P. 64. In this case Mock applied to the Supreme Court for admission to the bar. The petition was presented after the Legislature had amended sections 277 and 279 of the Code of Civil Procedure in such manner as to attempt to confer upon the District Courts of Appeal the power to admit applicants to practice, in the language of section 277, "in all the courts of this state, including the Supreme Court." In disposing of Mock's application, the Supreme Court said:

> "It is undoubtedly true that this court has the power, as a matter of comity, to permit an attorney from any other state to present argument to this court in any pending cause, but we are of the opinion that it has not, under the law as it is now written, the power to make an order admitting one to practice in all the courts of this state, and that the applicant must make his application to a District Court of Appeal."

This language is very broad it cannot be denied. It must be observed, however, that the opinion fails to show that the applicant made any appeal to the court's inherent power to admit, nor is that power mentioned by the court. No authorities are cited, except the two Code sections. Considering the state of the law throughout the country, considering the abundant reason for the prevailing rule that courts have inherent power over such matters, this case cannot be viewed as more than a sanction of the Code amendments relating to admissions by the District Courts of Appeal, as a reasonable regulation of the subject. Suppose the Legislature, instead of mentioning the Courts of Appeal, had named the justices courts of the state as the admitting tribunals. The issue then would have been sharply drawn. The extreme to which we are logically led by a concession to the Legislature of the actual power to interfere with a matter which in principle is solely one of judicial concern then would have been reached. We are confident that, in such a case, the Supreme Court would have asserted its inherent power and would have refused to follow the Code amendments as wholly unreasonable, as subversive of the dignity and functions of the judiciary, and as dangerous to the administration of justice.

In re Hovey, 7 Cal. Unrep. 202, 80 P. 234. What is above said as to In the Matter of Mock applies with full force to this case.

In re Students of Hastings College of Law, 7 Cal. Unrep. 376, 110 P. 341. Certain students, upon diplomas from Hastings College, applied to the District Court of Appeal for admission to the bar. The act of the Legislature which created the college contained the provision that a diploma of the institution should entitle the holder "to a license to practice in all the courts of this state." In admitting the applicants, the court said:

> "It is our duty to grant a license to each of said persons entitling him to practice as an attorney and counselor at law in all courts of this state. * * *"

Our comment upon In the Matter of Mock is equally applicable here. In order to draw to a sharp issue again the point urged by respondent bar association, suppose that one of the graduates from the college, after procuring his diploma and before making his application for admission to the bar, had been convicted of a crime involving a high degree of moral turpitude, or had suffered judgment for damages in a civil case because he had practiced gross frauds upon some trusting person. The court undoubtedly would not have ordered his admission under such circumstances, and it could have grounded its refusal solely upon its inherent power over such matters. We see at every turn, when logic is pursued to its legitimate extreme, how dangerous it is to concede to the Legislature any real power over these strictly judicial affairs.

In re Mash, 39 Cal. App. 548, 179 P. 897. In this case the District Court of Appeal had ordered an admission to the bar. An application for rehearing was made to the Supreme Court, but it was denied. The higher court said, in a brief opinion rendered by it, that the power "to admit persons to practice law is now vested exclusively in the District Court of Appeal," thus reiterating the view stated In the Matter of Mock. The rehearing was denied on the ground that the case presented merely a conflict of evidence, but the court employed this very general language in its opinion: "Our functions in such a case are supervisory only. We have no original authority to admit persons to practice law."

Danford v. Superior Court, 49 Cal. App. 303, 193 P. 272. There is nothing in this case which requires particular comment, nor which interferes with the views we entertain toward the question now before us.

In re Collins, 188 Cal. 701, 206 P. 990, 32 A. L. R. 1062. Some of the strongest language upon which respondent bar association may rely is to be found in the opinion in this case, if we look but to the letter of it. An order of disbarment had been entered against Collins without notice, upon presentation to the court of a certified copy of the record of his conviction of a crime involving moral turpitude. Because of the lack of notice, Collins petitioned that the order be set aside. The order had been made pursuant to the provisions of section 287 of the Code of Civil Procedure, which declared that one might be disbarred upon "conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence." After an exhaustive discussion of the question presented, the court determined that notice was not necessary to support the order of disbarment, but said in the course of its opinion:

> "It may be admitted that the right or privilege of exercising the vocation of attorney and counselor at law is a valuable right or privilege, but it must also be conceded that it is a right or privilege which the Legislature had the power to bestow, or to empower the judicial department of the state government to bestow, upon such terms as would be consistent with the nature and purpose of the right or privilege to be exercised; and that this being so the Legislature had the undoubted right to prescribe the possession of a good moral character in the applicant for the grant of the right or privilege of entering and of exercising the legal profession, and also, of necessity, to prescribe the continued possession of such good moral character in the individual receiving such grant."

We think this language was unnecessary to a decision of the mere question whether Collins was entitled to notice before he could be disbarred upon a production of the record of his conviction of crime. The case presented no question as to the power of either court or Legislature over the matter of disbarments. Whether notice was necessary depended wholly upon other matters of law, and the result would have been the same if the order had been made under a rule of court containing language similar to that contained in section 287 of the Code. That the matter of disbarments could be regulated by such a rule of court is established by a long line of authority, from which, as we have already observed, there is no departure or dissent. We cannot believe that the Supreme Court, by the language which we have quoted, whether it be regarded as obiter or as necessary to the decision rendered, intended to make inapplicable in California the universal rule pertaining to the control of the courts over the matter of disbarments. We think the language of the court requires no such construction, and it should not be so construed unless no other course were open. We regard the court's expressions as amounting to nothing more than a restatement of the ground taken for the first time In the Matter of Mock. It is especially to be noted—a thing peculiar to all the California cases upon which respondent relies—that the court makes no mention of the inherent power of courts over lawyers. We cannot conceive that the court has ever intended to decide a question which it has never either discussed or mentioned.

In re Stevens, 197 Cal. 408, 241 P. 88. While the opinion in this case is lengthy, and contains an exhaustive treatment of the questions considered by the court, we think it contains nothing new upon the particular question presented to us here.

In re Weymann (Cal. App.) 268 Pac. 971. This was an application for admission to the bar under the provisions of the Code of Civil Procedure which were in operation before the State Bar Act. There were but two questions presented for the consideration of the court. One of these was whether the sections of the Code had been repealed by the provisions of the act; that is, a question as between two sets of enactments by the Legislature, not a question as to a distribution of powers between two branches of government. The second question was as to the constitutionality of the State Bar Act under the provisions of the organic law requiring that a statute shall provide only for matters expressed in its title. In leading up to a determination of the first question, the court reproduced, in effect, the language which we have quoted above from In re Collins, and about which we need say nothing more. We cannot regard the case as interfering with the views we hold upon the question presented here.

We have considered carefully all the California cases upon which respondent relies, and we now turn to two others, both of which were decided by the District Court of Appeal. The first of these In re Chapelle, 71 Cal. App. 129, 234 P. 906, and it presents the other side of the shield, not exhaustively but in brief. This is the first case in California in which the inherent power of courts to admit to the bar was in question and the first in which the power was ever mentioned. Chapelle, desiring to avoid the necessity for an examination before the state board of bar examiners, and alleging reason for the claimed exemption in his case, asked for an admission under the inherent power of the court. In his brief petitioner cited authority to the effect that the inherent power exists, and no attempt was made to meet the point by either of the respondents in the proceeding. These were the state board of bar examiners and the Los Angeles Bar Association, the respondent in the present matter. Neither respondent saw in the decisions of the Supreme Court the ruinous potency which respondent bar association would now ascribe to them. Indeed, respondent bar examiners expressly relied on in Re Goodell, 39 Wis. 232, 20 Am. Rep. 42, and quoted that part of the opinion in the case to the effect that, where rules prescribed by the Legislature affecting admissions "have appeared reasonable and just, it has been the pleasure of the court to act upon such statutes in deference to the wishes of a co-ordinate branch of the government, without considering the question of power." After making this quotation, the bar examiners proceeded to say:

> "In this state our Supreme and District Courts of Appeal have expressly adopted the rules [fixing the powers and duties of the state board of bar examiners], Rules of Court, No. 1; hence it appears that the courts have voluntarily adopted the method prescribed by the

Legislature for securing the necessary evidence to determine the fitness of applicants."

Upon this background we remarked, in disposing of Chapelle's application, "The courts undoubtedly enjoy the inherent power to determine what persons shall be admitted to the bar"; and we said later in the opinion:

> "Notwithstanding the inherent power of the courts to admit applicants for licenses to practice law 'it has been generally conceded that the Legislature may, in the exercise of the police power, prescribe reasonable rules and regulations for admissions to the bar which will be followed by the courts,'" and cited authority for the statement.

After a quotation from Ex parte Yale, supra, we said further:

> "The only restraints upon the exercise of this power by the Legislature are that the regulations prescribed by that branch of the government shall be reasonable and shall not deprive the judicial branch of its power to prescribe additional conditions under which applicants shall be admitted, nor take from the courts the right and duty of actually making orders admitting them [citing cases]. In some jurisdictions it has been determined, it is true, that the power to regulate the machinery governing admissions to the bar is strictly judicial and that the legislative branch cannot be concerned with it, * * * but in our opinion such a view is consonant neither with reason nor with the weight of authority."

We then proceeded to inquire:

> "Do the sections of the Code of Civil Procedure relating to the board of bar examiners exhibit a proper exercise of the control which the Legislature may justly impose upon the matter of admissions to the bar?"

This question we answered in the affirmative, and for that reason we denied Chapelle's application. The opinion rendered by us contains certain inaccuracies of expression into which we probably should not have fallen if the question of power had been in dispute, for we then would have been called upon to make the exhaustive search of the authorities which has been conducted in the present case. Still, taking the opinion by and large, In re Chapelle truly reflects the state of the law upon the question of inherent power as it exists throughout the nation, with wholly unimportant departures from it in one or two states. The case declares the rule, in effect, that the matter of admissions, including regulations leading up to orders for admissions, belongs to the judicial branch of government, for we allowed potency to the legislative enactments which were before us solely upon the ground that they prescribed reasonable regulations.

The second decision of the District Court of Appeal to which we have referred above is Sloane v. Hammond, 81 Cal. App. 590, 254 P. 648, the opinion in which was also rendered by this division of the court. The case presented questions different from those considered in any other to which we have referred, but it shows the extent to which courts may go, in one direction, in keeping in existence a bar by means of which to perform the judicial function. The point in the case which is of interest here may be developed without taking the time or space to show how the litigation arose. We said that it was the primary duty of the Legislature to provide public officers whose duty it is to prosecute those charged with the commission of crime, but, in view of the fact that such officers are sometimes disqualified to perform their duty in particular cases, we quoted thus from State v. Moxley, 102 Mo. 374, 14 S. W. 969:

> "If the contention of defendant's counsel is to prevail then, if a prosecuting attorney should be for any reason disqualified, all the wheels of criminal justice would be brought to a standstill, for the reason that there would be no vacancy in the office that the Governor could fill, and no power in the court to make a temporary appointee who could in all things discharge the duties pertaining to the office in question. The law does not intend any such absurdity, and will not permit such a failure of justice. And aside from statutory provisions, such as those quoted, the power thus to appoint a temporary representative of the state, one armed with full authority to discharge in full the office he temporarily fills, is of necessity an inherent power in courts of justice."

We also quoted at length from Hisaw v. State, 13 Okl. Cr. 484, 165 P. 636, and, in addition, cited Board of Com'rs v. Fain, 66 Okl. 13, 166 P. 896, and State v. Ellis, 184 Ind. 307, 112 N. E. 98. We then said:

> "The law is well settled, upon just considerations of public policy, as we have seen, that courts possess the inherent power to name special counsel to act in the place of disqualified public prosecutors."

We think the power here referred to is closely akin to the inherent power of courts to create, maintain, and discipline a bar, if for the moment we suppose the Legislature had not attempted to provide for one, and the power which the courts of necessity must possess to do the same things where statutes upon the subject are in existence, which statutes prescribe regulations tending to degrade the courts or to imperil the due administration of justice. If the courts may disregard such statutes, they may disregard all statutes bearing upon such subjects, for it is for them to decide whether the statutes are reasonable, and no power exists to gainsay what they decide.

These are all the California cases which can be said to touch the question before us. We now turn to other matters. We have already referred to certain concessions which are made in the brief of respondent bar association. These are now to be noticed. After saying that the State Bar Act has removed from the courts the power to reinstate disbarred lawyers, respondent proceeds, "subject, however, to the possible qualification that the Legislature could not deprive the courts of authority to refuse to admit unworthy applicants." This concession, if we strike the word "possible" from the expression making it, eliminates in principle the entire argument advanced by respondent in support of the claim that the Legislature has plenary power over the admission and discipline of lawyers. If the Legislature enjoys that power, by what warrant may the courts defy it in the particular referred to in the concession? The attitude of respondent is like that exhibited in most of the cases upon the subject now under treatment. The decisions generally show an inexplicable attempt to split a question which is indivisible and a failure to pursue logic to its ultimate abode. The only part of the Constitution which can touch the question is that which divides government into three co-ordinate branches, with the accompanying mandate that neither of the branches shall exercise functions outside its own domain. If the Legislature has full power over admissions to the bar, it may provide for the installation as officers of the courts of unworthy as well as of worthy persons. Again, in principle there can be no distinction, granting the existence of such a power in the Legislature, between an enactment which permits the admission of immoral or criminal characters and one which allows the admission of persons deficient in mentality or in education. In short, if the power is admitted to exist, the Legislature is supreme, the courts are enslaved, with the result that the successful administration of justice depends in a large degree upon the legislative fiat and not upon a due and efficient exercise of the judicial function. This must be true, for a proper performance of the duties of the courts depends materially not only upon the integrity but upon the learning of the bar.

Respondent asserts that "the only power reserved to the courts" under the State Bar Act is mentioned in that part of section 26 which reads:

> "Nothing in this act contained shall be construed as limiting or altering the powers of the courts of this state to disbar or discipline members of the bar as this power at present exists."

This "reservation" is doubtless based upon a state of the law of judicial decision in some parts of the country which is beyond comprehension. We have already commented upon the fact that there is no dissent from the rule that the courts enjoy inherent power to disbar lawyers. This rule seems to prevail even in those few jurisdictions in which the Legislature has been said to be supreme in the control of other matters affecting the bar, especially the matter of admissions. Here is another attempt to dismember an indivisible subject. How can it be said that the power to disbar, including the power to provide for all steps leading to disbarment, is judicial, while the power over admissions is legislative? If we may resort for a moment to the vernacular, the assertion means that the legislative department may "hire" but that the judicial department may "fire." In language a little more choice, the assertion imports that the Legislature may compel the courts to admit to the bar on one day individuals whom they may disbar on the next. There is no warrant for such a state of affairs under the language of the constitutional provision erecting the three departments of government and making each of the three, in its own sphere, independent of the other two; and, as we have so frequently said, that provision is the only anchorage ground to which the question here involved may be fastened. All these matters—admissions, discipline, disbarments—are either wholly under legislative control or they are wholly under judicial control. This is so surely true that we now venture assertions which we have not yet made. The courts have quite uniformly held that, whatever wounds the legislative branch may inflict upon the body of the judicial branch, the courts have the power, of which they cannot be deprived, to make actual orders admitting to the bar. But why cannot they be deprived of this power, when all else is gone? If the Legislature may, by ill-advised regulation or requirement, put forward those whom the courts are bound to admit, the power to order admissions is already departed, for the courts grasp only at the shadow, while the Legislature holds fast to the substance. In making the orders, the judicial branch becomes but the agent of the legislative branch. Surely, upon principles of sound logic, the legislative domination for which respondent bar association contends must include the making of orders for admissions. To such straits are we driven by the concession to the legislative branch of power over officers of the judicial branch.

Section 7 of article 4 of the Constitution provides that each house of the Legislature shall choose its officers, and sections 23 and 23a provide that each house may provide for its attachés, although the provisions as to attachés seem to have been inserted as a mere introduction to language, also contained in the sections, imposing a limit upon the expenditure which may be made for the employment of "help," as it is termed in the organic law. At any rate, we think the provisions for the selection of officers and attachés adds nothing to the section of the Constitution erecting the three departments of government. Suppose the Constitution contained no specific provision for the choice of officers and the employment of attachés by the houses. Suppose that in that event the Governor should attempt to appoint the speaker of the Assembly and the president pro tempore of the Senate and to name the attachés of both Houses. Can there be a doubt that the attempt would be regarded justly as an invasion by the executive of the powers of the Legislature, and that the courts would so determine? The appointment and control of its officers and attachés is a necessary function of the two houses. The performance of the work of legislation could not safely be risked without such power of appointment and without such overmastering control. We regard the power to select, discipline, and disbar attorneys at law, necessary officers of the courts as they are, to be equally important to the operations of the judicial branch and as coming as clearly within its province.

[8] We conclude that this court possesses the inherent power to readmit petitioner to the bar, if we should determine that his application is meritorious. Into the merits of the petition, however, we have not gone, nor do we intend to do so. While we must avoid all appearance of prejudging any of the questions, constitutional or otherwise, which may hereafter arise under the State Bar Act, we do not hesitate to accord to the enactment, in so far as it affects the control of the bar, our sanction and approval as providing reasonable aids to the courts in the discharge of a duty which pertains strictly to them. We think the act a striking landmark in the history of the relationships between the bench and the bar, and believe it to contain some of the most salutary regulations ever devised for the purpose of purifying the well springs of justice. Viewing the statute as we do, we think we should not be the first to fritter away, even in a slight degree, the powers conferred by it upon the board of governors of the state bar. Disappointing as our conclusion may be to petitioner, if it shall eventually be determined that he is entitled to a readmission, his case must give way to the general good, and he must be remitted to the procedure provided by the State Bar Act for the accomplishment of his desires.

We have already said that it was incumbent upon us to consider the point raised by respondent bar association as to the inherent power of the courts over the bar, for the reason that, if the power exists, it should never be permitted to be brought in question. At this particular juncture in the judicial history of the state there is another reason why it was imperative that the question be decided. We now have in existence the State Bar Act, the general scheme of which we have approved and the excellences of which we have conceded. It is not beyond possibility that the act may be repealed at some future time by the Legislature. If the power of the lawmaking branch over the bar is plenary, as contended by respondent, the repeal then becomes effective, the judicial branch is powerless, and the Legislature may enact in the place of the discarded measure such ineffective or harmful legislation as it pleases, subject only to the inhibitions of the Constitution apart from the provisions erecting the three branches of government. On the other hand, the control of the bar being vested in the judicial branch, and the Legislature having no real power in the premises, any repeal of the State Bar Act may be disregarded by the courts, in so far as its provisions relate strictly to the admission, discipline, or disbarment of lawyers. A repeal of the act by the Legislature would wipe out the provision making the state bar a body corporate and perhaps other parts of it, but certainly considerable portions of the measure could be kept alive by the judicial branch in defiance of the will of the Legislature. Whether this should be done by ignoring the repeal and considering certain parts of the act as still effective, or whether those parts should be "re-enacted" by rule of court need not now be determined.

There is yet another reason why it is important that the inherent power of the courts over the bar should now be declared. While the board of governors of the state bar owes its existence to the initiative of the Legislature, it is well that it be understood that its real and continued existence depends upon the courts. It is well that it were realized that the board owes a faithful discharge of its duty to the judicial branch and not to the Legislature, and through the judicial branch, and as a part of it, to the people. It would be incongruous to view a board of lawyers, charged with the duty of aiding in the administration of justice, as dependent upon the Legislature for its existence and especially as answerable to the Legislature for the performance of its duty. The members of the board are lawyers, after all, in everything they do under the State Bar Act, and the Legislature could not, by providing for such a board, change the relations of those who might become its members to the branch of government of which, as individuals, they are a part.

Petition denied.

We concur: CRAIG, J.; THOMPSON, J.

94 Cal. App. 251

FEDERAL MUT. LIABILITY INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 6147.)

District Court of Appeal, Second District, Division 2, California. Oct. 5, 1928.

Master and servant ⚷375(1)—Injury to ranch superintendent returning to route to horticultural commissioner, from detour to his own house on personal errand, held within employment.

Ranch superintendent who, after setting out for auto trip to see horticultural commissioner, departed from direct route to deposit bucket of olives at his own house and was injured in collision with another automobile before he had returned from his detour, sustained injuries in course of his employment, where he was given broad latitude as to his hours of work and was permitted to mingle his business and personal affairs.

Proceedings under the Workmen's Compensation Act by E. R. Underwood, opposed by the Federal Mutual Liability Insurance Company. From an award of the Industrial Accident Commission in claimant's favor, the insurer brings certiorari. Affirmed.

R. P. Wisecarver, of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

WORKS, P. J. Respondent E. R. Underwood was employed as a ranch superintendent by a corporation that owned and operated a ranch. The corporation will hereafter be referred to as the company. In the discharge of his duties, which were varied in character, Underwood did much traveling far and near, in an automobile furnished him for the purpose by the company. Much of his time, also, was expended in various pursuits upon the ranch itself. He was supposed to be occupied about the company's business in the daytime from Monday morning to Saturday night of each week, but he was also subject to special call at any time, day or night. Upon the day—which was Saturday—upon which arose the occurrences which are of interest here, there was being considered the necessity for spraying some trees upon the ranch. It became necessary for a horticultural commissioner, who was stationed at a town some 35 miles from the ranch, to be consulted as to the best means of conducting the projected operations. Upon the Saturday afternoon Underwood's superior in the handling of the company's affairs instructed him to go to the horticultural commissioner and ask his advice upon the troublesome subject. Underwood testified before the respondent Industrial Accident Commission that the superior said he had seen an article in which a certain method of spraying was advised, and, further:

> "He instructed me to see [the commissioner] before returning to the ranch and consult with him as to whether it was necessary for us to do that on our particular place."

Shortly after this conversation, Underwood went to a garage not far from the ranch, where his car was being repaired, procured it, and drove away. He did not take the direct road to the town above mentioned, but left it approximately at right angles on a course which, after two turns to the left, would bring him back to the direct route thus referred to. The distance around this detour—we so term it for convenience only—was about four miles. Underwood's home was at a point on the road he thus took, in a stretch he traversed after making the first left turn. Before he departed from the ranch, one of the company's employees had given him some olives for his own consumption. These were contained in a large wooden bucket, which was filled with the fruit and with the brine in which it was immersed. When Underwood reached the garage he had placed the bucket in the car. When he reached his home he deposited the olives there and proceeded along the remainder of the so-called detour over a well-paved and well-traveled road which was on the direct route from his home to the town where the horticultural commissioner was to be found. On making the second turn above mentioned, he collided with another automobile and was injured. He applied to respondent commission for compensation for his injuries and an award was made in his favor. This proceeding was instituted for the purpose of annulling the award.

Further light is thrown upon the question presented by the testimony of Underwood's superior before the commission. He said:

> "He is a man that is carrying rather heavy burdens and his calls away from the ranch for various reasons take him in many directions, employing help, buying supplies, and reporting to me every Saturday, and his employment is in a similar nature to mine, in that I am on duty all the time and if any one rang up Mr. Underwood in the middle of the night, Sunday night, Saturday night, or any other night, it would be up to him to respond and he would respond.
>
> "Q. It would be his duty as your employee? A. Absolutely. A superintendent has no hours. Due to that fact, we extend rather broad latitude to that class of man, and if he had business to attend to of his own when he was in town on Saturday, that would be perfectly all right with us and he understood it that way. If he had occasion to stop at his home, he would still be on duty due to that latitude given.
>
> "Q. You did not fix any particular hours that he would travel or the route he would take in the execution of his business? A. It would be impossible.
>
> "Q. That was left to his discretion? A. Absolutely. * * * A man occupying the posi-

tion he does cannot separate his business from his personal affairs. They are intermingled sometimes, usually at all times. It is not like a man going on duty at 8 o'clock in the morning and leaving at 6.

"Q. He was practically subject to call at any time? A. Yes, sir."

We think respondent commission was justified in finding from the evidence before it that Underwood did not commence his journey to consult the horticultural commissioner until after he had left the olives at his home. His injuries therefore arose out of his employment and were incurred in the course of it. He was not instructed to go directly to the horticultural commissioner, but only to see him "before returning to the ranch." Undoubtedly, considering the general character of his employment, these special instructions would have been entirely satisfied if he had remained at home, after unloading the bucket of olives, until after dinner, or even until the next day, or perhaps even until Monday morning, then proceeding to consult the commissioner and thereafter communicating the result to his superior the next time he appeared at the ranch. These views force the conclusion that his journey upon the business of his employer began at the time we have already indicated.

Petitioner contends, of course, that Underwood should have proceeded directly from the garage to the town, and that his side trip to his home took him outside the course of his employment, and that he would not again have entered it until he returned to the direct route from the garage to the town. Employers' Liability A. C. v. Industrial Accident Commission, 182 Cal. 612, 187 P. 42, and other authorities cited in the opinion there rendered, are referred to by petitioner as supporting this contention. We think all those cases very different from the one now before us.

Award affirmed.

We concur: CRAIG, J.; THOMPSON, J.

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94 Cal. App. 230

FAULL et ux. v. JOHNSON et al.
(Civ. 3559.)

District Court of Appeal, Third District, California. Oct. 2, 1928.

1. Exchange of property 🔑8(4)—Evidence, in action to rescind exchange of properties, held to warrant inference that representations as to value were positive statements of fact.

Evidence, in action to rescind exchange of properties, *held* sufficient to warrant inference that defendants' alleged representations as to value of their property were not mere expressions of opinion, but positive statements of fact.

2. Trial 🔑165—On motion for nonsuit, favorable inferences fairly deducible from the evidence are considered facts proved for plaintiff.

In passing on motion for nonsuit, every favorable inference fairly deducible from the evidence must be considered as a fact proved in favor of plaintiff.

3. Exchange of property 🔑3(1)—Parties relying on representations in exchange of properties need not investigate their truth.

Parties to exchange of properties, having relied on the representations by the other parties, were under no obligation to investigate the truth thereof, and this though they had opportunity to do so.

4. Exchange of property 🔑3(1)—Representations in exchange of properties as to value, financial ability, and payment held material.

Where T., having a contract for purchase of a large tract of land, contracted to sell part of it to H., and defendants acquired T.'s rights under his contract with H., and exchanged them with plaintiffs for valuable properties, representations of defendants, in making the exchange, as to the financial ability of T., and as to the value of the property covered by H.'s contract, and that H. had already made a substantial payment on his contract, though it was not yet due, were material.

5. Exchange of property 🔑3(1)—Misrepresentation of single material fact in exchange of properties held sufficient for rescission.

Misrepresentation by defendants, in exchange of properties with plaintiffs, of a single material fact on which they had a right to and did rely, will suffice to support plaintiffs' cause of action for rescission.

6. Exchange of property 🔑5—Delay of 20 days not causing injury held not laches, barring action to rescind exchange of properties.

Plaintiffs' delay of 20 days before giving notice of rescission of exchange of properties with defendants, not being unreasonable, and not being shown to have caused defendants any injury, did not constitute laches, barring action for rescission.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by James Pooley Faull and wife against S. A. Johnson and others. From a judgment of nonsuit, plaintiffs appeal. Reversed.

Todd, Pawson & Watkins, of Long Beach, for appellants.

W. I. Gilbert, of Los Angeles, and E. G. MacAdams, of Long Beach, for respondents.

FINCH, P. J. In the year 1919 Nancy E. Farlow entered into a contract to sell 264 acres of land in Fresno county to E. J. DeMasters. In January, 1920, Joseph E. Trembley, William R. Trembley, Claude H. Trembley, and Frank Trembley acquired all of the purchaser's rights under the contract. January 2, 1922, the Trembleys entered into an agreement to sell 47 acres of the land to O. E. Hillyard for $19,500, $4,700 thereof to be paid on or before December 1, 1930, and 60 per cent. of the gross proceeds received from the sale of all crops grown or produced upon the premises during and after the year 1924 to be applied on the purchase price until the whole of the remainder was paid, the deferred payments to bear interest at 7 per cent. per annum. Thereafter the defendants acquired the rights of the Trembleys under the Hillyard contract, September 15, 1924, the defendants agreed to convey such rights to the plaintiffs in exchange for valuable real property in Long Beach. Subsequently both parties executed conveyances consummating the exchange. The Trembleys failed to make the payments due under their contract of purchase of the larger tract, and by reason thereof, early in 1925, all their rights under that contract and the rights of the plaintiffs under the Hillyard contract were canceled by decree of court. February 9, 1925, the plaintiffs gave notice of rescission, and, the defendants refusing to rescind, this action was commenced on the following day. As grounds for rescission the complaint alleges a number of false representations alleged to have been made by the defendants and to have induced the plaintiffs to make the exchange, of which the following only need be considered:

(1) That the property described in the Hillyard contract was of the value of $27,500, whereas its true value was only $7,000.

(2) That Hillyard had made a payment of $2,000 on the contract price when in fact he had made no payment thereon.

(3) That the "Trembleys were worth the sum of $150,000 and were able * * * to keep their contract under which they were purchasing the land, * * * in full force and effect and not permit the same to become delinquent," whereas they "were not worth the sum of $150,000 and were financially unable to keep said contract in full force and effect."

At the close of the plaintiffs' case the court granted defendants' motion for a nonsuit, and the plaintiffs have appealed.

The plaintiffs introduced evidence clearly showing, if true, that the foregoing representations were made and that plaintiffs were induced thereby to make the exchange of properties. Witnesses for the plaintiffs testified that the Hillyard land was worth only $8,000 or $9,000. The testimony shows without contradiction that Hillyard had paid nothing whatever on his contract of purchase. It appears from the evidence that the Trembleys were financially unable to make the payments as they became due under their contract to purchase the larger tract, but it was not shown that they were not worth $150,000.

In granting the motion for a nonsuit the trial court, referring to the Hillyard tract of 47 acres, said:

> "The testimony of the various witnesses seems to indicate that it was worth around $8,000 or $9,000."

The court took the veiw, however, that the representation that it was worth $27,500 was a mere expression of opinion, and that because the plaintiffs had an opportunity to examine the property they were not justified in relying upon the false representation as to its value.

Plaintiff James Pooley Faull conducted the negotiations on the part of himself and wife for the exchange of the properties. He testified that he had had no previous experience in buying agricultural land; that he did not "know anything about agricultural land"; and that he depended on the alleged representations "as to the value of this land." In company with one of the defendants, he was once upon the land for "an hour or an hour and a half possibly," but he made no independent investigation as to its value.

[1, 2] The evidence is sufficient to warrant the inference that the alleged representations as to value were not mere expressions of opinion, but positive statements of fact. Harris v. Miller, 196 Cal. 8, 15, 235 P. 981; French v. Freeman, 191 Cal. 579, 585, 217 P. 515; Powell v. Oak Ridge Orchards Co. (Cal. App.) 258 P. 636; Dickey v. Dunn, 80 Cal. App. 724, 727, 252 P. 770; Stone v. McCarty, 64 Cal. App. 158, 167, 220 P. 690. In passing upon a motion for a nonsuit, every favorable inference fairly deducible from the evidence must be considered as a fact proved in favor of the plaintiff. Estate of Arnold, 147 Cal. 583, 586, 82 P. 252.

[3] Plaintiffs having relied on the representations made by the defendants, they were under no obligation to investigate the truth thereof. French v. Freeman, supra; Dickey v. Dunn, supra. The fact that the plaintiffs may have had an opportunity to investigate the truth of the representations made by the defendants does not preclude a recovery. Teague v. Hall, 171 Cal. 668, 670, 154 P. 851.

[4, 5] The trial court also stated that the representation that Hillyard had made a payment of $2,000 on the contract of purchase was immaterial. Faull testified that he said, in a conversation with defendant Eby, that "there is one good feature of this contract, and that is that Mr. Hillyard has paid $2,000 cash on it, whereas he had until 1930 before he had to make any cash payments except the interest," to which Eby replied, "He got that money, I think, from the sale he made of a little piece of property up in that country somewhere." Eby denied that he made such statement, but he testified that he credited the $2,000 payment on the contract without any part thereof having been made. It appears from other testimony that this credit

was made during the negotiations with plaintiffs.

The alleged representations were all material. The statement that the Trembleys were worth $150,000 was in the nature of an assurance that they were financially able to complete their purchase of the 264 acres of land, included in which was the Hillyard tract. Their failure to acquire title meant the certain destruction of Hillyard's title. The Hillyard tract constituted the security, if the Trembleys fulfilled their contract, for the payment to the plaintiffs of the amount unpaid on the Hillyard contract, and it is self-evident that the value of the security for an indebtedness is a material matter. A payment by Hillyard of $2,000 in cash long before it was due under his contract of purchase would not only indicate a thrifty debtor, but the fact of putting that sum of money into the property would act as an inducement for him to complete the purchase by paying the remainder of the purchase price.

The representation that the Trembleys were worth $150,000 may be dismissed from consideration on account of want of proof as to its falsity, but the proof of the other representations mentioned and their falsity is such as to show clearly that it was error to enter a judgment of nonsuit. "The misrepresentation of even a single material fact upon which the plaintiffs had a right to and did rely will suffice to support plaintiffs' cause of action." Harris v. Miller, supra.

[6] The trial court seems to have been of the opinion that because "there was a delay of about twenty days before any notice of rescission was given," the plaintiffs were guilty of laches. The evidence does not show that the defendants suffered any injury on account of this short delay, and it is clear that such delay was not unreasonable. French v. Freeman, supra; Powell v. Oak Ridge Orchards Co., supra; Dickey v. Dunn, supra; Stone v. McCarty, supra.

The judgment is reversed.

We concur: HART, J.; PLUMMER, J.

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94 Cal. App. 172

SMITH v. SMITH. (Civ. 3492.)

District Court of Appeal, Third District, California. Sept. 27, 1928.

Divorce ⚷182—**Court may order husband to pay wife's attorney fees and costs on appeal, though interlocutory decree required parties to pay own costs (Civ. Code, § 137).**

Under Civ. Code, § 137, trial court after decree in divorce proceeding awarding wife alimony had jurisdiction to order payment of counsel fees and costs by husband to enable wife to properly present cause on appeal taken by husband, notwithstanding provision of interlocutory decree requiring each party to pay own counsel fees.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Elaine T. Smith against Sidney V. Smith, Jr. From an order requiring defendant to pay attorney's fees and costs to enable plaintiff to present cause on appeal, defendant appeals. Affirmed.

See, also, 267 P. 709; 270 P. 463.

Henry & Bedeau, of Sacramento, and Alden Ames, of San Francisco, for appellant.

Charles A. Wetmore, Jr., of San Francisco, for respondent.

PLUMMER, J. On December 12, 1927, the trial court made and entered its order that the appellant pay to the respondent herein the sum of $500 as and for her attorney's fees and actual costs not to exceed $100—the order being made to enable the respondent to properly present her cause on an appeal taken to this court by the appellant herein from an order theretofore made awarding the plaintiff and respondent alimony in a divorce proceeding theretofore tried in the superior court of Yuba county between the parties hereto. The order awarding alimony, as herein stated, was made on the 21st day of October, 1927. The final decree in said cause was entered on the 24th day of October, 1927, in which was incorporated a provision requiring the payment of $175 per month for the support and maintenance of the respondent, the plaintiff in that action, until the further order of the court. The defendant and appellant herein having appealed therefrom, the court, upon application of the plaintiff and respondent herein, made and entered the order first above referred to.

The appellant's contention upon this appeal is that the superior court was without jurisdiction to make the order awarding the plaintiff suit money upon this appeal, because of the provisions of the interlocutory decree in the main case which required that each party pay his own counsel fees. It is then assumed that the interlocutory decree is res adjudicata upon the question of attorney's fees; that it establishes the law relating to this proceeding, and therefore that the trial court possessed no jurisdiction to make any provision awarding counsel fees and costs to the respondent upon this proceeding. In making this contention appellant overlooks the fact that the power of the court in this proceeding is not controlled by the terms of the interlocutory decree. The court had in view the making of an order which would enable the respondent to properly present her cause in opposition to the contentions of the defendant in his appeal from the order of the trial court made on the 21st day of October,

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

1927, requiring payment of alimony. The respondent's opposition to the defendant's appeal being made in good faith, the trial court, under the terms of section 137 of the Civil Code, had jurisdiction to make the order allowing the counsel fees and costs involved in this proceeding. Some questions are raised upon this appeal which were presented to this court in an action between the same parties, numbered 3469, and decided adversely by this court to the contentions of the appellant herein on September 18, 1928, in an action wherein the parties are the same as in this proceeding.

Precisely the same contention made in this case was ruled adversely to the appellant in the case of Whiting v. Whiting, 62 Cal. App. 157, 216 P. 92. In that case the interlocutory decree provided that the parties thereto should pay their own costs. Afterwards, upon an appeal, the court awarded the respondent a certain sum for attorney's fees and costs, and it was from this order that an appeal was taken and the contention made as is made here. We quote from the opinion:

> "Defendant strenuously insists that the order appealed from cannot be sustained and enumerates the following grounds why the same should be set aside: First, the court, at the conclusion of the trial of the action, having entered its decree that each party pay its own costs, and denying plaintiff's application for attorney's fees and alimony, this decree was res adjudicata, and the court had no jurisdiction to grant a subsequent application for either alimony, costs, or attorneys' fees."

The further objection was made that the plaintiff had means of her own, which is not involved in this action. In a somewhat extended opinion the court reviewed the cases having to do with the allowance of suit money, and held that the contention of the appellant was untenable. The cases of Bacigalupi v. Bacigalupi, 72 Cal. App. 654, 238 P. 93, and Howell v. Howell, 104 Cal. 45, 37 P. 770, 43 Am. St. Rep. 70, related only to the power of the trial court to make an order allowing alimony under the provisions of section 139 of the Civil Code, and therefore have no bearing upon the issues tendered upon this appeal, as this appeal is governed solely by the power given to the trial court by section 137, Civil Code. That a trial court has power to award suit money to enable a wife to present her cause upon appeal, irrespective of whether any allowance therefor has been made in the interlocutory decree, is amply supported by the following authorities: Whiting v. Whiting, 62 Cal. App. 157, 216 P. 92; McCahan v. McCahan, 47 Cal. App. 173, 190 P. 458; Dunphy v. Dunphy, 161 Cal. 87, 118 P. 445. In this last case the power of the court under section 137, Civil Code, is fully considered and set forth. The recent decision of the Supreme Court in Lamborn v. Lamborn, 190 Cal. 794, 214 P. 862, supports the order of the trial court in this action. The case of McCaleb v. McCaleb, 177 Cal. 147, 169 P. 1023, contains nothing which in any manner limits or abridges the power of the trial court to award suit money under the provisions of section 137, Civil Code, as set forth in the cases herein cited.

As no contention is made that the amount allowed is excessive, it follows that the allowance made by the trial court should be approved, and the order is therefore affirmed.

We concur: FINCH, P. J.; HART, J.

94 Cal. App. 235

Ex parte PERRY. (Cr. 1493.)

District Court of Appeal, First District, Division 2, California. Oct. 4, 1928.

1. Habeas corpus 🔑31—Defense of former acquittal or conviction affords no ground for release on habeas corpus.

Defense of former acquittal or conviction in one trial is a matter of defense, to be relied on in a second trial, and does not go to jurisdiction, so as to afford ground for release on habeas corpus.

2. Criminal law 🔑739(4)—Former jeopardy or former acquittal on charge of carrying concealed weapons, by reason of acquittal of charge of robbery on same date on ground of insanity, is for jury (St. 1923, c. 339, § 2).

Question of former jeopardy or former acquittal of crime of carrying a concealed weapon, in violation of St. 1923, c. 339, by reason of former acquittal of charge of robbery in violation of chapter 339, § 2, on the same date, by reason of insanity at precise time robbery was committed, presents a question for jury, in that evidence might show that weapon was carried at a different time from robbery, and when defendant was perfectly sane.

Original application by Robert Perry for a writ of habeas corpus. Writ discharged.

Harry S. Whitthorne, of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and August L. Fourtner, Asst. Dist. Atty., both of San Francisco, for respondent.

PRESTON, Justice pro tem. This is a petition to this court in behalf of Robert Perry for his discharge on habeas corpus. The petition was filed by Harry S. Whitthorne. A hearing was had and the following facts appeared:

Robert Perry was charged with robbery, committed on the 3d day of March, 1928. On June 19, 1928, he was convicted by a jury in the superior court of the city and county of San Francisco of robbery in the first degree. On June 21, 1928, the same jury found him insane at the precise time that he committed the robbery. Thereafter, and on the 13th day of July, 1928, said Robert Perry was charged by an indictment returned by the grand jury of the city and county of San Francisco with a felony, to wit, a violation of section 2 of chapter 339, Statutes of 1923, the charging part of said indictment being as follows:

> "Robert E. Perry is accused by the grand jury of the said city and county of San Francisco, state of California, by this indictment, of the crime of felony, to wit: Violating the provisions of chapter 339 of the Statutes of 1923, committed as follows: The said Robert E. Perry having been, before the 3d day of March, 1928, in the superior court of the state of California, in and for the county of Los Angeles, convicted of the crime of felony, to wit, grand larceny, and upon said conviction was delivered to the state penitentiary at San Quentin, California, for confinement on the 4th day of October, 1924, and he, the said Robert E. Perry, did thereafter, to wit, on or about the 3d day of March, 1928, in the city and county of San Francisco, state of California, willfully, unlawfully, and feloniously possess and carry concealed upon his person a certain firearm, to wit, a loaded revolver, less than 12 inches in length, and then and there capable of being concealed upon the person. * * *"

A bench warrant was issued upon this indictment, and Perry was arrested, and in default of bail is now held in the county jail. On July 27, 1928, Perry was duly and regularly arraigned in the superior court of the city and county of San Francisco under said indictment and entered five separate and distinct pleas, among them being the following:

> "Second. The defendant pleads that he has already been acquitted of the offense charged by judgment of the superior court of the city and county of San Francisco, state of California, department No. 12 thereof, rendered at San Francisco, state of California, on the 21st day of June, 1928.
>
> "Third. The defendant pleads that he has been once in jeopardy for the offense charged by judgment of acquittal in the superior court of the city and county of San Francisco, state of California, department No. 12 thereof, at San Francisco, state of California, on the 21st day of June, 1928.
>
> "Fourth. The defendant pleads that he is not guilty of the offense charged, because he was insane at the time that he is alleged to have committed the unlawful act."

After the entry of these pleas, the trial court regularly set the case for trial, and the said Perry is now in the county jail awaiting trial.

The principal grounds upon which Perry bases his application for a release are that he has been "once in jeopardy" and that he has been acquitted of the same offense by reason of the fact that the jury found him insane at the precise time that he committed the robbery, and that, as he used the pistol in the commission of the robbery, he, therefore, cannot now be tried for the separate offense of having the pistol in his possession, or, in other words, it is claimed that the possession of the pistol is a necessary and inseparable part of the crime of robbery in the first degree, and that a finding by the jury that he was not guilty of the robbery by reason of insanity, necessarily includes therein the finding that he was also not guilty of having the pistol in his possession.

[1] The law is well settled that the defense of former acquittal or conviction in one trial is a matter of defense to be relied upon in the second trial; it does not go to the jurisdiction and affords no ground for release upon habeas corpus. In re Collins, 151 Cal. 340, 90 P. 827, 91 P. 397, 129 Am. St. Rep. 122; Ex parte Hartman, 44 Cal. 32. Therefore Perry, having entered his plea of "once in jeopardy" to the indictment for the possession of the pistol, merely puts in issue in that case the question as to whether or not he has been actually acquitted of that charge, and that is a matter to be determined first by the trial court. Petitioner is, in effect, asking this court to say, in advance of the trial in the superior court, that Robert Perry's pleas of "once in jeopardy" and "former acquittal," etc., are good. This we are not called upon to do in this proceeding. It is to be presumed that the trial court will rule correctly upon all defenses and pleas made by Perry in the case of People of the State of California v. Robert Perry, now pending in the superior court of the city and county of San Francisco. If not, the error can be corrected on appeal.

[2] Petitioner further contends that there is no dispute about the facts, and therefore the question of "former jeopardy" or "former acquittal" is one of law for the court to determine. We cannot agree with this contention. The case has not yet been tried, and no one is now able to say that there will be no dispute about the facts when the case is tried. The evidence may show that Perry had the pistol the day before the robbery or even ten minutes before the robbery, and at a time when he was perfectly sane. If such be the case, his pleas of "once in jeopardy" or "former acquittal" of the robbery charge would avail him nothing.

Other points raised by petitioner do not require discussion. The said Robert Perry is remanded to the custody of the sheriff of the city and county of San Francisco, and the writ is discharged.

We concur: KOFORD, P. J.; NOURSE, J.

94 Cal. App. 248

PEOPLE v. JAMES et al. (Cr. 1712.)★

District Court of Appeal, Second District, Division 1, California. Oct. 5, 1928.

Rehearing Denied Oct. 24, 1928.

1. Witnesses 🔑380(5)—Witness failing only to give certain expected testimony favorable to prosecution could not be impeached.

Where state witness failed to give certain expected testimony favorable to prosecution, without having made unexpected adverse statements concerning facts connected with crime, there was no right of impeachment, since mere failure to testify favorably does not entitle party to show that witness has elsewhere made contrary statements concerning facts sought to be elicited.

2. Criminal law 🔑1170½(1)—Error in permitting deputy district attorney to attempt impeachment of state witness held harmless, in view of evidence establishing guilt.

Any error in permitting deputy district attorney to lay foundation for impeachment of state witness on ground of surprise *held* harmless, in view of uncontradicted, positive, direct testimony, establishing guilt.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Roy James and another were convicted of robbery, and they appeal. Affirmed.

E. R. Simon, of Los Angeles, for appellants.
U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

YORK, J. The defendants, James and Whitfield, were convicted on an information charging robbery as stated in count 2 of the information. Counts Nos. 1, 3, 4, 5, and 6 were dismissed during the trial on motion of the district attorney. Their codefendants Reynolds and Sampson were acquitted. From the judgments of conviction and the order denying their motion for a new trial this appeal is taken by defendants, James and Whitfield.

Count 2 of the information charged all four defendants with robbery of the cashier of the Toloma Creamery Company, in the city of Los Angeles, on March 31, 1928. The cashier and two of his assistants identified the two defendants, Whitfield and James, as being the two men who perpetrated the robbery. Another witness testified that she was present when all four of the defendants returned from the robbery and that she saw them divide the money.

Reversal of the order denying a new trial and reversal of the judgment is sought on account of certain questions asked by the district attorney, in which he attempted to cross-examine one of his own witnesses, Gerald Reynolds, who was the brother of defendant Leo Reynolds, who was found not guilty. Objection was made to the statements made by the deputy district attorney, as follows:

"If the court please, the people are taken by surprise with the testimony given by this witness and desire to cross-examine him for the purpose of laying a ground for impeachment.
"The Court: All right, you may do so.
"Mr. Shaw: Well, we object—
"Mr. Crail: What is that?
"Mr. Shaw: All right.
"The Court: You may proceed."

Thereupon, the deputy district attorney attempted apparently to lay a foundation for the introduction of evidence (by way of impeachment) that the witness, Gerald Reynolds, made statements to officers Chitwood and Luquet that he had a certain conversation with his brother after the robbery about the commission of the crime and that he had a conversation with Mr. Sampson concerning the holdup; and that he had conversed with the defendants as to money taken and about checks taken during the holdup. Also that the witness had told the officers about conversations he had with the defendants, prior to the robbery, concerning the commission of the crime, and as to the advisability of holding up the place.

[1, 2] The surprise expressed by the district attorney concerning the testimony given by the witness related only to the failure of the witness to give certain expected testimony favorable to the prosecution. It could not have arisen from unexpected adverse statements by the witness concerning facts connected with the crime, for no such statements had been made. Under such circumstances, no right of impeachment of the witness had arisen, and it was useless to attempt the laying of a foundation therefor. "The mere failure of a witness to testify favorably for the party calling him, unaccompanied by any testimony which would tend to the prejudice of the case of the party calling the witness, will not entitle such party to show that the witness has elsewhere made contrary statements concerning the facts sought to be elicited from him." People v. Sliscovich, 193 Cal. 544, 554, 226 P. 611, 615. If, however, any harm was done by the statement of the deputy district attorney as to his surprise, and if any error was committed in asking the questions asked, we cannot see that it would be reversible error, or that it did cause any serious harm to the defendants. The defendants were convicted upon positive, direct testimony, which was wholly uncontradicted.

The instructions of the court relative to the case, which were given to the jury, were sufficient to cure any such impression if the district attorney's remarks could have been considered to have caused any such impression as feared by the appellants' attorney.

As we have said before, the evidence introduced clearly shows, without contradiction, the guilt of the appealing defendants, and therefore no miscarriage of justice could pos-

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★Rehearing denied.

sibly have resulted from the remarks of the district attorney complained of.

The judgment and order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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94 Cal. App. 223

IKNOIAN et al. v. WINTER et al.
(Civ. 6253.)

District Court of Appeal, First District, Division 1, California. Oct. 2, 1928.

1. Judgment ⚷780(1)—Lien does not attach to naked title, but only to judgment debtor's interest in real estate.

Lien of judgment does not attach to naked title, but only to judgment debtor's interest in real estate, and if he has no interest, though possessing naked title, no lien attaches, and court of equity will permit real owner to show that apparent ownership of another is not real.

2. Attachment ⚷178—Attaching creditor obtains lien only on title or interest debtor has at time of levy (Code Civ. Proc. §§ 542, 688).

Creditor, attaching property for debt under Code Civ. Proc. §§ 542, 688, obtains lien only on title or interest which debtor has in property at time of levy, and if, at that time, all title and interest has passed to third person, creditor gets nothing by levy.

3. Records ⚷6—Neither attachment nor judgment is "instrument," within statute protecting purchaser or incumbrancer acquiring title or lien by instrument first recorded (Civ. Code, § 1107).

Neither an attachment nor a judgment is an "instrument," within meaning of Civ. Code, § 1107, protecting purchaser or incumbrancer who in good faith and for valuable consideration acquires title or lien by instrument first duly recorded.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Instrument.]

4. Judgment ⚷780(1)—Where vendor had been paid in full for his interest before creditor attached property and obtained judgment against him, judgment lien did not attach to land (Code Civ. Proc. §§ 542, 688).

Where defendants attached property and acquired judgment against vendor after plaintiffs had contracted to purchase land, and had paid vendor in full for all his interest in property, and parties had agreed that balance should be paid directly to mortgagee, vendor had no interest subject to attachment, under Code Civ. Proc. §§ 542, 688, or to judgment lien, and lien did not attach to land.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action to quiet title by Hagop Iknoian and another against Karl Winter and others. From the judgment, defendants G. H. Salwasser, Philip Conley, and J. W. Meux appeal. Affirmed.

W. M. Conley and Matthew Conley, both of Fresno, for appellants.

Iener W. Nielsen, of Fresno, for respondents.

TYLER, P. J. Action to quiet title. On July 9, 1919, defendants Karl Winter and Mary, his wife, were the owners of certain lots in Sanger Colony, in the county of Fresno. The property was subject to a purchase-price mortgage in favor of Mary M. Barbour for $7,800. On the date last mentioned Winter and his wife entered into a contract with the plaintiffs for the sale to them of the property for the sum of $10,000, the terms being $1,000 cash; $1,000 and interest on or before November 1, 1920, $1,000 and interest on or before November 1, 1921, and a like sum and interest on or before November 1, 1922; $5,000 and interest on or before November 1, 1923, and the balance of $1,000 and interest on or before November 1, 1924. The parties agreed that the purchasers might make any of the payments agreed to be made, upon and towards the payment of said mortgage, and when so paid the amount would be credited upon the purchase price.

The evidence shows that plaintiffs paid Winter the sum of $4,000 in conformity with the terms of the contract, and at the time the last payment of $1,000 was made Winter only had coming to him the sum of $200 on the principal over and above the existing mortgage; that he received this $1,000 from plaintiffs, and paid $800 of the same on the mortgage, and informed plaintiffs that all future payments were to be made to the mortgagee or her representative, as he had been fully paid for whatever interest he held in the property. Plaintiffs then asked for a deed. Winter informed them he was busy at that time, but would execute one later. The deed was finally executed March 28, 1925. The evidence further shows that all subsequent payments were made by plaintiffs to the mortgagee in conformity with the agreement of the parties. At or about the time Winter received his last payment he was in financial difficulties. On the 10th day of January, 1923, appellant G. H. Salwasser in an action brought against Winter attached the land in question. Salwasser obtained judgment against Winter in the sum of $2,690, and thereafter he assigned an undivided one-half interest in such judgment to Philip Conley, and an undivided one-half interest to J. W. Meux, appellants herein.

The present action to quiet title to the land was brought by plaintiffs against Winter, his wife, the Commercial Bank of Sanger, which had a separate claim, G. H. Salwasser, Philip Conley, and J. W. Meux. The sole question here presented is whether or not the judgment lien acquired by appellants in the manner indicated affects the property in question.

[1-4] It is appellants' contention that at the time of the attachment the legal title to the property was in Winter, notwithstanding his contract of sale with plaintiffs, and that therefore the judgment lien of Salwasser attached to the property, for which reason the judgment in the present action quieting the title of plaintiffs is erroneous. The contention is without merit. It is true that under our Codes any interest, legal or equitable, which a defendant has in lands, is subject to attachment. Code Civ. Proc. §§ 542, 688; Fish v. Fowlie, 58 Cal. 373. Under this rule the interest of a mortgagor in lands contracted to be sold is bound by the lien of a judgment recovered against him while the contract is unexecuted, to the extent to which it is unexecuted. Godfrey v. Monroe, 101 Cal. 224, 35 P. 761. But there must be an interest to which the lien can attach. The law is well settled that the lien of a judgment does not attach to a naked title, but only to the judgment debtor's interest in the real estate; and if he has no interest, though possessing the naked title, then no lien attaches. Riverdale Min. Co. v. Wicks, 14 Cal. App. 526, 112 P. 896. Thus a creditor who attaches property for his debt obtains a lien only upon the title or interest which the debtor has in the property at the time of the levy, and if at that time all title and interest has passed from him to a third person, the creditor gets nothing by the levy. Nat. Bank of Pacific v. W. P. R. Co., 157 Cal. 573, 108 P. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391. The interest which the lien of judgment affects is the actual interest which the debtor has in the property, and a court of equity will always permit the real owner to show that the apparent ownership of another is or was not real, and, when the judgment debtor has no other interest except the naked legal title, the lien of judgment does not attach. Freeman on Judgments (4th Ed.) § 357; Black on Judgments (2d Ed.) §§ 420, 421; Hays v. Reger, 102 Ind. 524, 1 N. E. 386.

Here, at the time the judgment was docketed against Winter, he had no interest in the land, as he had been fully paid the amount over and above the mortgage, and by agreement of the parties the amount of this mortgage was to be paid by plaintiffs directly to the mortgagee. The mere fact that Winter had failed to comply with his agreement to execute a deed until after the rendition and docketing of the judgment in no manner affects plaintiffs' rights. One who conveys property by an unrecorded deed conveys title which is good against the grantor and every one claiming under him, except a purchaser or incumbrancer, who in good faith and for a valuable consideration acquired a title or lien by "an instrument first duly recorded," who is protected under section 1107 of the Civil Code. But neither an attachment nor a judgment is "an instrument" within the meaning of that section; an unrecorded deed takes precedence over a subsequent attachment or judgment against the grantor. Hoag v. Howard, 55 Cal. 564; Wolfe v. Langford, 14 Cal. App. 359, 112 P. 203. Here, as above, plaintiff had paid his vendor in full for all of his interest in the property. Under such circumstances there remained no interest in the vendor that was subject to the attachment or the judgment lien in question.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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94 Cal. App. 238

PEOPLE v. GRIMES. (Cr. 1719.)

District Court of Appeal, Second District, Division 1, California. Oct. 4, 1928.

1. Criminal law 🔑1202(5)—Where two of three prior convictions were stricken before trial, conviction established only one previous conviction (Poison Act).

Where information charging defendant with violating Poison Act (St. 1907, p. 124, as amended) further alleged that defendant had been convicted of three felonies, but prior to trial two of former convictions were stricken from information, verdict finding defendant guilty of violating act as charged and finding charge of previous conviction was true established only one previous conviction.

2. Criminal law 🔑1177—Where verdict established one prior conviction, defendant convicted of violating Poison Act was not injured by further proceedings renewing charges of other prior convictions which were not sustained (Pen. Code, § 969a, as added by St. 1927, p. 1064; State Poison Act).

Where two of three prior convictions were stricken before trial from information charging defendant with violating Poison Act (St. 1907, p. 124, as amended), and verdict found defendant guilty of violating Poison Act and only single prior conviction, further proceedings under Pen. Code, § 969a, as added by St. 1927, p. 1064, under amended information renewing charges of former convictions previously stricken, one of which was again dismissed and the other found to be not true by jury, *held* not injurious to defendant even if objections thereto were sustainable.

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Frank Grimes was convicted of a violation of the State Poison Act, with prior conviction, and he appeals. Affirmed.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

M. H. Broyles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

YORK, J. [1] By amended information filed on May 24, 1928, the defendant was charged with the crime of violating the state Poison Act (St. 1907, p. 124, as amended). It was further alleged that prior to the commission of said offense the defendant had been convicted of a felony in the county of Imperial, that he had been convicted of a felony in the county of Sacramento, and also that he had been convicted of a felony in the county of Maricopa in the state of Arizona. On the 11th day of June, immediately prior to the trial of the case, the charges of former conviction in Imperial county and in Arizona were stricken from the information. It follows that when the jury rendered its verdict finding the defendant guilty of violating the state Poison Act as charged and further found the charge of previous conviction "true as charged in the amended information," only one previous conviction was established.

On June 22, 1928, a second amended information was filed in which said charges of former conviction in Imperial county and in Arizona were renewed. At that time the defendant stood mute on the matter of said second amended information. Thereupon the court pronounced judgment and transferred the cause to another department for further proceedings. In that department at a later date a trial of the issues (as to these two former convictions theretofore undetermined) was had, in which the jury found the charge of prior conviction in Arizona to be not true. The jury being unable to agree upon said charge of prior conviction in Imperial county, the court dismissed said charge.

[2] As the record now stands, the defendant has had imposed upon him, only a judgment commensurate with a conviction of a violation of the state Poison Act and only the one prior conviction of robbery. The defendant therefore was not injured by reason of the further proceedings above noted, even of appellant's objections thereto were sustainable. It should be noted, however, that these additional proceedings, which affect the penalty only, are provided for by section 969a, Penal Code, as added by St. 1927, p. 1064.

There was a direct conflict in the evidence, and there was sufficient evidence to support the verdict of the jury as was announced by this court at the time of the oral argument herein. At that time the court held the case open only upon the question whether the superior court erred in ordering the second amended or supplemental information to be filed and a trial to be had of the issues as thereon presented.

The record clearly discloses a verdict with *one* prior conviction only, as heretofore stated in this opinion; therefore no harm could possibly have resulted to the defendant in so far as the judgment appealed from is affected. He may have had to stand trial uselessly as to the charge of second and third prior convictions, but the result of that second trial did not in any way affect the matter now before this court.

As was stated to counsel at the oral argument, we are of the opinion that there is nothing in the instruction which would be misleading to the jury.

The judgment and order denying motion for new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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94 Cal. App. 217

RIGGS v. GUEDEMANN et al. (Civ. 6289.)

District Court of Appeal, Second District, Division 1, California. Oct. 1, 1928.

Appeal and error ⚷607(1)—Filing notice of appeal constitutes waiver of notice of entry of judgment as respects filing notice requesting transcript (Code Civ. Proc. § 953a).

Filing of notice of appeal amounts to waiver of notice of entry of judgment under Code Civ. Proc. § 953a, providing that notice requesting transcript must be filed within ten days after notice of entry of judgment, and, in absence of prior service of notice of entry of judgment, time allowed for filing notice requesting transcript begins at once on filing of notice of appeal, and second notice of appeal was unauthorized, in view of Rules of District Court of Appeal, rules 1 and 5.

Action by Fred L. Riggs against Ralph H. Guedemann and others. From an adverse judgment, defendants appeal. On plaintiff's motion to dismiss appeal. Appeal dismissed.

Marshall A. Stutsman, of Los Angeles, for appellants.

Horace Wilson and Constan Jensen, both of Los Angeles, for respondent.

CONREY, P. J. Respondent moves to dismiss the appeal of defendants from a judgment entered against them on the 23d of July, 1928. The motion is made on the ground that appellants have not filed in this court a transcript of the record, and that the time allowed therefor by law and the rules of court has expired.

Appellants filed their notice of appeal on July 31st, and a second notice of appeal on September 4th. There has been no motion for a new trial, and no proceedings for a bill of exceptions are pending. No application for reporter's transcript under section 953a, Code of Civil Procedure, was made until September

1st. The reporter's transcript was filed with the clerk of the superior court on September 17th and presented to the judge for approval. The judge refused to certify the transcript, and there is not now pending any proceeding relating thereto.

The second notice of appeal was unauthorized. Brown v. Plummer, 70 Cal. 337, 11 P. 631; Nathan v. Porter, 36 Cal. App. 356, 359, 172 P. 170. The 40 days allowed appellant for filing his transcript of record expired on September 9th. See rules I and V of this court. Counsel for appellant contends that his time to file notice requesting transcript has been extended, and in fact has not commenced to run, for the reason that, as shown by the clerk's certificate presented with this motion, notice of entry of the judgment has not been served upon appellants. This contention is without merit. It is true that section 953a, Code of Civil Procedure, provides that the notice requesting transcript must be filed "within ten days after notice of entry of the judgment," etc., but the decisions are uniform that the filing of a notice of appeal amounts to a waiver of notice of entry of judgment, and that, in the absence of prior service of notice of entry of judgment, the time allowed for filing notice requesting transcript begins at once upon the filing of the notice of appeal. Fiske v. Gosbey, 168 Cal. 334, 143 P. 611; Brown v. Superior Court, 175 Cal. 141, 165 P. 429; Gross v. Hazeltine (Cal. Sup.) 269 P. 925.

The appeals are dismissed.

We concur: YORK, J.; HOUSER, J.

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94 Cal. App. 227

AREGOOD v. TRAEGER, Sheriff.
(Civ. 6168.)

District Court of Appeal, Second District, Division 2, California. Oct. 2, 1928.

Appeal and error 🔑345(1)—Notice of appeal from superior court, filed later than 30 days after entry of order determining motion for new trial, is too late (Code Civ. Proc. §§ 939, 953a).

Code Civ. Proc. § 939, provides the only method of appeal from superior court, so that notice of appeal filed later than 30 days after entry of order determining motion for new trial, the time limited for appeal by such section, is too late, and appeal will be dismissed; section 953a not providing for a notice of appeal, but its purpose, in connection with following sections, being merely to provide a method of preparing record or transcript to be filed in appellate court in support of appeal, and intent to change such purpose, so as to include a method of taking an appeal, not being evidenced by the amendment of such section in 1915, or by the repeal in 1921 (St. 1921, p. 193) of sections 941a–941c, which had provided an alternative method of taking an appeal.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Action by F. S. Aregood against W. I. Traeger, Sheriff of Los Angeles County. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

Charles W. Cradick, of Los Angeles, for appellant.

Youngworth, McClean & Hartman, of Los Angeles, for respondent.

THOMPSON, J. This is a motion to dismiss an appeal on the ground that the notice of appeal was not filed within the time required by section 939 of the Code of Civil Procedure. Judgment was entered on August 13, 1926. Notice of intention to move and motion for a new trial were filed on October 1, 1926, and an order denying the motion was entered in the minutes on January 21, 1928. Notice of appeal was not filed until July 6, 1928. Prefacing the more general discussion and to avoid possible confusion, it should be added that no notice of entry of judgment appears to have been filed; hence under the opinion in Deacon v. Deacon, 201 Cal. 190, 255 P. 798, the power of the court to pass upon the motion for a new trial had not expired at the time of the entry of the order denying it on January 21, 1928. No notice of this latter ruling was served upon defendant. The appellant contends that, where a motion for a new trial is pending the time within which an appeal may be taken does not expire until "ten days after notice of decision denying said motion, or of other termination thereof." He bases this argument upon his assertion that section 953a of the Code of Civil Procedure from which we have just quoted provides an alternative method of appeal and places great reliance upon a sentence found in Deacon v. Deacon, supra, as follows:

> "The time within which the motion for new trial must be passed upon would not have expired within the sixty-day period provided by section 660 of the Code of Civil Procedure, since no notice of the entry of judgment had been given as provided in said section, and the notice of appeal herein would therefore have been in time, *since the same was served and filed within the period after the determination thereof, provided in section 953a of the Code of Civil Procedure.*" (Italics ours.)

The question whether the notice of appeal was filed within time after the order dismissing the motion for a new trial was not involved in the Deacon Case, the notice of appeal having been filed on the same day the order was entered in the minutes. The point there involved was whether the power of the court to pass on the motion for a new trial had expired. It is obvious therefore that the portion of the sentence which we have italicized is dictum, and it is not at all clear that "953a" was not inadvertently used in place of "939." At least it cannot be said to be controlling. On the other hand, our courts have uniformly declared that sections 953a, 953b, and 953c, provide an alternative method of preparing a record on appeal. Magee v. Magee, 174 Cal. 276, 162 P. 1023; Schmitt v. White, 172 Cal. 554, 158 P. 216; Anderson v. Standard Lumber Co., 60 Cal. App. 445, 213 P. 65. In denying a hearing in the Supreme Court after decision by the District Court of Appeal in the case of Smith v. Jaccard, 20 Cal. App. 280, 128 P. 1026, the higher court said:

> "The District Court of Appeal, in its opinion, says that section 953a of the Code of Civil Procedure 'provides that the appellant shall file his notice of appeal with the clerk.' This section has been misapprehended by some practitioners, and lest there be further misapprehension by reason of this language we take this occasion to correct it.
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> "Section 953a does not provide at all for a notice of appeal. The purpose of that section, in connection with sections 953b and 953c, is to provide a method of preparing the record or transcript to be filed in the proper appellate court in support of the appeal. None of the proceedings there prescribed are jurisdictional to the appeal."

This language is so clear and unambiguous that it would preclude further argument or observation were it not for the fact that appellant urges that when, in 1915, the Legislature inserted in the section the words, "or for the purpose of presenting a record on appeal from any appealable judgment or order, or for the purpose of having reviewed any matter or order reviewable on appeal from final judgment," it evinced an intent to change the purpose of the act so as to include a method of taking an appeal, which intent he says is further evidenced by the fact that the Legislature in 1921 (St. 1921, p. 193) repealed sections 941a, 941b, and 941c, which sections had provided an alternative method of taking an appeal. We do not interpret the legislative mind in this manner. In 1915 the right of an appeal from an order denying a motion for a new trial was abolished by other amendments to the Code of Civil Procedure and provision was made whereby the appellate courts might review any order on motion for a new trial upon an appeal from the judgment, a thing which was not theretofore possible. In order to accomplish this purpose procedurally, it was necessary for the courts to have the record subsequent to judgment and the Legislature added the words, "or for the purpose of having reviewed any matter or order reviewable on appeal from final judgment," and also provided that the notice prerequisite to the preparation of the transcript should not necessarily be given until after the motion for the new trial was disposed of. In support of this interpretation of the section reference may be had to Schmitt v. White, supra, and also to two late cases, wherein it is said that "it is no objection to the notice that it is a part of the same paper that directed the clerk to prepare a record as the dual purpose may be accomplished by one paper." Anderson v. Standard Lumber Co., supra, and Wright & Hogan, Inc., v. Heide, 72 Cal. App. 16, 236 P. 219. Our conclusion is that section 939 of the Code of Civil Procedure provides the only method of taking an appeal in this character of action, and that, inasmuch as that section limits the time to 30 days after entry of the order determining the motion for a new trial, this notice of appeal was filed too late.

Appeal dismissed.

We concur: WORKS, P. J.; CRAIG, J.

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94 Cal. App. 218

DUNCAN v. DORMER et al. (Civ. 3534.)

District Court of Appeal, Third District, California. Oct. 1, 1928.

1. Master and servant 🔑80(10)—Evidence held not to support finding that manager of oil-mining plant, hired by trustee, received full payment for services.

Evidence *held* not to support finding that manager of oil-mining plant received payment in full for his services under contract for reimbursement entered into by trustee.

2. Trusts 🔑225—Trustee is personally liable for obligations incurred, in absence of express authorization in declaration of trust or otherwise.

While trustee acting within scope of his authority may bind trust property to same extent that agent can bind principal, trustee will nevertheless be deemed personally liable for obligations incurred, in absence of express authorization in declaration of trust or otherwise.

3. Trusts 🔑225—Trustee not authorized to charge trust estate held personally liable for materials furnished and services rendered by manager whom he employed (Civ. Code, § 2343).

Trustee, employing manager for oil-mining plant without express authority under declaration of trust to incur obligations to become a charge against the trust estate, *held* personally liable to manager for his purchase of materials and performance of labor, under Civ. Code, § 2343.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Thomas G. Duncan against George M. Dormer, William J. Larkin, and Emma B. Larkin, copartners doing business as the Emma Belle Mines Company, and others. Judgment for defendants, and plaintiff appeals. Reversed.

Clark & Law, of Los Angeles, for appellant.
Dennison & Kleber, of Los Angeles, for respondents.

THOMPSON, Justice pro tem. This is an appeal from a judgment in favor of the defendants in an action for labor performed and materials furnished. The complaint contained four separate counts. The first cause of action charged the defendants George M. Dormer, William J. Larkin, and his wife, Emma, as copartners doing business under the fictitious name of Emma Belle Mines Company, with being indebted to the plaintiff in the sum of $1,750 for labor performed. The second count alleged an indebtedness of $497 against the same defendants, in the same capacity, for materials furnished. The third cause was against these same defendants, for the same amounts, as trustees of the Emma Belle Mines Company. The last count was against the same defendants, as individuals, for the same value of said services and materials furnished. The trial was in the nature of an accounting, nearly every item of which was contested. February 28, 1923, the defendants were organized as an express trust for the purpose of operating an oil-mining enterprise at Kelso, Cal. About the middle of May, 1923, the defendant William J. Larkin met and employed appellant to take charge of their plant as manager. The amount of his salary is in dispute. Appellant claims that he was promised $250 per month for his services, while Mr. Larkin asserts that he was hired at $5 per day. The appellant employed two workmen to assist him. The respondent William Larkin admitted that these men were to receive $4 and $5 per day, respectively, for their services, less $1 apiece per day for their board. It appears that appellant and these two helpers worked substantially seven months, from May 18th to December 18, 1923. Some machinery and materials were purchased by appellant and used in the operation of the enterprise, the value of which was disputed. The respondent William Larkin claimed to have paid appellant the sum of $1,457.57. This was conceded by appellant, who claimed that he had expended in behalf of his employer the total sum of $3,705.31, and that no part of his wages had been paid. At the rate of $250 per month appellant's wages amount to the sum of $1,750, while the admitted net wages of the workmen aggregated the additional sum of $1,470. The only evidence of the payment of appellant's claim consists of the testimony of William J. Larkin, as follows:

> "Q. And in compliance with that agreement, did you make any payments to him for his services? A. Yes; I sent him always more than enough over the men's wages to pay him.
>
> "Q. Over and above other men's wages? A. Yes.
>
> "Q. Then you sent a lump sum every so often, and he was to pay himself and pay the men out of that? A. Yes; and sometimes a great deal more.
>
> "Q. And he was allowed out of those remittances you made Mr. Duncan, for himself. A. Well, he paid himself."

But the admission as to the specific amount which was in fact paid, to wit, $1,457.57, clearly leaves a balance due to the appellant. In fact, the respondent William Larkin admitted that there was still due to appellant the sum of $200 or $300. Mr. Larkin testified:

> "Q. Is there any money unpaid to him now, for his services? * * * A. Well, in the neighborhood of between $200 and $300."

The court found that the alleged copartnership did not exist, but that the defendants were duly organized as a trust under the name of the Emma Belle Mines Company; that the appellant was employed in May, 1923, by the respondent William J. Larkin at a salary of $35 per week for a period of 6½ months, but that he received payment in full for such services; that the appellant also purchased certain machinery and materials which were used in the operation of the mine, for which he was also paid in full; that said employment was contracted for solely by the respondent William J. Larkin, as an individual, who therefore became liable for such obligations; that the appellant then had no knowledge of the existence of said trust organization. There was neither evidence nor findings to the effect that the respondent William J. Larkin was authorized by the declaration of trust, or otherwise, to incur obligations to become a charge against the trust estate.

[1-3] The appellant contends that the findings are not supported by the evidence. It is apparent that this is true, and that the undisputed record shows that the appellant was not fully paid. While it is true that a trustee, acting within the scope of his authority, may bind the trust property to the same extent that the acts of an agent will bind his principal (Civ. Code, § 2267; Cullinan v. Mercantile Trust Co., 80 Cal. App. 377, 385, 252 P. 647), yet, in the absence of express authorization either in the declaration of trust, or otherwise, he will be deemed to be personally liable for obligations which he incurs (Hall v. Jameson, 151 Cal. 606, 611, 91 P. 518, 12 L. R. A. [N. S.] 1190, 121 Am. St. Rep. 137). In 26 R. C. L. 1316, § 175, it is said:

> "The general rule undoubtedly is that a trustee cannot charge the trust estate by his executory contracts unless authorized to do so by the terms of the instrument creating the trust. On such contracts he is personally liable, and the remedy is against him personally."

Having obtained personal credit for the purchase of materials and the performance of labor, without disclosing the existence of the trust organization which he represented, or his agency therefor, the respondent William J. Larkin became personally liable for such obligations. Civ. Code, § 2343.

For the reason that the record indicates that this respondent is personally liable for the obligations sued upon, and that the appellant has not been fully paid, it necessarily follows that the judgment should be reversed.

It is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

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94 Cal. App. 206

In re BOYER'S ESTATE.

BOYER v. SON.

(Civ. 6097.)

District Court of Appeal, Second District, Division 2, California. Sept. 29, 1928.

Executors and administrators ⟹501—Court cannot make allowance of fees to special administrator within year following admission of will to probate; "any administrator" (Code Civ. Proc. §§ 1417, 1616).

Under Code Civ. Proc. § 1616, authorizing allowance of compensation to any executor or administrator after one year from admission of will to probate, court cannot make allowance of fees to special administrator within year following admission of will to probate, since words "any administrator" include special administrator, in view of section 1417, as amended in 1921, providing that special administrator's fees and those of executor or general administrator must not amount to more than total allowable under section 1618.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Any Administrator.]

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

In the matter of the estate of Herman H. Boyer, sometimes known as H. H. Boyer, deceased. On Lucille Boyer's petition an order was made fixing fees of special administrator on rendition of final account, and Charles A. Son appeals. Reversed.

Crail, Shutt, Penprase & Miller, of Los Angeles, for appellant.

Joseph M. Maltby, of Long Beach, for respondent.

WORKS, P. J. This is an appeal from an order of the trial court fixing the fees of a special administrator upon the rendition of his final account and within one year following the admission of a will to probate. The only question to be determined is whether the court had jurisdiction to fix the fees within the time stated.

The point to be settled depends upon the construction of certain sections of the Code of Civil Procedure. As originally enacted in 1872, section 1417 provided merely for the rendition of accounts by special administrators. The section was amended in 1907 by adding a sentence to the effect that a special administrator "is entitled to a reasonable compensation for his services, to be fixed by the court at the time of the settlement of his final account." The section was recast in 1921 by the introduction of much new matter, but the verbiage of the amendment of 1907 was then omitted. The only language of the amendment of 1921 which bears upon the point presented on this appeal is to the effect that the fees of a special administrator—

> "shall be fixed by the court: Provided, however, that the total fees paid to the special administrator and executor, or to the special administrator and general administrator of an estate must not, together, exceed the sums provided for in section 1618 of this Code, including the further allowance therein provided. * * * And when the same person does not act as both special administrator and executor, or as special administrator and general administrator, of the estate, such fees shall be divided between the special administrator and executor, or between the special administrator and general administrator of the estate, in such proportions as the court shall determine to be just and reasonable."

Section 1616 of the Code of Civil Procedure reads in part:

> "At any time after one year from the admission of a will to probate, or the granting of letters of administration, any executor, or administrator, may, upon such notice to the other parties interested in the estate as the court shall by order require, apply to the court for an allowance to himself upon his commissions, and the court shall on the hearing of such application make an order allowing such executor or administrator such portion of his commissions as to the court shall seem proper, and the portion so allowed may be thereupon charged against the estate."

Other parts of the section show that the fees or commissions referred to are the same as those alluded to in section 1417; that is, those provided for in section 1618. It is not necessary here to further state the provisions of the latter section.

Respondent contends that the expression "any * * * administrator," contained in section 1616, does not include a special administrator. In view of the provision of that section to the effect that an allowance on commissions may be made at any time after a year following the probate of a will or the issuance of letters of administration, the Su-

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes preme Court has uniformly held, in effect, if not expressly, that such an allowance may not be made to executors or general administrators within the year. Estate of Jones, 166 Cal. 147, 135 P. 293; Estate of Piercy, 168 Cal. 750, 145 P. 88. There appear to be no decisions which bear specifically upon the rights of special administrators who seek an allowance of fees before the close of administration, and it is in view of this fact that respondent makes the contention already mentioned. In view of the matter imported into section 1417 by the amendment of 1921, it is reasonable to believe that the Legislature intended the words "any * * * administrator," found in section 1616, to include a special administrator.

As a special administrator's fees and those of an executor or general administrator must amount, when added together, to no more than the total allowable under section 1618, it is reasonable to suppose that the Legislature did not intend an allowance to a special administrator until a time when the court, in making the allowance, could determine, with some degree of accuracy, what should be the total apportionment of fees as between a special administrator and the executor or general administrator, as an aid to concluding what partial allowance should be made to the special administrator. It would appear that the Legislature determined that a sufficient time would elapse, for the purpose of making an intelligent solution of such a question, after the passage of one year. Indeed, if section 1616 were to be disregarded, and the question were to be solved according to section 1417 alone, there is great reason to believe that a special administrator could receive no part of his fees until the close of the estate over which he acts. Special administrators were doubtless in this unfortunate position under section 1417 as originally enacted. The code commissioner said, in explaining the amendment to the section, adopted in 1907:

> "As the law now stands, the compensation of a special administrator cannot be fixed until the final settlement of the estate."

The amendment, as already observed, provided for a fixing of the compensation after final account. In 1911 the provision for an allowance on fees at the conclusion of a year was first inserted in section 1616. From that time forward, for 10 years, the law thus stood: Under 1417 a special administrator could ask for an allowance on filing his final account, while under 1616 an executor or general administrator could make a similar request at the expiration of the year. At the end of the 10 years, in 1921, the Legislature so amended 1417 as to strike out the provision for an allowance to special administrators on final account. It would appear that, if this amendment did not bring into play the words "any * * * administrator" in 1616, as affecting special administrators, those representatives were remitted by it to the state of the law under 1417 as originally enacted. Such a view would be unfair to them, and calls for a construction of 1616 which would afford them relief. We see nothing to interfere with such a construction. In any event, we cannot so read the law as to see anywhere a jurisdiction conferred upon the superior court to make an allowance of fees to a special administrator within a year following the admission of a will to probate, or following the issuance of general letters of administration.

Order reversed.

We concur: CRAIG, J.; THOMPSON, J.

94 Cal. App. 188

STRATTON v. MOUNTAIN VIEW WATER CO. (Civ. 3550.)

District Court of Appeal, Third District, California. Sept. 28, 1928.

1. Waters and water courses ⚿156(5)—Recorded deed conveying water rights held good as against prior unrecorded deed of realty.

Recorded deed conveying exclusive and perpetual right to develop, collect, and take water from certain realty *held* good as against prior deed of same land not recorded until about nine years thereafter; Civ. Code, § 1055, Code Civ. Proc. § 1963, relating to presumptions, and Civ. Code, §§ 1614, 1615, relating to consideration, not being applicable.

2. Appeal and error ⚿1011(1)—Trial court's findings on conflicting evidence cannot be disturbed on appeal.

Trial court's findings on conflicting testimony cannot be disturbed on appeal, in absence of legal grounds for doing so.

Appeal from Superior Court, of San Bernardino County; Charles L. Allison, Judge.

Action by A. E. Stratton against the Mountain View Water Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Roland Rich Woolley, of Los Angeles, for appellant.

Leonard, Surr & Hellyer, of San Bernardino, and E. H. Jolliffe, of Ontario, for respondent.

WEYAND, Justice pro tem. The present action is one brought by appellant A. E. Stratton against the Mountain View Water Company, a corporation, to quiet title to a tract of land in the county of San Bernardino. In addition to the usual allegations of such a complaint, appellant alleged that the defendant company entered in and upon her lands, without right, and that it is "wrongfully operating a well thereon and conducting and removing a large quantity of water daily from said land by means of pumps and other machinery."

By its answer the defendant water company denies that plaintiff is the owner of said lands to the exclusion of defendant, and by proper allegations sets up its claim of right to "develop, collect and take any and all water" on, in or under said lands. The defendant further avers that it is a mutual water company, and for more than 25 years last past had served its stockholders with irrigation water, which said water is used to irrigate citrus fruits on the lands of said stockholders, and it has expended large sums of money to develop an adequate water system and water supply for their use and benefit. Defendant further specifically alleges that by a certain deed dated November 7, 1896, it purchased from the Sycamore Water Development Company the water right on, in, and under the said lands, and defendant further pleads an estoppel by an open and notorious user of waters from these lands since November, 1896, under a claim of right, and because they have expended said large sums in the development of water thereon.

On the issues thus presented trial was had and judgment was rendered for the defendant company; the judgment of the trial court being, in part, as follows:

> "That the defendant, Mountain View Water Company, is the owner of the sole, exclusive and perpetual right to develop, collect and take any and all water that is now, or hereafter may be on, in or under the real property described, * * * and that in the exercise of said right, said defendant is entitled, and owns the right to bore wells, run tunnels, lay pipe lines, dig ditches, and do anything reasonable and proper for developing, collecting and taking water from said real property, all of which rights are paramount to any right of the plaintiff, in said real property."

While the record of the testimony is quite voluminous, and some conflict exists upon some points, we see no necessity to relate all the details of the entire controversy, under the circumstances hereinafter stated.

To complete plaintiff's chain of title she introduced "Exhibit 8," which purported to be a deed of the Sycamore Water Development Company to one Allie Thompson. This deed, on its face, was dated May 13, 1896, and described the land in question. The certificate of the notary public attached thereto, however, disclosed that it was not acknowledged until December 13, 1905, over nine years after the date named on the face of said deed. It was signed by one B. K. Brant, president, and Archie Thompson, secretary, of the said Sycamore Water Development Company. The grantee therein named, Allie Thompson, was the wife of said Archie Thompson. This deed was recorded December 13, 1905.

The attorney for plaintiff, on presentation of this deed, said to the court: "In passing we can say that the entire controversy resolves itself around this deed." As we view this record, we fully agree with that statement of appellant's counsel.

[1] The defendant, Mountain View Water Company, introduced in evidence a deed dated November 7, 1896, which said deed was designated as defendant's Exhibit B, and whereby the right to develop and take any and all waters on, in, or under the lands here in suit were conveyed to the said defendant herein. This deed was certified by a notary on November 7, 1896, and was recorded on November 14, 1896. This deed was, in like manner, signed by B. K. Brant and Archie Thompson, president and secretary of the said Sycamore Company.

To the introduction of this deed plaintiff objected as irrelevant and immaterial. The point is made in the argument of appellant that as plaintiff's deed, Exhibit 8, antedates the defendant's Exhibit B, that therefore defendant's exhibit is objectionable as proving any right or title in defendant.

Many cases are cited by appellant, and there is much discussion as to the meaning and operation of section 1963, Code of Civil Procedure, subds. 23 and 39, section 1055, Civil Code, section 1961, Code of Civil Procedure, section 1614, Civil Code, section 1615, Civil Code, and section 1951, Code of Civil Procedure.

In the present case the trial court properly received the testimony of F. W. Hart, who was the notary public who took the acknowledgment of B. K. Brant, president of the Sycamore Water Development Company, and of Archie Thompson, the secretary of said company, which testimony was direct and positive to the effect that said Brant signed the deed Exhibit 8, on December 13, 1905, in his presence. Allie Thompson, the grantee named in Exhibit 8, testified that the said deed was dated May 13, 1896, and was then delivered to her, signed.

The records of the Sycamore Water Development Company failed to disclose any resolution of the directors of that company authorizing the execution of such a transfer. The records of said last-named company, however, disclosed a resolution granting authority to make the transfer to defendant herein. The minutes of the defendant company disclose that on October 9, 1896, the said Archie Thompson, husband of Allie Thompson, duly moved the adoption of a resolution directing the purchase of sundry water rights, including those relating to the land here in question.

We should here state that plaintiff's proof disclosed that on November 20, 1905, Allie Thompson and Archie Thompson, her husband, by a grant deed, conveyed to one Samuel Baer the lands in question, and which grant was with a reservation worded as follows: "Subject to the rights of various parties to take water from said land as deeded by Sycamore Water Development Company."

As we view the controversy, there is nothing in the Code sections cited that should preclude the testimony offered by defendant. The presumptions enumerated in section 1963, Code of Civil Procedure, are disputable. Section 1055, Civil Code, clothes an instrument with the presumption that it was delivered at its date. Nowhere is there assertion that this presumption is conclusive. Section 1614, Civil Code, and section 1615, Civil Code, relate to consideration alone, and in no wise affect the situation here presented.

We dislike to recount what we think may have impelled the trial court to regard the deed, Exhibit 8, as being questionable in many respects. Giving it all other indicia of fairness, yet its execution was not according to the due and usual practice in the execution of deeds. To allow a deed to remain in obscurity for over nine years before obtaining its acknowledgment before a notary public is wholly unusual and out of the ordinary practice. Archie Thompson was the husband of Allie Thompson and was, as she testified, her personal agent and manager. On October 9, 1896, he, as director of defendant, moved the purchase by the defendant of the water rights in the said land, of and from the Sycamore Company. Again, the court may have placed implicit confidence in the apparently probable testimony of the notary, F. W. Hart.

[2] The trial court heard the witnesses and made its decision on what, at most, was a conflict in the testimony. We are not at liberty to disturb its findings, unless there are legal grounds for so doing, and we can see no reason to disturb the findings and judgment of the lower court.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

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94 Cal. App. 241

SHAPRIO v. GREENBERG. (Civ. 5235.)

District Court of Appeal, Second District, Division 1, California. Oct. 4, 1928.

1. Frauds, statute of 🔑158(4)—Evidence held to sustain finding goods were sold to defendant, not to corporation, as respects validity of his oral promise to pay (Civ. Code, § 2794, subd. 2).

Evidence *held* to sustain finding that goods were sold to defendant and not to corporation, to which bill was rendered, as against defendant's contention that his promise to pay for goods constituted a nonenforceable guaranty of another's debt, because not in writing as required by Civ. Code, § 2794, subd. 2.

2. Sales 🔑52(3)—Permitting seller to testify he thought he was selling goods to defendant rather than to another to whom billed held not error (Civ. Code, § 2794, subd. 2).

In seller's action for balance due for goods sold, in which defendant set up defense that goods were in fact sold to a corporation to which they were billed, on his promise to pay therefor, which was nonenforceable because not in writing as required by Civ. Code, § 2794, subd. 2, court did not err in permitting seller to state whether he thought he was selling goods to defendant.

Appeal from Superior Court, Los Angeles County; M. W. Conkling, Judge.

Action by H. Shaprio against B. Greenberg. Judgment for plaintiff, and defendant appeals. Affirmed.

Henry Haves and Clore Warne, both of Los Angeles, for appellant.

Marcus C. Clark and Bearman, Engelhardt & Clark, all of Los Angeles, for respondent.

YORK, J. This is an appeal from a judgment rendered in favor of the plaintiff on the balance found to be due for and on account of goods, wares, and merchandise furnished the defendant.

[1] The appeal is apparently based upon the contention that the goods were not sold as stated in the evidence of the plaintiff; the appellant contending that the goods were sold to a corporation and that the appellant was merely the agent of the corporation. The principal legal question raised by the appellant is that the promise of the appellant was merely a promise to pay the debt of another, and therefore that same must be in writing. There is sufficient evidence to sustain the finding of the trial court that the goods were actually sold to the appellant himself, and not to the United Jobbing & Importing Company, in spite of the fact that the bill was rendered (on the request of defendant) to the said company. Respondent testified that, before the order was accepted or the goods delivered, he asked defendant the question, "Who are the United Jobbers?" and defendant said, "I am the United Jobbers." Defendant also, according to plaintiff's testimony, did say, "I will guarantee this account." But plaintiff further testified, "Mr. Greenberg told me that I was shipping this goods to him; I shipped goods to him." The goods were billed to the company, but this was at the request of defendant.

The substance of appellant's contention is that the evidence only establishes against him an oral promise of guaranty, and that this promise is nonenforceable because it was not in writing. But even under the controlling statute (Civ. Code, § 2794, subd. 2) the defendant should be regarded as the original obligor, because the promise was made "under circumstances such as to render the party making the promise the principal debtor."

[2] The ruling of the court on the question to plaintiff, "And you thought you were selling goods to him direct?" was correct, for the reason stated by the court, to wit, "He can state what he believes; it couples up with the representation that he says was made to him."

There is a conflict in the evidence, but there was sufficient evidence for the trial court to make the findings that it did make. The findings made were sufficient to support the judgment, and the judgment and findings are not in conflict with the complaint.

No other alleged errors have been called to our attention than those mentioned; therefore the judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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93 Cal. App. 728

HANSEN v. CITY OF SANTA ROSA.
(Civ. 3430.)

District Court of Appeal, Third District, California. Sept. 29, 1928.

1. Municipal corporations 🔑293(2)—Description in resolution of intention for improvement held not variance with plans and specifications not following exact language of resolution.

General description in resolution of intention for improvement of two blocks therein described and excepting work already done to official line and grade, with reference to plans and specifications, *held* not variance with plans and specifications setting out estimate of work to be done thereunder, though not following exact language of the resolution.

2. Municipal corporations 🔑330(1)—Resolution of intention providing for improvement in pursuance of ordinance did not defeat open and competitive bidding.

Resolution of intention that all work under proposed improvement was to be done in pursuance of ordinance giving city the right under certain conditions to reject bids and do the work itself *held* to show compliance with provisions of the general law of the state and not to defeat open and competitive bidding for doing of the work.

3. Municipal corporations 🔑293(1)—Where jurisdiction is acquired by resolution of intention, discrepancy in resolution ordering plans and adopting plans did not avoid proceedings.

Discrepancy in resolution ordering plans and resolution for adopting plans for public improvement *held* not to avoid proceedings, in that such mistake is immaterial in case jurisdiction is properly acquired by resolution of intention.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

On petition for rehearing. Petition denied. For former opinion, see 270 P. 268.

C. W. Anderson and F. W. McConnell, both of Santa Rosa, for appellant.

J. P. Berry, of Santa Rosa, for respondent.

PER CURIAM. [1] Appellant in his petition for a rehearing complains that in the decision filed in this case (270 P. 268) the court failed to consider the rule as announced in the case of Southwest Paving Co. v. Wilson, 57 Cal. App. 251, 255, 206 P. 776, 778, as follows:

> "That such a particular description in the plans and specifications which is at variance with the general description of the resolution of intention creates an ambiguity which renders the proceeding void."

Due consideration was given to this contention, although the point was not elaborated in the opinion filed. The resolution of intention, while providing for the improvement of two blocks therein described, also by its terms excepted work already done to official line and grade. It also provided:

> "That all of the work and improvement was to be done in accordance with the plans and specifications made therefor, which plans are hereby referred to and made a part hereof."

It is true that the plans and specifications did not follow the exact language of the resolution. Nevertheless, they do set out an estimate of the work to be done thereunder, which estimate is as follows: "Concrete curb and gutter, 550 lin. feet; grading, 385 cubic yards; macadam, 200 cubic yards."

The city engineer testified that such estimate shows on its face that there was contemplated to be but one block of street improvement. That it specifically stated the number of lineal feet of curbing and gutter, the amount of excavation, and a certain amount of cubic yards of macadam, and that any contractor would use these figures as a check of the amount of the work to be done under the contract.

It is therefore patent and subject to mathematical demonstration that the work contemplated by the plans and specifications, and as stated in the engineer's estimate thereof, was much less than *two* blocks, as contended by appellant. There can be no question but that the resolution of intention, as well as the plans and specifications, contemplated the exception of work already done to official line and grade. A reasonable construction placed upon the plans and specifications makes them harmonize with the resolution of intention and takes the case out of the rule laid down in Southwest Paving Co. v. Wilson, supra.

[2] Appellant states, as second ground for rehearing, that the court neglected to pass upon his contention that the city council

failed to comply with the provisions of section 2 of ordinance 395, in so far as "it failed to follow the provisions of the general law of the state of California, in taking the proceedings up to and including the posting and publication of the notice inviting sealed proposals or bids as therein provided." The contention is that the respondent did, from the outset of these proceedings, contemplate that the work was to be done by the city; that they announced in the resolution of intention and notice calling for the bids, "that all the work shall be done in pursuance of Ordinance No. 395." It is claimed that, because of this expression used in the resolution of intention, open and competitive bidding for the doing of the work was defeated, and that no contractor would bid on the job because the resolution of intention stated that the city intended to do work by day labor under said ordinance. There was, however, a bid submitted for the doing of said work, but which was rejected, because the same was not accompanied by a certified check as required by the resolution of intention.

A complete answer to this contention is to be found in Ordinance No. 395 itself. Section 3 of the City Charter of Santa Rosa (Stats. 1923, p. 1298) provides:

> "All public improvements, including the improving, widening or opening of streets or highways may be done under and in pursuance of the general laws of the state or procedural ordinances adopted by the council or the electors, and the whole or any portion of the cost thereof paid out of the city treasury or assessed on the property benefited."

Ordinance 395 is a procedural ordinance, and by its terms it not only gives the city the right, under certain conditions, to reject bids and do the work, but it provides for certain procedural acts which operate upon successful bidders or contractors who are making public improvements covered by said ordinance. It is just as reasonable to assume that the reference to Ordinance 395 in the resolution of intention was for the purpose of notifying the bidders of its procedural provisions, as it is to say that the city at all times contemplated to reject any and all bids and to do the work by day labor. We find no merit in this contention of appellant.

[3] Appellant's last contention in his petition for a rehearing is that this court was in error in stating that the clause excepting "from all of the above-described work such portions as now constructed to the official line and grade" was set out in the resolution ordering the plans and the resolution adopting the plans. It is true that, in this respect, the decision was in error, and that each of said resolutions did not make such an exception; but its mistake in this respect we deem immaterial. It is by the resolution of intention that jurisdiction is acquired (see authorities cited in opinion on file), and the discrepancies in the resolution ordering the plans and the resolution adopting the plans does not make void the proceedings. The resolution calling for bids, however, did have the identical exception as noted in the resolution of intention.

In determining the work to be done under the resolution of intention, extrinsic aid is not required to clear up any uncertainty in such proceeding. The work excepted which constitutes an improvement on the street in question is a monument itself on the ground, easily identified by inspection, and clearly referred to in the resolution of intention. San Francisco Paving Co. v. Dubois, 2 Cal. App. 42, 83 P. 72; Williams v. Bergin, 116 Cal. 56, 47 P. 877.

The petition for a rehearing is denied.

PEOPLE v. BARRETT. (Cr. 1695.)★

District Court of Appeal, Second District, Division 1. California. Oct. 5, 1928.

Hearing Granted by Supreme Court Dec. 3, 1928.

1. Criminal law 🔑1202(3)—Defendant's testimony as to three prior felony convictions and exemplified copies thereof held sufficient to establish such convictions.

Under information charging that defendant had theretofore been convicted of three felonies, defendant's testimony as to his having been convicted of such felonies, and exemplified copies, showing such convictions, filed in case, *held* sufficient to establish the three prior convictions, though complaint incorrectly stated date of one of them.

2. Prostitution 🔑4—Proof of several acts of prostitution in defendant's apartment by his wife held sufficient to establish character of apartment as "house of prostitution" (Pen. Code, § 266g).

Proof that, prior to date charged, a large number of acts of prostitution were committed in two-room apartment by defendant's wife with defendant's knowledge and at his solicitation, and to knowledge of proprietor of apartment house, *held* sufficient to establish character of apartment as a "house of prostitution," within Pen. Code, § 266g, though not necessarily of the entire apartment house.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, House of Prostitution.]

3. Criminal law 🔑1166½(6)—Trial court's refusal to allow defendant's attorney to question juryman respecting his occupation held not prejudicial in pimping prosecution.

Trial court's refusal to permit defendant's attorney to ask a certain juryman as to his business or occupation, on ground that such question was not a ground for challenge, *held* not prejudicial to defendant, in prosecution

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★Superseded by opinion of Supreme Court, 276 P. 1003.

for permitting wife to remain in house of prostitution and for pimping.

Houser, J., dissenting.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

Louis C. Barrett was convicted of permitting his wife to remain in a house of prostitution and of pimping, as a fourth felony offender, and he appeals. Affirmed.

H. Wenzlaff, of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

YORK, J. This is an appeal from a judgment of conviction of appellant on two counts of an information, one charging that he permitted his wife to remain in a house of prostitution, and the second count on which he was convicted was on a charge of pimping. He was further charged in the information with having been theretofore convicted of three felonies. The jury found the defendant guilty on both counts, and also found that it was true that the defendant had been convicted of three prior felonies. Defendant also appeals from the order denying his motion for a new trial.

[1] The first objection as to the sufficiency of the evidence with reference to the three prior felonies is answered by the opinions filed in this court in the recent cases of People v. Carrow, 270 P. 379, and People v. Bigelow, 270 P. 460. In this case the defendant testified fully as to his having been convicted of three prior felonies, and, in addition thereto, exemplified copies showing such convictions were filed. As to one, the date of conviction was incorrectly stated in the complaint in that it was alleged to be on or about or before the 3d day of January, 1918, when the correct date was March 21, 1918; but it becomes immaterial, in view of the testimony of the defendant himself, admitting the three prior convictions.

[2] As to the charge of permitting his wife to remain in a house of prostitution, it seems to be the impression of the defendant that to sustain such a charge there has to be proof that it was a common house of prostitution, where several prostitutes were engaged in such business. There is proof in this case of a large number of acts of prostitution committed on the particular premises by the wife of the defendant, prior to the date the offense was charged, thus making the two rooms so used a place of prostitution, regardless of what use was made of the rest of the place, known as the Kentucky Rooms, and there is evidence that these were all committed within appellant's knowledge, and there is evidence that they were each engaged in at his solicitation and upon his demand. Also there is evidence that the proprietor of the house known as "Kentucky Rooms," in which the apartment occupied by appellant and his wife was located, knew that the apartment was being used as a place of prostitution. This evidence, if believed by the jury, was sufficient to establish the character of the apartment, but not necessarily the entire house, as a house of prostitution, within the meaning of the statute (Pen. Code, § 266g), and therefore it was unnecessary to instruct the jury that in order to convict defendant on the first count they must find as a fact "that the said Kentucky Rooms was a house of prostitution," or "that it was one of the essential elements of the crime charged, and that the defendant had a right to have the jury determine whether the Kentucky Rooms was or was not a house of prostitution." The instructions that were given fully covered the only controversy involved, in view of the whole testimony introduced, and the court was justified in refusing to dismiss the first count of the information on motion of the defendant, which motion was predicated upon the claim that "there was no proof that the said Kentucky Rooms was a house of prostitution."

[3] As to the objection of appellant with reference to the refusal of the trial court to allow the attorney for appellant to ask a certain juryman as to his business or occupation, the court called the attention of the attorney to the fact that it was not a ground for challenge, presumably meaning that it would not tend to prove some fact material to a challenge for cause. No further attempt was made by the attorney for appellant to ask any of the prospective jurors any other questions as to their qualifications or disqualifications. There is nothing in the record from which this court can determine that the defendant was in any way prejudiced by the refusal of the trial court to allow the single question as to the business or occupation of the juror.

The judgment and the order appealed from are affirmed.

I concur: CONREY, P. J.

HOUSER, J. I dissent. However, my objection to the conclusion reached by the majority of the members of this court relates exclusively to the subject-matter last treated in the majority opinion herein. With reference thereto, the specification of error presented by appellant is that:

> "The court erred in denying defendant's counsel the right to interrogate the prospective jurors on their voir dire examination with competent questions, or any questions, to ascertain the fitness and qualifications to act as jurors in said cause, and as a result defendant was denied his constitutional and lawful right to a trial by a fair and impartial jury."

From the record it appears that, after the case had been called for trial, the roll of the jurors was called. Thereupon all the jurors were sworn to answer questions touching their qualifications "to act as jurors." At that time the names of no jurors had been drawn by the clerk, nor had any of the jurors been called into the jury box, but the entire panel was both sworn and examined collectively, solely with a view to determine whether any right to a challenge for cause existed as to any of them. After the trial judge had finished with his examination of the jurors, the names of 12 of them were called by the clerk of the court. Presumptively they then took their proper places in the jury box. Thereupon the judge made the statement:

> "You may examine upon any matter not covered by the court's examination."

After the trial judge had directly refused defendant the right to inquire as to the business or occupation of the several jurors, and had informed defendant's attorney that "they are qualified jurors, regularly on the term panel, all of them are qualified to act as jurors, * * *" and in answer to a question by defendant's attorney in substance had stated that theretofore all of the jurors had "acted as jurors in criminal cases," the jury was "passed for cause" by respective counsel.

Section 1078 of the Penal Code provides as follows:

> "It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury. He shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant."

In the case of People v. Edwards, 163 Cal. 752, 127 P. 58, after a review of the authorities, it is held that no statutory authority exists in this state which gives the right to a defendant to examine a juror on his voir dire, solely for the purpose of determining whether a peremptory challenge may be exercised upon him. To the same effect are People v. Riordan, 79 Cal. App. 488, 250 P. 190, and Zolkover v. Pacific Electric Ry. Co., 81 Cal. App. 772, 254 P. 926. It is therefore manifest that the language of section 1078 of the Penal Code, which, after an examination by the "trial court" or "prospective jurors," permits "reasonable examination of prospective jurors" by counsel for the defendant, can refer or apply to nothing other than those subjects which may furnish legal ground for a challenge for cause. By the terms of the statute and by judicial determination the only limitations upon the examination of jurors by a defendant are that the examination must be "reasonable," and that it be with reference to statutory grounds for the exercise of a challenge for cause. In the instant case, as hereinbefore stated, after the "trial court" had examined the entire panel collectively, the statement was made that "you may examine upon any matter not covered by the court's examination."

Assuming that the examination conducted by the trial judge fairly covered the statutory field of subjects constituting a basis for a challenge for cause, the defendant was precluded from ascertaining the correctness of any of the answers necessarily inferred as having been given by any juror to questions propounded to him by the trial judge. A general, assumed, answer of "yes" or "no" to a broad, comprehensive question might not have constituted a fair test of the qualifications of the "prospective juror," and yet by the order of the court defendant was effectually prevented from asking any question or questions which, for example, might definitely have determined the actual prejudice of such juror against the defendant, or the bias of such juror in favor of the prosecution. While it may be that the scope of the examination permitted to a defendant may be reasonably controlled by the trial judge, to my mind the fair construction of the statute does not admit of an order by the trial judge excluding any examination whatsoever—which is the effect of the order in the instant case. It is manifest that a rule providing that, after an examination by the trial judge of prospective jurors, *no examination* by counsel for defendant would be permitted, might result in hardship and the denial of a fair trial to a defendant. By a mere paraphrasing by a trial judge of the words of the statute relating to challenges for cause, the examination of prospective jurors by defendant might be absolutely prevented. Considering constitutional and statutory provisions, and viewed solely from a legal standpoint, I doubt that defendant had a fair trial.

No point is raised by appellant regarding the propriety of examining the entire jury panel collectively and before the jury box has been filled by jurors whose names have been regularly drawn by the clerk from the trial jury box. I wish, however, to take this opportunity to express my personal disapproval of such a course. No authority exists for the procedure adopted by the trial court. It is manifest that such a practice is open to many objections, and might easily lead to the selection of a jury by which neither of the parties would be accorded a fair trial. Until such time as the procedure may be amended, so as to legally provide for such a course, it would conduce to less likelihood of judicial error being committed by the trial court if the prescribed procedure were followed. In People v. Estorga, 267 P. 589, this court held, in effect, that where the court made no examination of the jurors, other than by questions addressed to the members of the panel before any jurors had been drawn for the case on trial, the examination so made by the judge was not the examination contemplated by section 1078 of the Penal Code.

However, as the Supreme Court has transferred the cause for hearing in that court, it seems inadvisable to volunteer another definite ruling on that point at this time.

94 Cal. App. 209

DE RIGNE v. HART. (Civ. 3560.)*

District Court of Appeal, Third District, California. Sept. 29, 1928.

Rehearing Denied Oct. 29, 1928. Hearing Denied by Supreme Court Nov. 26, 1928.

1. Partnership ⊂⇒104—Partners cannot sue one another at law in respect to partnership business; remedy being by equity suit for dissolution and accounting.

Partners cannot sue one another at law in respect to any business of partnership or to recover damages from the one or the other of copartners for breach of partnership agreement; remedy being by suit in equity for dissolution of partnership and accounting and settlement of partnership affairs.

2. Partnership ⊂⇒328(2)—Evidence showing breach of partnership agreement and damage resulting is admissible in suit for dissolution of partnership.

If any partners have by their conduct injured partnership business or have breached partnership agreement and damage to partnership or to other copartners has resulted, evidence showing such breach and damage is admissible in suit for dissolution of partnership.

3. Partnership ⊂⇒20—Agreement reciting entry into business of manufacturing and selling certain article held to create partnership (Civ. Code, §§ 2395, 2404).

Recital in written agreement that to promote a certain device, parties "have entered into the business of manufacturing and selling the above article under the name of * * *" *held* to show intent to thereby form partnership and not merely an agreement to form partnership in future, in view of other provisions for adjustment of partnership affairs, division of proceeds, and withdrawal of partners, notwithstanding recital that one of partners should receive 50 per cent. of all gross receipts, since other provisions showed intent that both should share equally in profits and losses under Civ. Code, §§ 2395, 2404.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by Charles A. De Rigne against Richard D. Hart. From an adverse judgment, plaintiff appeals. Affirmed.

Max Schleimer, of Los Angeles, for appellant.

William Schreider, of Los Angeles, for respondent.

HART, J. The plaintiff sued the defendant to recover damages in the sum of $5,000 for the alleged breach by the latter of a certain contract made by and between the parties. The contract, which is in writing, is set out in the complaint in hæc verba, and as so pleaded is as follows:

"Los Angeles, California, October–1–1924.

"Agreement between Charles A. De Rigne of the first part and Richard D. Hart of the second part. I Richard D. Hart have entered into agreement with Charles A. De Rigne to fiance and promote the De Rigne automobile motor eliminator, serial number 726576, patent pending.

"For my consideration of fiancing this proposition, I am to receive fifty per cent (50) of the business and fifty per cent (50) of all gross receipts, and all accounts shall be agreed upon by both parties.

"To promote the above De Rigne automobile motor eliminator we Charles A. De Rigne and Richard D. Hart have entered into the business of manufactoring and selling the above article under the name of the De Rigne and Hart Manufacturing Company.

"At any time that we shall consider to sell the business shall be divided equally fifty per cent (50).

"Within any time after the first of the year nineteen hundred twenty five (1925), that either party should become dissatisfied, the other party as the exclusive right to buy or sell. In case of death of either parties, the wifes or heirs of the above said parties, shall go right ahead with the business if they so desire, Minnie May De Rigne, Emma Zaiser Hart.

"All money collected from the business, shall be deposited in the bank, (whatever such bank shall be) in the name of the De Rigne and Hart Mfg. Co., and all checks must bare the signature of both. Richard D. Hart.
"Chas. A. De Rigne."

The court below sustained a general demurrer to the complaint and allowed the plaintiff 10 days within which to file an amended pleading. The plaintiff failed to file an amended complaint within the indicated time, and judgment dismissing the complaint was thereupon rendered and entered. The plaintiff appeals from said judgment.

[1, 2] The legal integrity of the judgment appealed from rests upon the solution of the question whether the contract above reproduced herein is and was intended as an executed agreement of partnership between the parties to this action, or was and is, and intended to be only, an executory contract providing for the formation in the future of a partnership, the consummation thereof to depend entirely upon the actual advancement by the defendant to the plaintiff of the finances which he (defendant) therein agreed to advance "to fiance and promote (as the preamble of the agreement reads) the De Rigne automobile eliminator," etc. If the above-written instrument was intended by the parties to constitute written evidence of the formation of a partnership between them, or, in other words, if it was the intention of the parties that the effect of the instrument upon its execution by both was itself to establish a partnership inter sese, then the demurrer to the complaint was properly sustained, since it is a thoroughly established rule that partners cannot sue one another at law in respect to any of the business of the partnership, or to recover damages from the one or the other of the copartners for a breach of the partnership agreement. Stone

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★Rehearing denied. Hearing denied by Supreme Court.

v. Fouse, 3 Cal. 292, 294; Russell v. Ford, 2 Cal. 86; Buckley v. Carlisle, 2 Cal. 420; Nugent v. Locke, 4 Cal. 318, 320; Pico v. Cuyas, 47 Cal. 174; Fisher v. Sweet, 67 Cal. 228, 230, 7 P. 657; Bremner v. Leavitt, 109 Cal. 130, 41 P. 859; Dukes v. Kellogg, 127 Cal. 563, 60 P. 44; Rassaert v. Mensch, 17 Cal. App. 637, 120 P. 1072; Streeter & Riddell, Inc., v. Bacon, 49 Cal. App. 327, 193 P. 285. As the foregoing cases say, the remedy is by a suit in equity for a dissolution of the partnership and an accounting and settlement of the partnership affairs. And, as is further said in those cases, if any of the partners have by their conduct injured the partnership business, or have breached the partnership agreement and damage to the partnership or the other copartners as such has resulted, evidence showing such breach and damage is admissible in the suit for a dissolution of the partnership and the damage considered in the accounting as among the partnership affairs to be settled therein. See, in particular, on this proposition, Dukes v. Kellogg, supra, and Rassaert v. Mensch, supra. As before stated, the important question then is: Did the parties to this action intend to form themselves into a partnership by the agreement hereinabove set forth to take effect and be in force immediately upon the making of the agreement? The learned trial judge of the court below, as is obvious from his ruling on the demurrer, construed said writing as a partnership agreement, and held, as would necessarily be the result under such construction of the writing, that the plaintiff, by the institution of this action, has not pursued the proper remedy for the righting of the alleged wrong of which he complains.

The agreement, as will readily be observed on an inspection thereof, is not skillfully phrased, it having evidently been drawn by some person without experience in drafting legal documents; yet its language is not so wanting in clarity as to make it a matter of serious difficulty to ascertain therefrom the nature of the legal relation which the parties to the instrument actually intended should thereby be created between them.

[3] It will be noted that in language, the meaning of which cannot be misunderstood, the second paragraph of the agreement declares that:

> "To promote the above De Rigne automobile motor eliminator we, Charles A. De Rigne and Richard D. Hart *have entered into the business of manufactoring and selling the above article under the name of the De Rigne and Hart Manufacturing Company.*"

Here is a plain and unequivocal declaration that the parties *have* together entered into the business named. Paraphrased in accord with a rational interpretation thereof, said language cannot have been intended to mean anything short of this:

> "That we (meaning the parties) have by these presents jointly entered into the business of manufacturing and selling the above article under the firm name of the De Rigne & Hart Manufacturing Company."

This construction of the second paragraph of the agreement is supported by the succeeding paragraphs. The two paragraphs immediately following the second contain stipulations, common to partnership agreements, providing for the adjustment of the partnership affairs upon the happening of contingencies to which such business relationships between several partners are naturally subject and which may arise at any time during the existence of a partnership, viz.: How or in what proportion as between the partners the proceeds of the business and its essential equipments shall be divided, in case of a sale; that, if either partner should become dissatisfied "within any time after the first of the year 1925" (the agreement was made October 1, 1924), the other party is to have "the exclusive right to buy or sell" (that is—as would seem to be the only reasonably permissible construction of that stipulation—in case one of the partners became dissatisfied with the business or for any reason the partnership relation, he should either buy the other's interest or sell the latter his interest); that, in case of the death of either of the partners, his wife or his heirs shall, with the surviving partner, proceed with the further prosecution of the business as the successor of the deceased partner, if she so desires. The last paragraph provides that all moneys derived from the business shall be deposited in a bank agreed on in the name of "the De Rigne & Hart Manufacturing Company" and that "all checks shall bare (bear) the signature of both."

The stipulation that, if either party "within any time after the first of the year 1925" should become dissatisfied, "the other party as (has) the exclusive right to buy or sell," is noticeably significant in its bearing upon the question whether it was the intention of the parties to the agreement that the writing was to stand as written evidence of a partnership which had previously been, or at the time of the making of the agreement and by reason thereof was, formed between them. The agreement was, as seen, executed by the parties on the 1st day of October, 1924—three months from the time within which (at any time) either party might, if dissatisfied with the arrangements provided for by the writing, either sell to the other party or buy from him his interest. If the instrument was not intended as a partnership agreement, what was there by reason of the agreement or that was created thereby that either party would have to sell or buy? If it was not the intention of the parties to create a partnership at the time of the making of the agreement and none was created thereby, when was the partnership relation to begin? The agreement does not say that the partnership relation should not begin until the first of the year 1925. To the contrary, that particular stipulation may well be construed to presuppose the existence of a partnership at the time of the making of the agreement that the instrument itself was intended as a partnership agreement. When considered in connection with the other provisions of the agreement, such construction of said stipulation seems to be entirely sound. But the complaint itself in effect construes the agreement as we view it. It is therein alleged that, after the making of the agreement, and on or about October 10, 1924, the plaintiff, upon the written order of the defendant, employed the Mulford Manufacturing Company to manufacture certain patterns and moulds "of said device and invention," referring to the "De Rigne automobile motor eliminator"; that, on October 20, 1924, the plaintiff, "upon the written order of the defendant," employed "Kay-Brunner Steel Casting Company to manufacture certain castings of said device and invention from the patterns and moulds manufactured by the Mulford Manufacturing Company"; that on October 25, 1924, "with the consent of the defendant," the plaintiff rented "a certain space" of certain described premises in the city of Los Angeles "for the purpose of conducting the said business"; that, on October 25, 1924, the plaintiff, "with the consent of the defendant," employed a certain named concern "to manufacture certain tools in the said business and to render certain services in connection therewith"; that on November 15, 1924, the plaintiff, "with the consent of the defendant," rented certain space in certain described premises other than the space so rented as above stated, for the purposes of the business; that also on November 15, 1924, the plaintiff, "with the consent of the defendant, purchased certain lumber from Mox Incorporated, to make a partition of the said space to be used and occupied by *the said business*." It is perfectly clear from the foregoing averments of the complaint that the partnership between the parties was launched and actively being prosecuted for a period in excess of two months prior to the date (December 23, 1924) of the filing of the complaint in this action.

But the point is made by the plaintiff that the agreement cannot and does not constitute the parties to it partners, because it provides, so it is contended, for a division between the parties, not of the profits, but of the gross earnings of the business, citing Wheeler v. Farmer, 38 Cal. 203, 213, and Freeman v. Sullivan (Cal. App.) 260 P. 807. See, also, Story on Partnership (7th Ed.) § 34, and footnotes. As seen, the paragraph of the agreement giving rise to that point provides:

> "For my consideration of fiancing this proposition, I am to receive fifty per cent (50) of the business and fifty per cent (50) of all gross receipts, and all accounts shall be agreed upon by both parties."

It is obvious that the parties did not intend to say what the language of that paragraph seems to imply. If it was the intention of the parties that the defendant was to receive 50 per cent. of the business—that is, to own one-half of the business—and receive 50 per cent. or one-half of all gross earnings of the business, there would be little, if anything, left of the business for De Rigne. It is not probable that a person of ordinary intelligence (and we must assume that the plaintiff possesses that degree of intelligence) would intentionally bind himself to an agreement the very operation of which would ultimately if not immediately divest him of all interest in the business. But a fair and enlightened consideration of the writing as a whole will show and does show that the intention of the parties was that they were to share equally in the ownership of the business and in the profits derived therefrom. For instance, the provision in the writing that "at any time that we shall consider to sell, the business shall be divided equally fifty per cent (50)," itself clearly indicates that the intention was that the parties were to be equal partners in the business, and to share equally in the profits thereof. Again, we find in the very paragraph we are now considering this clause: "All accounts shall be agreed upon by both parties." If it was the intention that the defendant was to receive 50 per cent. of the gross receipts, what interest would he have in the accounts? Clearly, none. But if, as seems to be true, the defendant's agreement to the accounts was to be required or was necessary, it is, of course, manifest that he was to have an interest therein, and that the defendant was to receive 50 per cent. only of the net receipts, or, as it is expressed in the previous clause of said paragraph, "fifty per cent of the business."

But we need not further pursue the discussion. We are satisfied that it must be held that the instrument involved herein is and was intended by the parties as an executed agreement, whereby the parties thereto intended to effect and did effect an association between themselves, "for the purpose of carrying on business together, and dividing its profits between them" (Civ. Code, § 2395), and that the agreement, being wholly silent as to the division of losses, the instrument itself implies an agreement "for a corresponding division of its losses" (Civ. Code, § 2404).

The judgment appealed from is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

94 Cal. App. 200

CRITTENDEN v. CREDIT FONCIER DES ETATS-UNIS. (Civ. 6236.)

District Court of Appeal, First District, Division 1, California. Sept. 29, 1928.

1. Corporations 🔑80(7)—Representation that corporation proposed loaning money in United States held not promise that corporation's sole business would be lending of money.

In action to rescind contract for purchase of stock in corporation for breach of promise that corporation would loan money in America, representation by promoter to plaintiff that corporation proposed lending money in United States did not amount to promise and representation that corporation would loan money as its sole business.

2. Corporations 🔑80(11)—Evidence held not to show failure of consideration for stock purchase by breach of agreement to loan money in America by corporation organized therefor.

In action to rescind contract for purchase of stock in corporation organized to loan money in United States, for breach of agreement to loan money, testimony by promoter that he told plaintiff corporation expected to borrow money in Europe and loan it in America at higher interest, and that money was not loaned because of war in Europe, showed that representations relied on were based on continuance of existing conditions, and that conditions were nonexistent when plaintiff gave notice of rescission, and did not sustain claim of failure of consideration for subscription agreement which was unconditional.

3. Corporations 🔑80(5)—Statements that corporation, when organized, would invest funds largely in securities of certain territory, held expressions of opinion in suit to rescind stock purchase.

In suit to rescind contract for purchase of stock in corporation, statements that corporation, when organized, would invest its funds largely in securities offered in Pacific Coast territory, *held* mere expressions of opinion.

4. Corporations 🔑83—Whether there is abandonment of purposes of corporation is generally question of fact.

Whether there is an abandonment of purposes and objects of corporation is generally question of fact, there being no fixed standard by which it is to be determined.

5. Corporations 🔑382—That corporation's principal purpose was to loan money in United States did not preclude it from having other purposes.

That principal purpose of corporation was to lend money in United States does not preclude it from having other purposes, but implies that there may be other purposes.

6. Appeal and error 🔑882(17)—Finding that corporation did not fail to loan money in United States could not be complained of on appeal, where plaintiff placed issue before court and there was no evidence thereon.

In suit to rescind contract for purchase of stock in corporation, organized principally to loan money in United States, and alleged to have failed and refused to make any loans whatsoever, finding by court that corporation did not so fail, or refuse, cannot be complained of on appeal, where plaintiff placed issue before court and there was no evidence offered or received thereon.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by William C. Crittenden against the Credit Foncier des Etats-Unis. Judgment for defendant, and plaintiff appeals. Affirmed.

Joseph J. Webb and Wm. A. Nunlist, both of San Francisco, for appellant.

Chickering & Gregory, of San Francisco, for respondent.

BEAUMONT, Justice pro tem. In the early part of 1912 certain persons in Paris, France, and San Francisco, Cal., decided to form a corporation, the chief object of which was to borrow money in Europe and lend it in America. At that time the interest rate in France was approximately 2 per cent. lower than in the United States. Henry Brunner, who lived in Paris, but who had formerly been a resident of San Francisco, was mainly responsible for the plan. He interested Tilden C. Tognazzini, of San Francisco, in the formation of the corporation. William Crittenden (appellant herein), a practicing attorney in San Francisco, heard of the proposed enterprise, came to Tognazzini, and requested participation therein. After some discussion, it was agreed that Crittenden should become one of ten incorporators to be selected from San Francisco. Appellant agreed to purchase 400 shares of the capital stock, and later subscribed therefor, paying $9,643.20. The corporation was organized in Paris in November, 1912, with Brunner and Tognazzini as members of the board of directors. The name of this corporation was Credit Foncier des Etats-Unis. Just prior to the formation of that corporation, the organizers thereof had caused to be formed in Delaware, U. S. A., a corporation by the name of Credit Foncier of the United States, Incorporated. The latter corporation was an auxiliary of the former. Some years after the beginning of this action it was dissolved. The French corporation issued Crittenden a stock certificate, in accordance with his subscription agreement. In April, 1914, Crittenden served on the French corporation (Credit Foncier des Etats-

Unis) a notice of rescission. Shortly thereafter, this action seeking to rescind the contract of purchase of the stock was instituted. Defendant had judgment, and from this plaintiff has appealed.

Many specifications "wherein the evidence is alleged to be insufficient to justify the decision" were made by appellant, but in his brief he concisely states the contention on which he relies. It is as follows:

> "That the consideration inducing him to purchase said stock was the promise on the part of the promoters of the defendant, the 'Paris Corporation,' and the promise of the defendant itself, the 'Paris Corporation,' as shown by its by-laws, to loan money in America and particularly in California; that the defendant, the 'Paris Corporation,' failed to loan any money in America or in California in violation of its agreement; that the consideration having failed, the plaintiff and appellant was entitled to rescind the purchase of the said stock and recover the money paid therefor."

First, let us examine the record as to the promise so claimed to be shown by the by-laws. It is not shown in the by-laws that the corporation is to loan money in California. The by-laws read:

> "The principal purpose of this corporation is to carry on in America, and especially in the United States of America, either alone, or in association with other concerns or individuals, or as agent for the account of the third parties, a general business of making loans on mortgages or mortgage securities."

[1] Appellant alleges in his third amended complaint that promoters of respondent promised and represented to him that they were engaged in organizing in Paris, France, "a corporation having for its principal purpose the carrying on in America and especially in the United States of America, but more particularly in what is known as the 'Pacific Coast territory,' a general business of making loans of money on mortgages and mortgage securities," and that "when said corporation was organized the said corporation would perform each of said acts as its sole business." The court found adversely to these allegations. There is no evidence in the record that Tognazzini made any representation that this was to be the sole business of the corporation. That he represented to appellant that the corporation purposed lending money, not only generally in the United States, but particularly in the Pacific Coast territory, is apparent from the evidence. The numerous exhibits in the record establish this clearly.

[2] We now consider the point of appellant's contention "that the defendant failed to loan any money in America or California in violation of its agreement." Respondent did not lend any money in the United States, and the court so found; but was this in violation of any agreement? Tilden C. Tognazzini, sworn as a witness on behalf of plaintiff, testified on cross-examination:

> "I believe Mr. Crittenden came to me and asked to join this group, at the solicitation of Mr. Boardman, I think he told me at that time. I remember telling Mr. Crittenden that I did not think he should join, being an attorney, and having already one attorney as one of the group. * * * I don't remember just exactly what took place, but my impression is that I rather discouraged Mr. Crittenden, on that theory. * * * As to what was said, we had a great many talks in those days; we used to meet daily I think and I perhaps told him exactly what I told the rest—what I expected this corporation would do under certain conditions then existing, which was the only logical thing I could have told him, of course."

As to the conditions existing about the time these conversations were had relative to forming the corporation (prior to August, 1912), the record shows definitely that the rate of interest in France and Europe generally was about 2 per cent. per annum lower than in the United States. This motivated the organization of the corporation. The organizers planned to borrow money at the lower rate then current in Europe and loan it at the higher rate in the United States. The evidence shows that wars in the Balkan states unsettled the financial condition of Europe in 1913. The witness Tognazzini was asked why the corporation did not invest any money in the United States. He answered:

> "At the time this organization was formed, and which was again the motive for organizing the company, it was on account of money being much cheaper in France than it was here. I would say that within a year conditions changed materially in Europe, that is, a year from the date of the organization. If I recollect correctly, I think the Balkan war started about that time in 1914. It raised rates in France, of course, a great deal. I do not think the situation changed our financial condition in this country materially."

The subscription agreement signed by appellant was unconditional. The condition that appellant contends should attach in order to show a violation of its terms, and a consequent failure of consideration, rests in parol. This testimony shows that the representations relied upon were based on the continuance of the existing conditions. These conditions were nonexistent at the time appellant gave notice of rescission and when he began this action.

[3] Statements to the effect that the "corporation when organized would invest its funds largely in the securities offered in the Pacific Coast territory," made under the circumstances shown by the evidence in this case, were merely expressions of opinion. Jefferson v. Hewitt, 95 Cal. 535, 30 P. 772. On cross-examination appellant stated that he and Mr. Tognazzini "discussed what in effect this corporation was going to do after

its organization. I don't remember him using the word 'promise.' He never used the word 'intend' or 'intended.' He simply, as far as I remember, stated that the corporation was going to do this, such and such." The findings of the court show that the statements were made without any fraudulent purpose. Appellant testified that Mr. Tognazzini, who was the only person who made any statements to him concerning the proposed corporation, acted in good faith.

[4-6] There is a finding of the court that directly negatives failure of consideration. In appellant's complaint it is alleged that the "said corporation has, without cause, abandoned or is about to abandon, the sole object and purposes thereof and now intends to liquidate its affairs." In another part of the complaint it is alleged that the capital stock of the corporation is 40,000 shares; "that the entire amount has been issued and is now outstanding; that of this total sum 400 shares only were issued to this plaintiff; that a majority of the stock has been issued to and is now held by persons who, at all times referred to herein, have been and now are in active control of the said 'Paris Corporation.'" Upon the questions of abandonment and liquidation, the court found adversely to plaintiff's allegations. Whether there is an "abandonment" of the purposes and objects of a corporation, is generally a question of fact. There is no fixed standard by which it is to be determined. Fletcher's Cyc. Corporations, vol. 2, § 654, and cases cited; Gibson v. Columbia & New Richmond Turnpike Co., 18 Ohio St. 396; Milwaukee Smelting & Ref. Co. v. Lindenberger, 142 Wis. 273, 124 N. W. 273. As heretofore mentioned, the court found that to lend money in the United States was not the sole purpose of respondent. It was the principal purpose, it is true, but that does not conclude it from having other purposes. On the other hand, it implies there may be other purposes. There is no evidence in the record that the corporation was not, at the time of the commencement of this action, engaged in the active business of some, or at least one, of its purposes. Indeed, appellant's allegation regarding the large number of shares outstanding and the active control of the corporation by the board of directors so indicates. The complaint alleged that respondent had failed and refused to make any loans whatsoever. The court found it had not so failed or refused. Appellant cannot now complain of this finding, having placed the issue before the court and there being no evidence offered or received thereon. Monterey County v. Cushing, 83 Cal. 507, 23 P. 700. In the present case there was no testimony that the corporation intended to liquidate its affairs. We cannot say that the circumstances, as shown by the evidence and especially by the testimony of the witness Tognazzini, were not sufficient to justify the court in its finding upon the question of abandonment.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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205 Cal. 396

BOLAR v. MAXWELL HARDWARE CO. ★
(S. F. 12407.)

Supreme Court of California. Oct. 22, 1928.

Hearing Denied in Bank Nov. 19, 1928.

1. Explosives 🔑9—Fifteen year old boy, who bought gunpowder from defendant and secretly planned mounting and loading of cannon, held contributorily negligent as matter of law as to injuries received after igniting fuse.

Fifteen year old boy, who bought gunpowder which he loaded into cannon, and who secretly secured substitute fuse, and mounted cannon and ignited fuse in company of other boys for target practice, *held* guilty of contributory negligence as matter of law, in action against hardware company selling the gunpowder for injuries sustained as result of bursting of contrivance or recoil.

2. Negligence 🔑85(1)—Minor may under certain circumstances be guilty of contributory negligence.

Minor may under circumstances be guilty of contributory negligence, though he is not held to same degree of accountability as an adult.

3. Negligence 🔑1, 136(9)—"Negligence" is want of care which person of ordinary prudence would exercise, and is question for court, where no other inference than that of negligence can be drawn.

"Negligence" is want of such care as a person of ordinary prudence would exercise

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★Hearing denied in bank.

under the circumstances, and is question for court, where facts are clear and undisputed, and no other inference than that of negligence can be drawn.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence.]

4. Negligence 🔑136(14)—Court may determine whether alleged negligent act would be deemed dangerous in common judgment of mankind.

Court in negligence case may determine whether act is such as would be performed by person of ordinary prudence, or whether in the common judgment of mankind it would be deemed dangerous or attended with peril.

5. Negligence 🔑85(2)—Child is required to exercise degree of care ordinarily exercised by children of like age.

Child is required to exercise the same degree of care which is ordinarily expected from children of his age, or which children of his age ordinarily exercise.

6. Negligence 🔑122(6)—Child claimed to be contributorily negligent must be presumed to have qualities ordinarily belonging to person of like age, where capacity and intelligence are not controverted.

Where capacity and intelligence of child are not controverted, he must be presumed to have had all qualities belonging to a person of his age, in determining whether he was contributorily negligent.

Department 1.

Appeal from Superior Court, Alameda County; E. N. Rector, Judge.

Action by Philip Bolar, by Ethel Bolar, his guardian ad litem, against the Maxwell Hardware Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Breed, Burpee & Robinson, of Oakland, for appellant.

Philip M. Carey, of Oakland (Marvin B. Sherwin, of Oakland, of counsel), for respondent.

PRESTON, J. Action for personal injuries sustained by plaintiff, a minor, as the result of explosion of a toy cannon.

Plaintiff, a 15 year old normal boy, in the last term of junior high school, purchased 35 cents worth of black gun powder at defendant's hardware store in Oakland, Cal., stating after purchase that he intended to use it in a toy cannon, although the evidence is in conflict as to whether he explained to the salesman that it was to be a cannon of his own construction. He then secured a piece of heavy pipe, about 15 inches long and 2 inches in diameter, in which he had a hole drilled for the fuse, and on one end of which he fastened a screw cap. The garage man, who drilled the hole for him, warned him that the device was exceedingly dangerous. Fearing his mother, he secreted the powder and cannon until evening, when, accompanied by his younger brother and two other boys, he took it to a large vacant lot near their home and loaded it with the powder, rammed in with a paper wad, and also with nails, bolts, etc., to serve as projectiles. A soda straw filled with powder was inserted in the breech hole and served as a fuse. The boys stood out of danger and plaintiff applied a match to the "fuse." His first effort was unsuccessful, but applying a second match produced an immediate explosion. The projectiles tore a hole through the "target," a large signboard, but the contrivance exploded and, as a result of either the recoil or the bursting of it, plaintiff was thrown to the ground and his right kneecap was broken, deeply lacerated, and severely and painfully injured. This action charges defendant corporation with responsibility for said injury by reason of its alleged negligence in permitting the purchase of said explosive by an inexperienced minor. The jury rendered a verdict for plaintiff in the sum of $7,500. Motion for a directed verdict was denied, and motion for a new trial was denied by operation of law. Defendant now prosecutes this appeal from the judgment entered in favor of plaintiff upon said verdict.

Section 1 of Ordinance 1939 (N. S.) of the city of Oakland provides in part:

> "No person * * * shall at any time fire or discharge * * * any * * * cannon * * * or any combustible or explosive device * * * of any kind whatsoever, or by whatever name known, within the city limits of the city of Oakland. * * *"

This ordinance was first offered in evidence by defendant at the close of its case, for the purpose of showing contributory negligence. The court expressed his belief that it was not admissible, but, as no objection was made by plaintiff, it was admitted. Defendant next made a motion for a directed verdict, which was denied, and the court reopened the cause of its own motion and then struck the ordinance from the record.

Appellant contends that plaintiff was guilty of contributory negligence per se in discharging said cannon in violation of said ordinance; that the court erred in refusing to admit the ordinance in evidence, in refusing to instruct the jury that a violation thereof in itself constituted negligence, and in likewise refusing to give two other instructions relative thereto. Appellant further contends that, if the effect of admission of said ordinance would not have been to conclusively establish negligence per se on the part of plaintiff, nevertheless it should have been admitted in evidence; further, that plaintiff was guilty of contributory negligence as a matter of law in acting as he did, considering his age, education, intelligence, knowledge, experience, and warnings.

[1, 2] A careful examination of this cause leads us to the conclusion that plaintiff as a matter of law was clearly guilty of negligence contributing proximately to the injuries of which he complains. This conclusion forces itself upon us from the facts of the case enumerated above, to which should be added the following: The plaintiff constructed the dangerous device himself, the whole plan originating in his own mind. The idea of a soda straw as a substitute for a fuse, the capping of the pipe, the boring of the breech hole, the mounting of the cannon, loading it, and the ignition of the fuse were all independent ideas of his own, carried out secretly, as he well knew that both parents, if cognizant of his plans, would have forbidden their execution. He knew, at least to some extent, of the explosive power of gunpowder, having extracted it from firecrackers and touched it with a lighted match, and here he warned his companions to stand back when he touched the match to the "fuse" of his cannon. Indeed, he bore the marks of a previous explosion, which occurred while he was burning leaves in which was hidden a dynamite cap. The cap exploded, causing numerous injuries to his face and body. Not only was he possessed of all the knowledge, intelligence, and experience of an ordinary 15 year old boy with respect to these matters, but he might well be classed as above the average in such respect. We can discern no ground whatever upon which minds could differ for an instant as to plaintiff's own patent negligence in causing the explosion which produced his injuries. If this is not a case of contributory negligence as a matter of law, then that rule cannot be held applicable in any case to a minor. Such, however, is not the rule of law. While a minor is not to be held to the same degree of accountability as an adult, still he may, under certain circumstances, be guilty of contributory negligence, and he is held to the same degree of responsibility as a normal, ordinary boy of his own age, unless the presence of special circumstances, such as mental inferiority, except him from application of the rule.

Here we have no controverted facts. We are simply called upon to say whether as a matter of fact reasonable minds could draw any other conclusion than that of negligence on the part of said minor. More frequently, of course, different conclusions may be drawn, and a jury issue thus arises; but in this case common reason and ordinary experience show that a normal boy of 15 years would know positively that he was engaged in an exceedingly dangerous experiment. At the age of this boy the ordinary youth is well acquainted with the use of firearms and to a certain extent with explosives. It is said that thousands of boys of the age of 15 years and younger were in the armies during the Civil War. The testimony of plaintiff himself confirms, and does not weaken, the conclusion that he was a normal youth, at least with respect to his knowledge of explosives; his statement in this respect being substantially as follows:

> "When I took the powder home I hid it from my mother in the basement. I also hid my cannon in the basement because I did not want my mother to see or she would have taken it. She would have taken the powder and thrown it away and busted up the cannon, I guess. I knew that powder was something that neither one of my parents wanted me to play with. I knew that my parents did not want me to play with cannons. When boys have a gun parents always say they are going to take the gun away because the boys will get hurt and hardly any of them ever get hurt, but I thought I could shoot a cannon off and nothing would happen. But my mother and father was bound to take it away. I did not know the cannon was dangerous. Bigger ones are dangerous but not these small ones. That particular one was made just to make noise. I knew that ordinary powder had to be handled carefully but I thought that the quantity that I put in the cannon was safe, that powder was not dangerous except in large quantities. * * * With the exception of the time that that cap exploded among these leaves when I was raking up the yard there, with the exception of the one time when I picked some powder out of one fire cracker, I have never had any experience with explosives of any kind previous to the time that I used this black gunpowder in this toy cannon."

[3-6] We conceive the rule applicable to this case to be announced in Studer v. Southern Pacific Co., 121 Cal. 400, 404, 405, 53 P. 942, 943 (66 Am. St. Rep. 39), wherein a child between 12 and 13 years of age was held as a matter of law to be guilty of contributory negligence, in attempting to climb over the coupling between two freight coaches; a sudden moving of the train at the time having caused his death. Judge Harrison, speaking for the court, said:

> "The fact that the deceased was only about twelve years of age did not require the court to submit to the jury whether his attempt to cross the street between the cars constituted negligence. Negligence is the want of such care as a person of ordinary prudence would exercise under the circumstances of the case. When the facts are clear and undisputed, and when no other inference than that of negligence can be drawn from them, the court is not required to submit the question to the jury, but may itself make the inference. Nagle v. California Southern R. R. Co., 88 Cal. 86 [25 P. 1106]. The court may also determine whether an act is such as would be performed by a person of ordinary prudence, or whether in the common judgment of mankind it would be deemed dangerous or attended with peril. The same act which would be negligence in an adult may not be such if done by a child, but a child is required to exercise the same degree of care that would be expected from children of his age, or which children of his age ordinarily exercise (State v. Baltimore, etc., R. R. Co., 24 Md.

> 84, 87 Am. Dec. 600; Collins v. South Boston R. R. Co., 142 Mass 301 [7 N. E. 856] 56 Am. Rep. 675) and the court is as fully authorized as a jury to determine what this degree of care is. Children, as well as adults, should use the prudence and discretion which persons of their years ordinarily have, and they cannot be permitted with impunity to indulge in conduct which they know, or ought to know, to be careless. 'The law imposes upon minors the duty of giving such attention to their surroundings and care to avoid danger as may fairly and reasonably be expected from persons of their age and capacity.' (Merryman v. Chicago, etc., R. R. Co., 85 Iowa, 635 [52 N. W. 545].) In the present case the capacity and intelligence of the child are not controverted, and he must be presumed to have had all the qualities ordinarily belonging to a person of his age."

A kindred principle is recognized in such cases as Nicolosi v. Clark, 169 Cal. 746, 147 P. 971, L. R. A. 1915F, 638, and Bradley v. Thompson, 65 Cal. App. 226, 223 P. 572, both of which are what is known as attractable nuisance cases, and show a trespass by a child upon defendant's property to obtain explosives, with resulting injuries, defendant being exonerated from liability as a matter of law.

The rule above announced is sound. It has not been modified, and is applicable to the case before us. It is clearly implied, if not expressly stated, to be an exception to the general rule announced in such cases as Cahill v. Stone & Co., 153 Cal. 571, 577, 96 P. 84, 19 L. R. A. (N. S.) 1094; Nicolosi v. Clark, 169 Cal. 746, 147 P. 971, L. R. A. 1915F. 638; Mayne v. San Diego Electric Ry. Co., 179 Cal. 173, 177, 175 P. 690; Morris v. Standard Oil Co., 188 Cal. 468, 471, 205 P. 1073; Schroeder v. Baumgarteker (Cal. Sup.) 262 P. 740.

It is plainly recognized in Wallace v. Great Western Power Co. (Cal. Sup.) 266 P. 281, where the court below was sustained in granting a nonsuit on account of contributory negligence on the part of plaintiff, a boy of 14 years. The following is a list of cases from other jurisdictions similar in fact and principle, where conclusions are announced in harmony with the holding here made: Dudley & Orr v. Hawkins (Tex. Civ. App.) 183 S. W. 776; Thornton v. Ionia Fair Assn., 229 Mich. 1, 200 N. W. 958; Shields v. Costello (Mo. App.) 229 S. W. 411; Holmes v. Delaware & Hudson Co., 128 App. Div. 24, 112 N. Y. S. 421.

This conclusion renders it unnecessary to give consideration to the contention that the excluded ordinance was applicable to plaintiff and violation thereof by him constituted negligence per se as well as to the contention that defendant, under the circumstances, may not invoke the terms of said ordinance as a defense. It is for the same reason unnecessary to consider whether the sale of the powder, assuming it to have been a negligent act under the facts of this case, was the efficient, proximate cause of the injuries suffered by plaintiff minor.

In this cause the provisions of section 629 of the Code of Civil Procedure are applicable, authorizing the appellate court, if it appears from the whole evidence that a verdict should have been directed at the trial, to order that judgment be so entered. The judgment is therefore reversed with directions to the court below to enter judgment for the defendant.

We concur: CURTIS, J.; SEAWELL, J.

205 Cal. 309

SECURITY TRUST & SAVINGS BANK v. CARLSEN et al. (L. A. 8044.)★

Supreme Court of California. Sept. 29, 1928.

Rehearing Denied Oct. 29, 1928.

1. Interpleader 🔑10—Alleged right of escrow holder to bring interpleader action held not defeated by indebtedness due it from vendor asserting claim to property involved (Code Civ. Proc. § 386).

Fact that bank, as escrow holder, also held certain bonds and evidences of indebtedness of vendor, *held* not to defeat its alleged right, under Code Civ. Proc. § 386, to bring interpleader action to relieve itself of liability on account of conflicting claims between vendor and subvendee.

2. Interpleader 🔑10—Escrow holder, assuming definite and independent liability to party to escrow, cannot have responsibility terminated by interpleader action (Code Civ. Proc. § 386).

Where escrow holder has assumed a definite and independent liability to one of the parties in escrow, his right to bring interpleader action, under Code Civ. Proc. § 386, is thereby defeated, since judgment of court could not absolve him from performing his independent contract.

3. Interpleader 🔑6—Absence of time limit in escrow instructions held not, under circumstances, to defeat right of escrow holder to interpleader.

Absence of time limit in escrow instructions *held* not to defeat right of escrow holder to institute action in interpleader, under the terms of Code Civ. Proc. § 386, where contracting parties named in escrow agreement were in hopeless discord as to their respective rights thereunder, and there was no certainty and little possibility that conditions might change for the better and that obstacles standing in the way of closing escrow would be removed within any reasonable length of time.

4. Interpleader 🔑6—Provision of escrow agreement that no rescission or modification should take place without consent of parties did not preclude interpleader (Code Civ. Proc. § 386).

Provision of escrow agreement that no rescission of its terms should take place without the consent of the parties thereto, including

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★Rehearing denied.

bank as escrow holder, *held* not to deprive bank of its right to avail itself of interpleader pursuant to Code Civ. Proc. § 386.

Preston, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Wm. H. Dehy, Judge.

Action in interpleader by the Security Trust & Savings Bank against the Dominguez Land Corporation, the California Chemical Company, and others, in which defendants named filed cross-complaints. From an order granting a motion for nonsuit, made by defendant F. C. Carlsen and another, and denying plaintiff's prayer, plaintiff appeals. Reversed.

Rehearing denied: SEAWELL and PRESTON, JJ., voting for a rehearing.

Superseding opinion of District Court of Appeal in 265 P. 303. See, also, 265 P. 301, 271 P. 104.

Newlin & Ashburn, of Los Angeles (Clyde E. Holley, of Los Angeles, of counsel), for appellant.

Goodwin & Morgrage and W. I. Gilbert, all of Los Angeles, for respondent Petroleum Midway Co.

Foster & Godward and Lester R. Godward, all of Los Angeles, for other respondents.

CURTIS, J. An opinion in this proceeding was rendered by the District Court of Appeal, Second District, Second Division. Thereafter we granted a motion for a hearing thereof in this court. The following portion of said opinion, rendered by the District Court of Appeal, we hereby adopt as the opinion of this court:

This action is one in interpleader. The appeal is from an order granting a motion for nonsuit made by the defendants and respondents F. C. Carlsen and Petroleum Midway Company; also from an order denying the prayer of the plaintiff.

The circumstances out of which this litigation arose are that on April 22, 1922, the California Chemical Company, herein referred to as the company, and F. C. Carlsen opened an escrow with the plaintiff, hereinafter referred to as the bank. At the time the parties to the escrow signed and delivered to the bank certain written instructions as to the handling of the escrow. There was then placed with it certain deposits, to wit: (1) Written agreement between the Dominguez Land Corporation, hereinafter referred to as the corporation, and the company, by which the corporation contracted to sell certain land to the company; (2) written agreement between the company and F. C. Carlsen, in which it was agreed that the company would convey all of its interest in the instrument referred to as deposit 1, to Carlsen; and (3) written assignment by the company as stipulated in the written agreement last mentioned to be made by Carlsen.

Deposit No. 2 provided that the consideration to be paid by Carlsen for the assignment by the company of its interest in deposit No. 1 should be $16,000. The instructions signed by Carlsen required, among other things, that the bank, escrow holder, have delivered to it "a letter or report by the Title Insurance & Trust Company, subject to my approval, and showing that no assignment of said agreement last above mentioned appears of record, and that said Dominguez Land Corporation has not placed of record any declaration of forfeiture of or default in said agreement prior to April 22, 1922." Further, it was provided that upon such delivery the bank should pay to the company or order $2,000, etc. There was also contained in the instructions a provision which reads as follows:

> "No rescission of this escrow or modification of its terms or any notice or demand shall be of any effect without joint consent in writing subscribed by the undersigned and assented to by the bank."

Without enumerating each step taken or act done, it may be said that Carlsen appears to have performed all of the conditions agreed to be performed by him. It is so stated in a letter dated March 21, 1923, written by the bank to the First National Bank of Torrence. Nor is there any claim that the company was in default, except that the bank, acting for it, was unable to secure the report from the Title Insurance & Trust Company, required by the escrow instruction. Considerable negotiations were had, and finally, according to the testimony of the witness Martin, an attorney for the bank, "Carlsen or his attorney representing him stated that they would waive these requirements." The bank then asked the other parties to the escrow to waive them also. However, Martin testified:

> "The other parties to the escrow, who were communicated with either by me or by Mr. Keyes at my suggestion, objected to the waiver."

Upon some occasion after the escrow was begun, and before suit was entered, Martin further testified, a representative of the corporation "stated that so far as they were concerned we were at liberty to go ahead with the escrow according to the terms and conditions of it."

On May 15, 1922, the corporation brought suit against the company to quiet title of the former to the property involved in these transactions. It was because this suit had been filed that the bank was unable to secure from the Title Insurance & Trust Company the report required by the instructions. On June 19, 1922, the company demanded by letter that the bank close the escrow by delivering to the company the money and notes to which it was entitled under the escrow, or, if that was not possible, that the papers deposited by it with the bank be returned. On January

18, 1923, the corporation notified the company, Carlsen, and the bank of the termination of the contract referred to herein as deposit No. 1. On March 21, 1923, the bank received notice, directed to "F. C. Carlsen and to all whom it may concern," declaring with reference to the agreement dated April 21, 1922: "Whereas, the terms and conditions of said agreement have not been complied with," a forfeiture was claimed by the company; and the letter also directed that all documents executed in connection with that agreement be returned to it.

This suit resulted from the same disagreements of the parties in the transaction which also were the basis of the suit entitled Carlsen v. Security Trust & Savings Bank (a Corporation), numbered 5889, and reported in 265 P. 301. The escrow instructions here involved were construed in our decision upon the appeal of that case. We there held that the provision of the instructions calling for guaranty of title before the close of the escrow necessitated that the guaranty show the title in question to be unincumbered; that, because of the provision that no modification of the terms of the escrow could be made without "joint consent in writing subscribed by the undersigned and assented to by the bank," oral waiver by Carlsen of the requirements concerning guaranty of title was ineffectual, and hence that the bank acted within its rights in refusing his demand for delivery of the muniments of title agreed to be delivered to him under certain conditions.

The additional question is now presented as to whether or not upon these premises of facts and of law the bank was entitled to relieve its responsibility through an action in interpleader.

It is admitted by the respondent that, if the bank were not an escrow holder, it would be entitled to the relief asked by it. It is insisted, however, that the escrow holder is not a mere stakeholder, but has an interest in the transaction, and a legal duty to perform in connection therewith; further, that the bank can with perfect safety to itself determine which claimants are entitled to documents in controversy, and that under such circumstances it cannot require that the claimants interplead.

We know of no decision in this jurisdiction passing upon the exact question here presented. However, although the statement is obiter dictum, the Supreme Court of New Mexico, in Davisson v. Citizens' Nat. Bank, 15 N. M. 680, 113 P. 598, indicated that, in the opinion of that court, an escrow holder may secure relief from conflicting claims against the escrow through interpleader. Referring to the bank, escrow holder in that action, it is said:

> "And when it failed to secure appellant's consent, it should have held the escrow and let the parties either come to some agreement among themselves or appeal to the courts, when the appellee could have interpleaded the money into court and secured its acquittance."

That a person holding personal property in escrow and having no interest therein may require conflicting claimants to interplead is directly held in Walker v. Bamberger, 17 Utah, 239, 54 P. 108.

Section 386 of the Code of Civil Procedure provides, in part, as follows:

> "* * * And whenever conflicting claims are or may be made upon a person for or relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves."

[1] One objection to the right of the complainant to require the defendants to interplead in this action is the claim that the bank is so interested as to exclude it from the right to maintain this action. It is important to note that during all times involved the bank was also the holder of certain bonds and evidences of indebtedness of the corporation. It is claimed by respondent that under these circumstances the interests of the bank were such that because of this fact alone, any right to maintain interpleader which it might otherwise have had was defeated.

Upon this statement of facts, the interest which the bank had was not in the fund and muniments of title in dispute but merely an interest in a legal question, in that, if it were determined favorably to the corporation, the latter would be a better security for the payment of its debt to the bank. Such an interest does not defeat the right to interplead. Pomeroy, Equity Juris. § 51, p. 83. We know of no conflict of authority in the general acceptance of this rule.

[2] Another ground for denying an escrow holder the benefits of the remedy provided by this law would be, if in any case it appeared to be true, that the complainant in interpleader had assumed a definite and independent liability to one of the parties to the escrow. In McGinn v. Interstate National Bank, 178 Mo. App. 347, 166 S. W. 345, the reason for the rule as to independent liability defeating a right of interpleader is explained to be that, where such liability exists, a decision as to which of the conflicting claimants was right would not absolve the party asking interpleader from performing his independent contract. However, if the relations of the parties are such that the court's decision would determine the responsibility of the escrow holder, he is for the purposes, and within the scope, of the Code section authorizing interpleader a mere stakeholder.

[3] The only material difference between the escrow instructions in the present action and those involved in the cases of Davisson v. Citizens' Nat. Bank, supra, and Walker v.

Bamberger, supra, is that there is no time limit fixed by the escrow herein in which the same should be closed, while in the two cases just mentioned the escrow instructions provided for such a time limit. In some instances, the absence of such a time limit might have the effect of defeating the right of an escrow holder to institute an action in interpleader and have the rights of the parties to the escrow determined by the court. But in the present controversy we do not think that this right should be withheld from the plaintiff for that reason. The contracting parties named in the escrow agreement are in hopeless discord as to their respective rights thereunder. The defendant Carlsen has served notice on the plaintiff demanding an immediate closing of the escrow and a delivery to him of the documents to which he would be entitled were the escrow closed according to its terms. The company, the other party to the escrow, on the other hand, has served notice on the bank to deliver said documents to it, claiming that Carlsen has forfeited all his rights under his agreement with the company. While the corporation, although not a party to the escrow, but a party to the agreement between it and the company, which agreement is one of the documents held by plaintiff in escrow, has served written notice upon the plaintiff, claiming that said agreement had terminated. It had already instituted suit to quiet its title to the land described in said written agreement. This was the condition of the controversy when the plaintiff instituted this action of interpleader. There was no certainty and but little possibility that conditions might change for the better, and the obstacles, standing in the way of closing said escrow according to its terms, removed within any reasonable length of time. In the meantime the plaintiff might be harassed with litigation instituted by the several persons interested in the property held by it in escrow. Had it acted in the matter and delivered the documents held by it to either of the parties demanding the same, it would have acted at its peril, and would have been responsible had it delivered said documents, or the money held by it, to any of the parties not entitled thereto. Under these circumstances we think the plaintiff was clearly entitled to act under the terms of section 386 of the Code of Civil Procedure.

It will be noticed that the Code section expressly provides that "whenever conflicting claims are or may be made upon a person for or relating to personal property, * * * such person may bring an action," etc. We know of no rule of law, and none has been called to our attention, which requires that such a person, upon whom such conflicting claims have been made, shall await some indefinite time in the future, when possibly there may be some change in the rights of those asserting their conflicting claims, before instituting the action provided for by said section of the Code, whereby he may seek a discharge from liability to all conflicting claimants. On the other hand, as we have already seen, the section of the Code under consideration gives him this right, whenever such conflicting claims have been made upon him. In fact, the Code section goes even further and gives this right to such person whenever conflicting claims "may be made" upon him.

[4] The escrow instructions in the present action contained, as we have before noted, a provision as follows:

> "No rescission of this escrow or modification of its terms or any notice or demand shall be of any effect without joint consent in writing subscribed by the undersigned and assented to by the bank."

In Carlsen v. Security National Bank, supra, it was held that this provision of the escrow was for the benefit of the bank as well as the parties thereto, and could not be waived without the assent of the bank. It follows, from this interpretation of the escrow instructions, that the bank assumed certain obligations by virtue of the provisions of said escrow instruction. These obligations were principally to pay the money and deliver the documents deposited with it to the respective parties entitled thereto whenever all the conditions of such payment and delivery had been complied with in the manner set forth in the escrow. The fact that the bank had bound itself to perform these obligations did not necessarily prevent it from availing itself of the section of the Code providing for a suit in interpleader. In general, every mere stakeholder has assumed some obligation to those interested or owning the property held by him. His obligation is to deliver the property held by him to the party entitled thereto. But, when a disagreement arises as to the ownership of said property, the holder thereof has not obligated himself to settle said disagreement and deliver the property to either of said parties in the face of conflicting claims thereto. He may do so, but, in case he does act, he does so at his peril, and, if he delivers the property to one not legally entitled thereto, the legal owner thereof may hold him responsible in damages for such wrongful delivery. No one questions the right of a mere stakeholder to avail himself of the relief afforded by section 386 of the Code of Civil Procedure, and to institute an action in interpleader and compel the parties claiming the property held by him to litigate in such action their respective claims thereto, notwithstanding the obligation of the stakeholder to deliver the property to the rightful owner. The bank in this action stands in no different position than that of an ordinary stakeholder. It has not assumed any obligation to settle the disputes which have arisen between the parties to the escrow, and, if it should attempt to do so, and should deliver the property held by it to either of the parties not entitled thereto, the rightful owner of said property can hold the bank liable for the value of the property so wrongfully delivered. In our opinion, therefore, the provision of the escrow agreement that no rescission or modification of its terms should take place without the consent of the parties thereto, including the bank, does not deprive the bank of its right to avail itself of the remedial provisions of section 386 of the Code of Civil Procedure.

The orders appealed from are reversed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

I dissent: PRESTON, J.

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205 Cal. 302

CARLSEN v. SECURITY TRUST & SAVINGS BANK. (L. A. 9560.)★

Supreme Court of California. Sept. 29, 1928.

Rehearing Denied Oct. 29, 1928.

1. Escrows 🔑6—Instruction that escrow holder have guaranty of title, showing "good and sufficient grant deed," required that marketable title be shown before completing escrow.

Provision in escrow instructions that escrow could not be completed until there was furnished "a guarantee of title showing agreement last above mentioned and assignment of same to me and a good and sufficient grant deed * * * conveying said property to me," *held* not to require merely a certificate showing an agreement for the sale of property and its assignment, but to require that bank, as escrow holder, have a guaranty showing ownership of property with marketable and unincumbered title on part of vendor, in suit by subvendee to recover damages from bank for failure to deliver muniments of title held in escrow.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Good and Sufficient Deed.]

2. Escrows 🔑10—Pendency of vendor's suit to quiet title held to warrant escrow holder's refusal to transfer muniments of title to subvendee, where escrow instructions required guaranty of title showing good and sufficient grant deed.

Subvendee, suing escrow holder for damages for failure to deliver muniments of title deposited in escrow, *held* not entitled to recover, where instructions signed by plaintiff required guaranty of title showing contract and assignment and a "good and sufficient grant deed," and where suit by vendor to quiet title to the property was pending, since instructions in effect required that marketable title be shown before completing escrow.

3. Escrows 🔑5—Escrow instructions must be read together in determining escrow holder's liability to subvendee, where both purchase contracts were deposited in escrow.

Where original contract for sale of property and purchaser's contract with subvendee were deposited in escrow, escrow instructions must all be read together as forming an entire contract in determining liability of escrow holder for failure to deliver to subvendee muniments of title, during pendency of vendor's action to quiet title.

4. Escrows 🔑6—Attempted oral waiver by subvendee of escrow instructions, requiring marketable title and joint consent in writing to any modification of instructions, was ineffective.

Where escrow instructions, agreed on by purchaser of property, subvendee, and escrow holder, provided that no rescission or modification of terms should be effective without joint consent of parties in writing assented to by bank as escrow holder, subvendee, who made no attempt by way of execution of written waiver to waive provision in instructions to escrow holder requiring that marketable title be shown before completing escrow, was not entitled, on basis of mere oral statement, to demand closing of the escrow before marketable title was shown, though stipulation was inserted for his benefit.

5. Contracts 🔑143—Court may not redraft contract of competent parties.

It is not within the province of the court to redraft a contract which the parties have executed, where no question is raised to their contracting capacity.

6. Escrows 🔑6—Requirement that modification of escrow instructions be in writing and consented to by parties and escrow holder held reasonable.

Requirement that modification in escrow instructions be in writing, and consented to by parties and escrow holder, *held* reasonable requirement, which neither party could eliminate from purchase contract.

Preston, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by F. C. Carlsen against the Security Trust & Savings Bank. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 265 P. 303.

Kelby & Lawson and Lester R. Godward, all of Los Angeles, Edwin V. McKenzie, of San Francisco (Samuel M. Garroway, of Los Angeles, of counsel), for appellant.

Newlin & Ashburn, of Los Angeles, for respondent.

PER CURIAM. A petition for a hearing herein of this appeal was granted after a decision thereof by the District Court of Appeal, Second District, Second Division. It was granted mainly for the reason that a

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★Rehearing denied.

similar petition was granted on the same day in the case of Security Trust & Savings Bank v. Carlsen et al. (L. A. No. 8044), a case which arose out of the same controversy as is involved in the present action. After a further consideration of the opinion rendered in this action by the District Court of Appeal and written by Mr. Justice Craig and concurred in by the other members of said court, we are satisfied that said opinion correctly disposes of the question considered therein, and we adopt the same as the opinion of this court, which is as follows:

This is an action for damages against the respondent bank, as an escrow depositary, for failure to deliver certain muniments of title admittedly deposited with it in the escrow. For purposes of brevity, the Security Trust & Savings Bank is referred to in this opinion as the bank, the Dominguez Land Corporation is termed the corporation, and the California Chemical Company is named the company.

The facts essential to a presentation of the appeal are that the corporation, as owner of certain apparently oil-bearing land, entered into an agreement to sell it to the company. In this connection an escrow was arranged with the First National Bank of Torrence. The company thereafter contracted to transfer its interest in said agreement of purchase to the plaintiff, Carlsen. In that behalf an escrow was opened with the bank, respondent herein. As is usual in such cases, escrow instruction were signed by the company and Carlsen. The dispute centers primarily on the construction to be placed upon certain parts of these instructions. After the second escrow had been opened, letters, notices, and demands, written and oral, were made by the parties herein mentioned. The instructions called for a certain guaranty of title. Soon after the escrow was begun, the corporation filed suit to quiet title against the company, and recorded a lis pendens of the same. Carlsen appeared in said last-named action, assuming to be a "John Doe" who had been made a party defendant therein. He asked affirmative relief by way of a judgment quieting his title to the premises in question. Under these circumstances, the bank did not complete the escrow, but held the documents and money which it had received, and finally, after demand therefor had been made by Carlsen, it refused to deliver to him the muniments of title which the escrow instructions, as well as the agreement with the company, contemplated that he should receive upon the close of the escrow. This stand of the bank was based upon the theory that the escrow instructions requiring that a guaranty of title be furnished to the vendee could not be complied with while the suit brought by the corporation was pending.

Many other facts are recited in the record and in the briefs, but, in view of our decision upon the two pivotal points presented, it would only tend to confuse the issues to recount such details, which we deem unessential.

[1-3] Without a waiver of certain provisions of the escrow instructions, the bank could not complete the escrow, because under such provisions it was necessary that before doing so it have "a guarantee of title showing agreement last above mentioned and assignment of same to me and a good and sufficient grant deed, executed by said California Chemical Co., conveying said property to me." The "agreement last above mentioned" is the contract between the corporation and the company, and the instruction from which we have quoted is signed by Carlsen. Appellant contends that by this provision nothing is required, except a certificate showing the agreement and its assignment. However, we think this interpretation is too narrow, and that both the language used and other stipulations in the agreement, which consist of the escrow instructions and the contract between the company and Carlsen, clearly indicate that it was the intention of the parties that the bank, as escrow holder, have in its possession a guaranty, in the sense that that term is ordinarily used, and which implies ownership of the property in question, with the title marketable and unincumbered. In the provision above quoted, that part which reads "showing agreement last above mentioned and assignment of same to me" merely indicates that the title is to be brought down to Carlsen, and not to terminate, as it often does, with a certification that the vendor has title at the time he transfers to the vendee.

That the parties understood that the vendee was to receive a definite and full title to the land, and not merely an assignment of whatever interest the company might have in it, is evidenced by the other documents involved in the transaction. In the agreement between the company and Carlsen, it is recited that the company has entered into a contract "covering the sale and purchase of certain real property," and that the company "agrees to sell" to Carlsen all of the rights of the company in and to its agreement with the corporation, and to execute the necessary assignment and deed to carry the transfer into effect, so that Carlsen should receive the deed contracted by the corporation to be delivered to the company through the escrow with the First National Bank of Torrence. These references direct us back for further explanation of the understanding of the parties to the agreement between the corporation and the company. That contract provided that the corporation should "deliver a certificate of title * * * showing title to said property to be vested in Dominguez Land Corporation free and clear of all incumbrances." When we consider that the contract from which we have last quoted was one of the documents required to be, and which was, deposited in the escrow, as was also the contract between the company and Carlsen, it is apparent that these instructions must all be read together as forming an entire contract. The corporation was required to furnish a certificate of title showing its ownership, free and clear of all incumbrances, the company contracted to transfer that same character of title to Carlsen, and his requirement in the escrow instructions with the defendant escrow holder requiring guaranty of title, etc., must be construed as calling for a certificate that the seller had title free and clear of all incumbrances, but, in addition to this, that a transfer of such title had been made to Carlsen.

[4-6] We now proceed to a consideration of the question which both appellant and respondent state to be of the most vital importance in determining this appeal, to wit, as to whether or not Carlsen waived the requirement as to guaranty of title. As we view the matter, this is not a difficult problem, nor one requiring any extended discussion. It is admitted that the only attempted waiver was an oral statement by Carlsen or his attorney. The escrow instructions agreed upon by the company, Carlsen, and the bank, and to which all are parties, provides:

> "No rescission of this escrow or modification of its terms or any notice or demand shall be of any effect without joint consent in writing subscribed by the undersigned, and assented to by the bank."

Authorities cited by appellant announcing the general principle that a party to a contract may waive any provision contained within it and intended for his benefit, and also those holding such a waiver may be made orally, do not aid us in interpreting the agreement here in question. In the absence of the stipulation which we have just quoted, doubtless the vendee might have waived a direction to an escrow holder concerning the kind of guaranty required. It may be that under certain circumstances, and particularly where the modification of the contract has been acted upon by the parties, a waiver may be verbal. But here the parties have deliberately affixed their signatures to an agreement which is so clear that it has not been suggested that it can have any other meaning than that plainly expressed by it. This covenant is that there shall be no modification of the terms of the escrow instructions without joint consent in writing, subscribed by the company, by Carlsen, and also assented to by the bank. It is of no moment, and therefore we need not analyze the motive which may have actuated the parties in making this agreement. The language of this proviso clearly indicates that the escrow holder should not under any circumstances assume the burden of attempting to settle a dispute between the parties, except upon strict compliance with the letter of the instructions. However, we need not consider whether or not the requirement for a guaranty of title is one solely for the benefit of Carlsen, nor what present or future, actual or possible, interest the company or the bank might have had in such requirement. It is not within the province of the court to redraft a contract which the parties, as to whose contracting capacity no question is raised, have executed. It may be observed in passing that, in the face of such a provision in the escrow instructions, if the appellant had sincerely desired to waive the requirement as to guaranty of title, it would seem that he would at least have placed a written waiver signed by himself with the escrow holder. Had he even taken this step, he might be in a position to present the question for decision by this court as to the necessity that consent be joined in by the company and assented to by the bank; but, not having himself executed a waiver in the form required by his agreement with the other parties, he is not, and never has been, in position to demand the closing of the escrow, and this is true without regard to the necessity for the other parties joining with him in a waiver. The requirement that any modification in the escrow instructions be in writing is a perfectly reasonable one, quite obviously for the benefit of the escrow holder, and one which neither the vendor nor the vendee could eliminate from the contract.

In view of our decision upon the points discussed, it is not necessary to consider others presented.

The judgment is affirmed.

PRESTON, J. I dissent. The escrow party based its refusal to carry out the escrow solely upon the ground that the title company would not furnish the certificate the contract required to be furnished by the seller. It cannot be doubted that this provision was solely for the benefit of the purchaser Carlsen. Admittedly Carlsen repeatedly offered to waive it—not only this, but he repeatedly offered to sign and execute any kind of a release or acquittance the escrow party might see fit to require. Admittedly the purchaser performed every covenant on his part to be kept and performed under the contract, including payment to said escrow holder of every dollar of the escrow price for said property. The escrow party did not at any time complain that such waiver and offer of release was parol. This estopped it to assert that said waiver was ineffectual because it was oral.

The escrow agreement contained the following clause:

> "No rescission of this escrow or modification of its terms or any notice or demand shall be of any effect without joint consent in writing, subscribed by the undersigned, and assented to by the bank."

A literal interpretation of this paragraph is made the basis of the conclusion announced in the majority opinion. It may well be doubted whether a waiver by one party to a contract of a covenant made expressly and solely for his benefit is indeed a modification of the terms of an escrow. To say that a paragraph such as this is binding literally upon the escrow holder is to say that the escrow agreement has no efficacy whatsoever. Under such a construction one of the parties to the contract could be the escrow holder. Indeed, under this construction one party to a contract could by his own willful act defeat the performance on his part of his own solemn covenant.

The necessary deduction from the majority opinion is a principle similar to the case where a debtor gave his creditor a promissory note payable when convenient, with the proviso that, if not so paid, the note was to be null and void.

I can see no substance whatever in the material used in making up the conclusion of the court in this case. The question is important, and an erroneous pronouncement will be far-reaching in its ill effects.

The judgment of the court below should be reversed.

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94 Cal. App. 254

BURNS v. VALLEY BANK OF FRESNO et al. (Civ. 6343.)

District Court of Appeal, First District, Division 1, California. Oct. 8, 1928.

1. Banks and banking 🔑105(½)—Employment of attorney by secretary appointed by bank president to work out condition of debtor bank held authorized, permitting recovery against creditor bank of attorney's fees.

Where president of bank had general authority to direct and manage its affairs, president's employment of secretary to work out difficulties of debtor bank and recover claim and secretary's employment of attorney to perfect sale of debtor bank *held* authorized, rendering creditor bank liable for attorney's fees, where the executive committee of the board of directors approved the appointment of the secretary and the directors ratified the entire transaction, and as a result thereof the bank recovered a large part of its indebtedness.

2. Banks and banking 🔑105(½)—Bank employing secretary to safeguard its claim against debtor bank was liable for fees of secretary's attorney, though some of its directors controlled debtor bank.

Bank, whose president with approval of executive committee employed secretary to investigate account of solvency and business management of another bank which owed it large sums, *held* not entitled to avoid liability for fees of attorney employed by the secretary in perfecting sale of the debtor bank, which resulted in avoiding insolvency and in payment of considerable part of creditor bank's claim, on ground that services were for benefit of directors ratifying transaction, some of whom owned majority stock of debtor bank.

3. Banks and banking 🔑119—Bank owes duty to depositors to recover fund loaned, though loan was illegal.

Fact that moneys of bank may have been loaned contrary to law, or that liability therefor might be shifted on directors individually, does not affect duty of bank to its depositors to recover the funds.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by M. E. Burns against the Valley Bank of Fresno and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

Carl E. Lindsay and Lindsay & Gearhart, all of Fresno, for appellant.

Youngworth, McClean & Hartman and Harry J. McClean, all of Los Angeles, for respondent.

PARKER, Justice pro tem. This action was brought in the court below by the respondent as assignee of Leo V. Youngworth, attorney at law, to recover the sum of $1,500 for legal services alleged to have been rendered the defendants at their special instance and request between January 1, 1924, and February 8 of the same year. At the trial the action was dismissed as to the defendant W. D. Mitchell, and the case proceeded as against Valley Bank, appellant. Judgment was entered in favor of plaintiff and against defendant Valley Bank for the full amount prayed. A motion for a new trial was made and denied, and the present appeal is from the judgment.

The only question presented is as to whether the appellant Valley Bank employed Mr. Youngworth to render the services performed by him. Appellant makes no contention as to the rendering of the services, or that their value was not as found, but insists that the services were not rendered to the appellant. A brief synopsis of the facts becomes necessary to illustrate the contentions made.

In January, 1924, the Valley Bank was a corporation duly engaged in the business of general banking pursuant to the laws of this state. W. D. Mitchell was the president of the bank, duly elected as such, and in actual discharge of the general duties pertaining to his office. The by-laws of the corporation provided:

"The president shall take charge of the moneys, funds and other property of the corporation and be the acting managing agent of the corporation, subject at all times to the by-laws and orders of the board of directors."

Likewise the by-laws of the corporation provided:

> "The board of directors shall appoint from their number an executive committee constituted of five members, including the president, for the transaction of such business of the corporation as may require their attention between the meetings of the board of directors of this corporation; and all business transacted by such committee shall be submitted to and be approved by the board of directors at their next regular meeting if required; and this committee shall constitute a standing committee of the corporation, a majority of which may sit in the absence of the regular or special meeting of the committee and have the power and authority herein conferred by the board of directors."

In the latter part of September, 1923, it developed that a certain banking institution in the city of Bakersfield, which will hereinafter be referred to as the Bakersfield Bank, had become indebted to the Valley Bank in a large sum of money. This sum is fixed at something between $60,000 and $90,000. This loan was of doubtful collectibility, and it is agreed herein that the chances of recovery thereof were quite speculative and doubtful to an extreme. The president of the bank, Mitchell, with the full knowledge and approval of the executive committee, employed one T. S. Saunders, whose position was termed "confidential secretary to the president of Valley Bank," and whose duties embraced an investigation of the account and of the solvency and business management of the Bakersfield Bank. The primary purpose apparent in the employment of Saunders was to work out the destiny of the Bakersfield Bank with the motive of recovering for the Valley Bank the sums loaned, it being obvious that a failure or insolvency of the Bakersfield institution would involve a heavy loss upon the Valley Bank. Accordingly Saunders set about the work. It is unnecessary to detail the various steps in his investigation or the reports and suggestions following. The fact was that the fear concerning the recovery of the loan was not without foundation. For a time it was planned that possibly the Valley Bank might take over the Bakersfield Bank. However, in the course of rehabilitation it developed that certain interests in Los Angeles were seeking a bank opening in Bakersfield. Thereupon Saunders, in the employ of the Valley Bank and under directions from Mitchell and the executive committee, undertook the working out of the details incident to a sale of the Bakersfield Bank. Saunders was instructed and authorized to employ counsel in this regard, the counsel not being designated, but to be some Los Angeles attorney. Accordingly Saunders employed Mr. Youngworth, and the latter performed all legal services necessary to carry out the sale. As a result of the sale the Bakersfield Bank was put upon a sound footing, and a part of the agreement was that the indebtedness due the Valley Bank should be paid and discharged. Here it may be observed that the written evidences of the transaction do not contain this agreement; nevertheless, the direct testimony offered does support this statement. It appears also from the record before us that some of the directors of Valley Bank owned a majority of the stock of the Bakersfield Bank, and that the sale of the latter institution necessarily was of direct benefit to these directors. It does not appear that Mitchell, president, owned any Bakersfield stock; the contrary is the fact. It is not in evidence just how many of the directors were thus interested. There is evidence sufficient to support the conclusion that the board of directors knew of the entire transaction, the employment of Saunders and the directions given him. There is direct evidence that while the negotiations with the prospective purchasers of the Bakersfield Bank were yet unfinished, the board of directors decided to cancel the employment and disavow the obligation of Saunders' salary; that Saunders, upon being notified of this act, told the directors to go ahead and finish the work themselves, whereupon the board informally reconvened and then instructed Saunders to proceed and he would be paid. Saunders, pursuant to his instructions, as mentioned, employed Mr. Youngworth to assist in the legal details, and the latter performed services stipulated to be reasonably worth the sum claimed.

[1] The contention of appellant here is that the president had no authority, express or implied, to engage an attorney; that the services rendered were for the benefit of the directors as individuals; and that, if it should be held that appellant is in error in these contentions, then finally it is urged that the whole transaction was ultra vires as concerns the corporation, and as to it no liability could arise therefrom. In support of the first argument appellant relies upon two California cases, viz. Pacific Bank v. Stone, 121 Cal. 202, 53 P. 634, and Campbell v. Hanford, 67 Cal. App. 155, 227 P. 234.

A careful analysis of these cases will disclose that they do not support appellant in its conclusions here. In each of them the background of fact differed entirely from that presented here. The facts of the instant case bring it well within all of the exceptions mentioned in the decided cases. There is ample evidence in the record to show that the president of the Valley Bank had general authority to direct and manage the affairs of the bank; that the executive committee was a standing committee of the board of directors to transact such business of the corporation as might require their attention between meetings of the directors; that the directors themselves, both personally and as a body, ratified and approved the action taken, and likewise the fact that the transaction recovered and restored to the bank a large sum of money, the recovery of which may reasonably be said to have been doubtful in the absence of this action. This showing brings the case well within such authorities as those cited, and the judgment of the court below is supported by the following cases: Bartlett Estate Co. v. Fraser, 11 Cal. App. 373, 105 P. 130; Countryman v. Cal. Trona Co., 35 Cal. App. 728, 170 P. 1069; Brown v. Crown Gold Mining Co., 150 Cal. 376, 387, 89 P. 86; Jan Wai v. Smith-Riddell Co., 55 Cal. App. 59, 202 P. 952; Ellet v. Los Altos Club (Cal. App.) 264 P. 270; Capitol Woolen Co. v. Berger (Cal. App.) 262 P. 351. A further citation of authority is needless.

[2, 3] It is next contended that, because a majority of the Bakersfield Bank stock was owned by directors of the Valley Bank, the employment of Saunders and Youngworth was by the directors personally and for their benefit. The record does not disclose that a majority, or even a comparatively large number of directors were interested. It does show that the president had not the slightest personal interest. The argument of appellant in this connection would in any event show a complete knowledge by the directors, and both an authorization and ratification. Further, if all of the directors were interested stockholders in Bakersfield Bank, and had permitted the funds of Valley Bank to be loaned without security or collateral of any sort, it would make more compelling their duty to the Valley Bank to have those funds recovered. The fact that the moneys of the Valley Bank had been loaned contrary to law, or that a liability might be fastened upon the directors individually, would not lessen the interest that the Valley Bank itself had in the recovery of the funds. First and foremost was the Valley Bank's duty to its depositors; and because some of the directors may have technically assumed a double position this duty was not shifted.

Lastly appellant contends that, inasmuch as the entire transaction was one whereby the Valley Bank purchased shares of another banking corporation contrary to the provisions of the Bank Act, then it was an ultra vires and void contract. This contention is based upon an hypothesis wherein the major premise is unfounded. The argument is suppositious and proceeds thus: "If the transaction was one whereby the Valley Bank was purchasing the stock of Bakersfield Bank," etc. Nothing in the record before us justifies the supposition.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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94 Cal. App. 271

CAVANAUGH v. CAVANAUGH. (Civ. 6357.)

District Court of Appeal, First District, Division 1, California. Oct. 9, 1928.

1. Appeal and error 🔑173(10)—Contention that claim against estate is stale should be presented at trial rather than on appeal.

Contention that claim against estate of decedent is stale should be presented to trial court rather than to appellate court.

2. Executors and administrators 🔑437(2)—That claim against estate for services, rejected by administrator, was on its face barred, held not to preclude claimant's enforcement thereof on showing agreed date of payment was within statutory period (Code Civ. Proc. § 339, subd. 1; § 1499).

Fact that claim for services as presented to administrator showed on its face that it was barred by statute of limitations (Code Civ. Proc. § 339, subd. 1), and fact that administrator consequently disallowed the claim as required by section 1499, *held* not to prevent claimant in suit on the claim from showing time of payment for the services was subsequent to the date on which they were rendered, taking the claim out of the statute.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Caroline Cavanaugh against Charles F. Cavanaugh, as administrator of the estate of William L. Cavanaugh, deceased. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Ford, Johnson & Bourquin, of San Francisco, for appellant.

John Anthony McGee, of San Francisco, for respondent.

PARKER, Justice pro tem. This is an action in a claim against the estate of William L. Cavanaugh after rejection by the administrator.

The claim presented to the administrator was as follows:

"For services rendered William L. Cavanaugh, deceased, during his lifetime, for which he agreed to pay the reasonable and market value thereof, consisting of continuous day and night nursing and taking care of said decedent and other incidental work, labor, and services made necessary by the illness of said decedent for a period of sixty-eight (68) weeks from June 24, 1922, to October 15, 1923, at twenty dollars ($20.00) per week, $1,360.00."

It is admitted that the claim was presented within the time required by statute, and that, after rejection, action was commenced within the period prescribed.

William L. Cavanaugh died on or about October 3, 1925, and appellant was appointed administrator on October 5, 1925, and thereafter as such administrator caused notice to be given to creditors in the usual way. The claim, as hereinbefore noted, was rejected; hence the present action.

In plaintiff's complaint herein she sets forth exactly the same demand as contained in the rejected claim. However to the complaint is added this statement:

> "That during the lifetime of said William L. Cavanaugh no part of said sum was paid, and on and after the 16th day of October the entire amount and value of said services was the sum of $1,360.00, and that upon said last-mentioned date the entire amount above named, to wit, the sum of $1,360.00 became and was due, owing, and unpaid from William L. Cavanaugh to plaintiff."

Defendant administrator in his answer denied the rendition of service, and denied the fact of nonpayment, and likewise denied the value of said services claimed to have been rendered. As a separate defense, defendant set up the statute of limitations, section 339, subd. 1, Code of Civil Procedure, this defense going to the claim as a whole and specifically to that portion thereof accruing prior to October 1, 1923.

At the trial plaintiff was permitted to amend her complaint, in conformity with proof offered, to allege that decedent, William L. Cavanaugh, promised to pay for the services as soon as he could sell certain real estate owned by him and that said real estate was sold on January 2, 1924. The trial court found in favor of plaintiff on all of the issues tendered, and judgment followed for the full amount claimed. Defendant administrator presents this appeal.

[1] Appellant at the outset relies on the familiar principle of law that courts do not look with favor upon stale claims, particularly when urged against the estate of a decedent debtor. Conceding the strength of the rule, yet this is a contention that is more proper to present to the trial court. And the scope of our inquiry here differs but little from other cases. We find in the record sufficient evidence to sustain the trial court's findings, and we do not attempt to determine anew the conflict of testimony as urged, nor do we attempt to draw new conclusions from the apparent shiftings of position on the part of respondent.

[2] Appellant next contends that the cause of action in the complaint was and is based upon a claim different and distinct from the claim presented to the administrator and rejected. It is conceded that the original claim as presented, and the complaint filed and judgment entered, each and all concern but one demand, namely, services rendered to the decedent over a period of 68 weeks from June 24, 1922, to October 15, 1923, at a price of $20 per week. But appellant contends that the original claim as presented merely set forth the nature of the services and the time of rendition, and was on its face an outlawed claim, and that the administrator had no power to allow it. It may be conceded that the claim as presented was *on its face* barred by the statute of limitations. Corato v. Estate of Corato, 201 Cal. 155, 255 P. 825; Estate of Steuer, 77 Cal. App. 584, 247 P. 211. Section 1499, Code of Civil Procedure, provides that no claim must be allowed by the administrator which is barred by the statute of limitations. Therefore the action of the administrator here in rejecting the claim was not improper or unwarranted. However, a mere rejection by the administrator does not conclude the claimant's rights. Upon action brought, the claimant, urging the same claim, may offer any legal evidence in support thereof. It is appellant's contention that, when a claim is presented against an estate of a decedent, the demand should show affirmatively the time when payment was due, and that where, as here, any special time of payment has been agreed upon whereby a different period of limitation would apply, then the demand should show on its face the supplemental agreement. Concretely appellant argues that, when plaintiff filed her claim with the administrator, she set forth services rendered covering a period between June, 1922, and October, 1923, without any statement as to promise to pay, and that the law would presume the employment as one from month to month, with each month's service payable when performed (Corato v. Estate of Corato, supra); that, when plaintiff alleged a cause of action based upon the same services and alleging a promise to pay, which promise or agreement did not appear on the presented claim, she thereby sought to enforce a demand that had never been presented for allowance to the administrator.

It is unnecessary to follow the contention throughout all of its phases. In some ways it seems quite persuasive, and serves to convince us that it would be a much better practice to set out in a claim to an administrator all of the details concerning time of payment and conditions thereof to a legal nicety. Yet the fact remains that in a vast majority of cases a claimant creditor has not the ability to determine all of the legal formulæ nor the advantage of counsel. In Doolittle v. McConnell, 178 Cal. 697, 174 P. 305, the court says:

> "The same rules announced by the court in overruling appellant's various attacks upon the complaint as amended [referring to the liberality of the law in permitting amendments to pleadings where the cause of action remains unchanged] apply with greater force to the refusal to hold that there was a fatal difference between the creditor's claim as filed and the one upon which suit was brought, because the courts go further in upholding such demands against estates than in sustaining pleadings. * * * The purpose of presenting such a demand" to the administrator is to advise him "of its na-

ture, and there is no requirement that it shall state the facts with all the detail necessary in a complaint nor is its sufficiency to be tested by the rules of pleading."

See Pollitz v. Wickersham, 150 Cal. 238, 88 P. 911; Elizalde v. Murphy, 163 Cal. 681, 126 P. 978; Enscoe v. Fletcher, 1 Cal. App. 659, 82 P. 1075; Doolittle v. McConnell, 178 Cal. 697, 174 P. 305; Thompson v. Koeller, 183 Cal. 476, 191 P. 927.

In Thompson v. Koeller, 183 Cal. 476, 191 P. 927, the plaintiff had presented a claim to the administrator of an estate upon a certain promissory note. The claim did not specify that the note had been given as security, and did not set forth the notes for which it was security. Upon a trial after rejection of the claim, the administrator showed that the note upon which the creditor's claim rested was given as security for the payment of notes of third persons. The trial court then permitted plaintiff to show that these third party notes had never been paid, and that default had been made therein in an amount greater than the note of decedent, and thereupon the trial court gave judgment for plaintiff. The contention on appeal was that there was, under the facts, an insufficient claim presented to support the demand as shown. The court, in an exhaustive review of authorities, summarizes the law to be as hereinbefore indicated. The general rules laid down may be stated: The claim should sufficiently indicate the nature and amount of the demand to enable the executor and judge to act advisedly upon it. A sufficient compliance with the law is made when the claim presented shows the nature of the claim, the circumstances out of which it grew and its approximate amount, which manifestly is all that can be stated. In the instant case, in the claim presented and in the pleadings plaintiff urged but one demand, namely, payment for services rendered. From the outset plaintiff claimed that she had rendered personal services, nursing, and care from June, 1922, to October, 1923. At no stage of the proceedings is this claim changed or altered. Her claim has for its sole foundation these services rendered. The rejection of the claim and the setting up of the bar of the statute does not change matters. In practice much hardship would result from upholding defendant's contention here. Suppose a case where a creditor presented a claim arising from services or upon any obligation, which claim had accrued 10 years prior to the death of the debtor; that this claim was presented along towards the close of the period during which claims could be presented and was rejected. Thereafter, within the statutory period, suit was commenced and plaintiff was able to show that for 9 years of the time following the accrual of the claim decedent had been continuously without the state. Both reason and justice compel the conclusion that such a showing could be made in support of the demand without changing the nature thereof. The requirements of the law are statutory, and no doubt designed to work out some proper system and order in the administration of the estates of deceased persons; but no rule of expediency, statutory or otherwise, should impinge upon the judicial power of the state as vested by the Constitution. Whatever apparent irregularity there may have been in the details of the claim here the estate was allowed and had its day in court and a full, fair, and complete hearing on the merits of the claim. Plaintiff recovered for exactly the same services set out in her claim, and it was proper for the trial court to determine, even after the conclusion of the administrator, whether or not the bar of the statute prevented enforcement of the claim.

Appellant has, as hereinbefore indicated, questioned the sufficiency of the evidence as a whole. In none of the briefs does the evidence or any transcript thereof appear. No appendix or appendices accompany the briefs. The contention of appellant on this score is purely argumentative. He contends that, because no agreement of payment was in the presented claim and that a change appears in the pleadings whereby different grounds of recovery are urged, thereby a cloud of suspicion is thrown over the entire transaction. We have examined the transcript carefully and find no support for appellant's contention. As to his general argument concerning the so-called suspicious circumstances, we see nothing warranting our interference with the trial court's judgment.

On the point that a promise to pay may be contingent and the statute of limitations running only from the happening of the event mentioned, see Van Buskirk v. Kuhns, 164 Cal. 472, 129 P. 587, 44 L. R. A. (N. S.) 710, Ann. Cas. 1914B, 932, and note.

Judgment and order denying new trial are affirmed.

We concur: TYLER, P. J.; CASHIN, J.

PEOPLE v. CLEMETT. (Cr. 1664.)★

District Court of Appeal, Second District, Division 1, California. Oct. 10, 1928.

Hearing Granted by Supreme Court Dec. 6, 1928.

1. Indictment and information ⚷129(1)—Defendant may be charged and convicted of both unlawful possession and unlawful operation of still (St. 1927, p. 497).

Defendant may be charged with and convicted, under St. 1927, p. 497 (Deering's Gen. Laws Supp. 1927, Act 3795), of the unlawful possession of a still and also the unlawful operation of a still.

2. Criminal law ⚷1159(2)—Appellate court cannot disturb jury's verdict where there is sufficient evidence for jury to find that defendant committed acts as charged in information.

There being sufficient evidence for jury to find that defendant committed acts as charged in information, appellate court cannot interfere with jury's verdict.

3. Intoxicating liquors ⚷236(19)—Evidence held to sustain conviction of unlawful possession and unlawful operation of still (St. 1927, p. 497).

Evidence *held* sufficient to sustain conviction, under St. 1927, p. 497 (Deering's Gen. Laws Supp. 1927, Act 3795), of unlawful possession and unlawful operation of still.

Appeal from Superior Court, San Bernardino County; Chas. L. Allison, Judge.

F. E. Clemett was convicted of the unlawful possession and the unlawful operation of a still, and he appeals. Affirmed.

Henry C. Huntington, of Los Angeles, and H. William Hess, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., George H. Johnson, Dist. Atty., of San Bernardino, and James L. King, of San Bernardino, Deputy Dist. Atty., for the People.

YORK, J. This is an appeal from a judgment of conviction and from an order denying motion for a new trial.

The defendant was convicted on two counts of an information, the first count charging the unlawful possession of a still designed for the manufacture of intoxicating liquor for beverage purposes, and the second count charging defendant with the unlawful operation of a still, or a stilling device designed for the manufacture of intoxicating liquor for beverage purposes.

[1] The record of the evidence is somewhat complicated by reason of the fact that there were originally several defendants, the defendant, F. E. Clemett, being the only party convicted. There was sufficient evidence for the jury to find the defendant, Clemett, guilty for a violation of both counts of the complaint. As we read the act (Stats. 1927, p. 497; Act 3795, Deering's Gen. Laws), it is clear that although a person might be charged under said act with one offense only, as suggested by the appellant's opening brief, the evidence in this case shows circumstances from which the jury could find that the defendant was in the unlawful possession of a still as charged in the first count, and there is also sufficient circumstantial evidence to support the finding of the jury that the defendant was guilty of the unlawful operation of the still as charged in the second count; therefore two separate offenses under said act were, in the instant case, both alleged and proven.

A similar question—that is that one offense only could be charged under said act, no matter how many different provisions thereof were alleged and proven to have been violated—was attempted to be raised by the petitioner in the matter of the application of Louis Chaus for a writ of habeas corpus, determined in the Second Appellate District, Division 2, June 2, 1928, reported in 268 P. 422. The cases therein cited seem to amply sustain the order of the court in that matter in discharging the writ and remanding the petitioner.

[2, 3] As to the sufficiency of the evidence, it is true that it is circumstantial, but as there was sufficient evidence for the jury to find that the defendant committed the acts as charged in the information, this court cannot therefore interfere with such verdict. There is evidence in the record showing that the premises on which the still was located and operated was leased by defendant, Clemett, under the name of G. L. Johnson; that he signed such fictitious name thereto; and that he claimed to be a brother of the man who accompanied him when he first introduced himself as G. L. Johnson to the owner of the premises. When on the stand, defendant, Clemett, denied that he had ever given his own name as G. L. Johnson, and swore positively that he had not signed the lease, but that the lease was signed by the man who accompanied him. There is evidence in the record that the defendant, Clemett, stated that he wanted to raise chickens on the property, and that he had approximately 750 chickens to place on the property at once. But there is also in the record evidence that there were but few chickens ever on the premises during his tenancy.

In his evidence defendant admitted having been upon the premises several times during the time when the evidence shows that the still must have been installed and in operation. The still was warm when the place was raided, and a large amount of alcohol and mash and equipment for the marketing and preparing of illicit liquor was found upon the place. The premises were evidently used only to operate a still, and there was evidence that machines were constantly go-

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★Hearing granted. 280 P. 681.

ing and coming to and from the place during the tenancy of appellant.

Defendant denied that a picture of his wife was that of a woman whom he had introduced as Miss Frederickson, when he had introduced her as the purchaser of the premises. This picture was positively identified by several witnesses as being a picture of the woman he had introduced to them as Miss Frederickson. Throughout the testimony of defendant, Clemett, he made contradictory statements, and his testimony in reference to a check for $1,000 which was made out to G. L. Johnson, which he admitted having indorsed with the name of G. L. Johnson and deposited in a bank to the credit of G. L. Johnson, and his statement that thereafter he drew a check on that account and signed the name of G. L. Johnson, was sufficient, when considered with the facts in evidence, for the jury to scan with more than mere suspicion his entire connection with the matter.

The still, under the evidence, must have been installed during his tenancy. The record shows that during the term of the lease, Clemett, under the name of G. L. Johnson, paid rent from time to time during the time the still must have been in operation; that he stated to the owner of the land that he wanted to keep the land during this time, and that he wanted to purchase the land, as he was satisfied with it; but later he stated that the purchaser was a woman whom he stated was Miss Frederickson, but who was identified by several witnesses as being the woman whose picture was admitted by the defendant, Clemett, to have been a photograph of his wife. And this woman, who was identified as being his wife, was seen frequently on the premises during the time when the still, according to the evidence, must have been operated. His entire testimony is given in an indirect, insincere manner, and the circumstances related by him are very unusual. His testimony that he received $500 from the mysterious man who, he said, signed a lease of the property for only $25 per month, as G. L. Johnson, for no services rendered, except securing said lease, is also a circumstance that the jury could take into consideration as evidence that he was directly connected with the ownership and operation of the still. His constant reference to this man Johnson as his brother is also a peculiar circumstance. He stated that he introduced him merely as Brother Johnson, but this is positively denied by several witnesses. His testimony in reference to the escrow and matters preceding the escrow, the way in which the money was handled that went into the escrow, are circumstances which, when taken with the whole evidence in the matter, were strong enough for the jury to find that he was still handling the property and that he had possession of the still and was also operating the same.

We find no substantial error in the record as to any ruling of the trial court, and the instructions given to the jury fully cover the law of the case. No error has been called to our attention by appellant. The judgment and order are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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94 Cal. App. 260

DYER v. SUPERIOR COURT OF CALIFORNIA et al. (Civ. 6174.) ★

District Court of Appeal, Second District, Division 2, California. Oct. 8, 1928.

Rehearing Denied Nov. 5, 1928. Hearing Denied by Supreme Court Dec. 6, 1928.

1. Pleading 🔑237(1) — When evidence shows party entitled to relief except for defect in pleading, amendment should be allowed to make pleadings conform to proof.

Generally, when evidence shows that one of parties to action is entitled to relief except for defect in pleadings, amendment should be allowed or directed by court in order to make pleadings conform to facts proven.

2. Pleading 🔑236(5)—Court's power to allow amendment to pleading to conform to proof is to be exercised in its sound discretion.

Power of court to allow amendment to pleadings to conform to proof is to be exercised in its sound discretion.

3. Pleading 🔑237(1)—Facts occurring subsequent to filing complaint, if before court, may be made basis for amended or supplemental pleadings to conform to proof.

Facts occurring subsequent to filing of original complaint may be made basis of amendment or supplement to pleadings as well as facts occurring before, if facts were before court, so as to make pleadings conform to proof.

4. Religious societies 🔑11—Constitution of Congregational church reciting "organic" relation with association of Congregational churches showed purpose was to enter into such relationship.

Under the constitution of Congregational church reciting that "its organic relation is with association of Congregational churches," the word "organic" was intended to signify that essence of organization or purpose for which it was brought into existence was relationship with other Congregational churches.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Organic.]

5. Religious societies 🔑11—Constitution of Congregational church reciting organic relationship with other Congregational churches and independence of individual church held not conflicting nor preventing such relationship.

Constitution of Congregational church reciting its organic relation with other Congregational churches, and provision that particular church shall not be subject to control of any

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

other ecclesiastical body, must be construed in harmony, and did not show that essence of organization was not to enter into relationship with other Congregational churches, since self-government of individual church was feature of Congregationalism.

6. Religious societies 🔑14—Superior court had jurisdiction to construe constitution of Congregational church and determine whether association of churches had withdrawn fellowship from pastor sought to be ousted.

In controversy seeking to restrain pastor from occupying pulpit and to terminate contract of employment by Congregational church, superior court had jurisdiction to construe provisions of constitution of Congregational church, reciting its organic relationship with Congregational associations, and to determine that association of Congregational churches had withdrawn its fellowship from pastor, and effect of such action on pastor seeking to prevent court from taking further action.

7. Evidence 🔑51, 508—Court in construing constitution of Congregational church and action of association could consider expert testimony and consult standard authorities (Code Civ. Proc. § 1875, subd. 8).

Superior court in construing constitution of Congregational church and in determining whether association of Congregational churches had withdrawn fellowship from pastor sought to be ousted, had power to consider expert testimony and consult standard works of authority on subject, under Code Civ. Proc. § 1875, subd. 8.

8. Religious societies 🔑14—Superior court had jurisdiction to determine whether person deprived of fellowship of association of Congregational churches could act as pastor of one unit of association.

Superior court having jurisdiction to determine what ecclesiastical tribunal decided has jurisdiction to determine whether person deprived of fellowship with Los Angeles association of churches and ministers can claim to act as pastor of one of units constituting Los Angeles association.

9. Religious societies 🔑24—Superior court could determine separation from church by pastor organizing new denominational church, and declare property of church under control of loyal members.

Where complaint to oust pastor from Congregational church alleged that pastor organized a new superdenominational church not Congregational church, and was conducting services for new church in edifice of Congregational church, superior court had jurisdiction to determine as fact the separation of churches, and, after determining separation, to declare that pastor had forsaken pastorate and that property of church was under control of members who remained loyal thereto.

Application for writ of prohibition by Frank Dyer against the Superior Court of the State of California and another to prevent further proceedings in action for removal of trustees. Writ denied.

Cooper & Collings, of Los Angeles, for petitioner.

George Beebe, Schweitzer & Hutton, and Bernard L. Herlihy, all of Los Angeles, for respondents.

Halverson & Halverson, of Los Angeles, amici curiæ.

THOMPSON, J. Every one who has had occasion to study the nature and character of the controversy which gives rise to the present proceeding must regret that it ever reached the civil courts. Dissensions among members of a religious body are first to be deplored, but it is more distressing to realize that the sensibilities have been so far excited that means have not been found within the ecclesiastical domain to bring about an amicable adjustment of the disputes. Such, however, is the nature of the judicial calling that although we may be grieved by the consciousness that a body of Christians have been so agitated as to reach to the secular courts for relief from their distress, yet the approach to the problems presented must be with the hope that the principles of justice when applied to the situation cannot fail to be of some benefit to those involved in pointing the way out of the present difficulties.

There are pending in the respondent court two actions, the one entitled W. F. Fliedner et al. v. Mark A. Pierce et al., wherein it is sought by the plaintiffs to have it adjudged that they are the trustees of the Wilshire Boulevard Congregational Church, and that the defendants who claim to have been elected trustees at a special meeting of the church are not in fact trustees, and to enjoin the defendants from acting as trustees or controlling or attempting to control the affairs of the church. The other action, entitled the Wilshire Boulevard Congregational Church of Los Angeles, a Corporation, v. Frank Dyer, seeks to have it adjudged that the contract of employment of the defendant as pastor of the church has been canceled, or in lieu of such a decree that it be canceled, and to restrain the defendant from occupying the pulpit or acting as pastor of the plaintiff church. We are primarily concerned with the second action, which may from time to time, for the purpose of convenience in this opinion, be referred to as the Dyer action to distinguish it from what may be called, for like purposes, the trustees' action. The Dyer action seeks the relief already mentioned upon the allegations in the complaint that the plaintiff, acting through its board of trustees, did on January 23, 1928, cancel and terminate the contract by which defendant was employed as its pastor for a term of ten years commencing July 28, 1925, at a salary of not less than $7,500 per annum. Annexed to the complaint is a copy of the constitution of the church, wherein it is said in article IV, under the title of government, as follows:

> "Its government is vested in the body of believers who compose it.
>
> "It is subject to the control of no other ecclesiastical body, but it recognizes and sustains the obligation of mutual counsel and co-operation which are common among Congregational churches.
>
> "Its organic relation is with the Los Angeles Association of Congregational Churches and the Congregational Conference of Southern California and the National Council of Congregational Churches, and it recognizes its fellowship with all churches which acknowledge Jesus the Christ to be their divine Redeemer and Lord."

It is provided also in article VI of the constitution that the officers of the church shall be "a pastor, deacons, deaconesses, trustees, clerk, financial secretary, treasurer, benevolent treasurer, and Sunday school superintendent," who shall be elected by ballot. Section 2 of this same article says:

> "The pastor shall be chosen at a regular meeting called for the purpose by written notice from the pulpit at least one Sunday before such meeting is held, and such choice must receive the votes of at least two-thirds of all the members present at said meeting.
>
> "As soon after settlement as possible, he shall become a member of this church and shall be installed by ecclesiastical council when the church and pastor so agree.
>
> "He shall have control of the pulpit, shall ordinarily preside at the meetings of the church, and perform the duties attaching to his office."

The power of the trustees is defined in section 7 of the same article in these words:

> "The trustees shall have the care of the place of worship but shall have no power to buy, sell, mortgage, lease or transfer any property without specific vote of the church, authorizing such action.
>
> "They shall provide, under the direction of the church, for the raising of money for its support, shall have general charge of its finances other than moneys contributed at the Lord's Supper, or for any charitable or benevolent objects, shall authorize and direct the treasurer as to the payment of moneys under their control, and shall provide for the proper auditing of his accounts."

The complaint in the Dyer action also alleges as a reason for its termination of the contract of employment, or as a reason for its termination by the court, various incidents of asserted misconduct on the part of the defendant, consisting of undue familiarity with women and of a domineering and autocratic attitude assumed by him in church affairs and toward various of the members of the church.

This proceeding is instituted for the purpose of prohibiting the respondent court from taking any action in either of the causes there pending; but, as we have stated, we are especially interested in the Dyer action for the reason that the order for the alternative writ was limited to that action, except that it did prevent the court from entering a judgment affecting the pastorate or pastoral relations of the church. The return to the writ denies that the petitioner is a Congregational minister, and alleges that by action of the Los Angeles Association of Congregational Churches and Ministers on June 7, 1928, the fellowship of that association was withdrawn from him. There is included in the return an amendment and supplement to the complaint in the Dyer suit in which this action is alleged and the decision withdrawing fellowship from the petitioner is final. It also alleges that during June, 1928, the defendant organized a new superdenominational church, not a Congregational church, and is conducting services for the new church in the edifice of the plaintiff. The return also shows in response to an allegation in the petition that the judge of the respondent court had announced his intention to render judgment against the defendants in both of the actions that he did so announce and that he had prepared findings, a copy of which are set forth in the return, and in which the allegations of the supplement to the complaint of plaintiff are found to be true as well as the allegations to which we have made reference in the complaint itself.

[1-3] The first question presented for settlement concerns the right of the court to permit the amendment and supplement to the complaint for the purpose, which is stated therein, of conforming to the proof. In our consideration of this phase of the case it should be noted that we are not concerned with whether the court erred in permitting the amendment and supplement to be filed, but whether it had the power to grant the request. It is the general rule for which there is an abundance of authority that when the evidence shows that one of the parties to the action is entitled to relief except for a defect in the pleadings an amendment should be allowed or directed by the court in order to make the pleadings conform to the facts proven. Indicative of the extent of the power of the court in this regard is the case of McClure v. Alberti, 190 Cal. 348, 212 P. 204, wherein it is said:

> "After the evidence was closed, but before decision, the trial court permitted the respondent to amend her third amended complaint and her amended answer to the second amended cross-complaint of the appellants by setting up the mutual abandonment of the written agreement by the parties—the allegation theretofore having been merely that the parties 'entered into an oral agreement in alteration of said written agreement.' Appellants sought to demur and to answer to respondent's pleadings as amended, claiming that a new cause of action and a new defense were set up. The demurrers and the answer were stricken from the files. Appellants were not prejudiced by this action. As we read the record, the amendment, in effect, was merely one to conform to the

proofs. Assuming that an additional issue was tendered by the amendment, we cannot see how the testimony in the case could have been different from that already introduced. All the facts were before the court, and its findings conclusively establish the liability of the appellants, irrespective of whether the issue was one of an alteration of the written contract or its entire abandonment, and the substitution of the oral agreement."

Undoubtedly also the power of the court is to be exercised in its sound discretion. 21 Cal. Jur. 143. It is obvious from this brief statement of the law anent the subject of amendments to conform to the proof that in this character of a proceeding where we are not possessed of a record of the testimony and where we are inquiring, not into errors of law, but rather into a threatened excess of jurisdiction, that we must unequivocally assert the power of the court to direct or allow the amendment here permitted. We can see no reason why facts occurring subsequent to the filing of the original complaint should not be made the basis of an amendment or supplement as well as those occurring before, if they were (and it must be so presumed) actually before the court. It is patent that had the plaintiff sought leave to file a supplemental complaint before the introduction of the testimony and for the purpose of having it introduced, the court with propriety could have made an order permitting it to be filed. In like manner the evidence having been admitted, the court could properly allow or direct the pleadings to be so changed as to conform to the proof made. This then, brings us to the question of whether the respondent court has jurisdiction to file the findings and judgment in conformity therewith, which, as we have noticed, corresponds to the amendment and supplement to the complaint.

We shall assume, although it is not necessary to decide, that the board of directors of the church, under the Constitution as drafted and adopted, had no authority to dispense with the services of a pastor elected by the congregation, and we shall likewise assume that the civil courts have no power to determine what conduct is sufficiently unbecoming a pastor to warrant his removal from the clerical office. We indulge these presumptions without attempting to discuss or formulate a decision thereon, because the opinion we now entertain of the proceedings renders it unnecessary to determine the questions, and yet we would leave no room for a reader to infer subsequently that we entertain an opinion that in the administration of ecclesiastical discipline the civil courts have a right to interfere.

The constitution of the Wilshire Boulevard Congregational Church, as already stated, recites that:

> "Its organic relation is with the Los Angeles Association of Congregational Churches and the Congregational Conference of Southern California, and the National Council of Congregational churches. * * *"

[4] In attempting to define its alliance with the Los Angeles Association of Congregational Churches, etc., we have recourse to the generally accepted meaning of the word "organic" in the domain of jurisprudence, it being here employed in the constitution of the church adopted by its members for their own guidance and government. In this sense when we speak of organic law we generally refer to the fundamental law or Constitution of the state or nation. 3 Bouv. Law Dict. p. 2426. One of the definitions we find in Webster's New International Dictionary is as follows: "Pertaining to, or inherent in, a certain organization; depending upon the constitution or structure; not secondary or accidental." And the same lexicographers say of organic law: "Designating, or pertaining to, the law or laws by virtue of which a government or organization exists as such; designating the laws incorporated or involved in the organization of a state, political organism, other organized association; fundamental." We conclude from these definitions that when the members of this church wrote the quoted portion of their constitution they intended to say that it was the very essence of the organization's being—that purpose for which it was brought into existence—that it enter into relationship with the other Congregational churches and associations; that the church was one of the units constituting the whole structure of Congregationalism in the nation and as such subjected itself to the customs, usages and laws of the denomination as a whole. In such a sense we can with propriety say of a state of the union that it is in organic relation with the other states of the United States, all of which, as so interrelated, constitute a nation.

[5] However, the above definition of "organic relations" is not sufficiently complete for our purposes for the reason that the same article says: "Its government is vested in the body of believers who compose it." "It is subject to the control of no other ecclesiastical body, but it recognizes and sustains the obligation of mutual counsel and co-operation which are common among Congregational churches." Undoubtedly the statements we have just quoted must be construed with and made to harmonize with the provision containing the expression, "organic relations," if the same be possible. In this connection it is well to bear in mind that the idea of a self-governing body of disciples linked to one another by a voluntary covenant which transforms them into the visible church has been one of the chief characteristics of Congregationalism since the organization of its first churches in the latter part of the sixteenth century (see article on Congregationalism in vol. 4 of The Americana,

by Williston Walker, professor of church history at Yale University, which we have consulted for the purpose of stimulating our judicial knowledge in accordance with the rule for which authority is hereafter cited). We find, therefore, an apparent rather than a real conflict between the two provisions, because if self-government of the individual church be a feature of Congregationalism, then it must logically follow that its customs, usages and laws will not conflict therewith, and we are returned to our original determination of the meaning of "organic relations," which also finds support in the article already mentioned in its history of the denomination in this country wherefrom it is made to appear that there has always been a close bond of fellowship binding together the various units in a relation of mutual helpfulness, advice and counsel in matters of importance, such as the settlement or dismissal of a pastor.

[6, 7] With this understanding of the church government it becomes apparent that the respondent court not only has jurisdiction to construe the provisions of the constitution which we have been considering, but also has jurisdiction to determine that the Los Angeles Association of Congregational Churches and Ministers has withdrawn its fellowship from the petitioner, and the effect of such action, as to whether it is final and conclusive, as well as its effect upon the petitioner. To this end it is within the power of the court to consider expert testimony and consult standard works of authority upon the subject. In Arthur v. Norfield Parish Congregational Church Soc., 73 Conn. 718, 731, 49 A. 241, 246, it is said:

> "What that usage is was a question of fact as to which the court of common pleas heard expert testimony and consulted standard works of authority upon the customs and ecclesiastical law which govern this religious denomination. The object and justification of any such resort to printed books is the aid which they may be expected to afford to the court in the exercise of the faculty of judicial notice. Congregationalism was for nearly two centuries the established religion of Connecticut, and its laws and usages form part of the history of the commonwealth."

See, also, Frohliger v. Richardson, 63 Cal. App. 209, 218 P. 497; subdivision 8, § 1875, Code Civ. Proc.

While there seems to be some difference of opinion in the adjudicated cases in other jurisdictions upon the conclusiveness of a decision or determination of an ecclesiastical authority or tribunal (see note to St. Vincent v. Murphy, 35 L. R. A. [N. S.] 919), such difference cannot alter the outcome of this proceeding for the reason that if the determination of the Los Angeles association be final the respondent court has jurisdiction to ascertain its decision and so declare, whereas if the decision of the tribunal be not conclusive upon the court it also has jurisdiction to inquire into the regularity of the proceedings. In either case the respondent court is vested with jurisdiction to determine what the ecclesiastical tribunal has done, and inasmuch as we are not now to inquire into mere errors of law we are not called upon to determine whether the court is exercising its jurisdiction correctly or incorrectly. It is proper, however, to call attention to the fact that our Supreme Court has definitely aligned itself with those authorities which hold that the civil authorities cannot disregard the decisions of the church tribunals. In Committee of Missions v. Pacific Synod, 157 Cal. 105, at page 128, 106 P. 395, 403, it is said:

> "Lest we be understood to hold that the civil courts can disregard and overrule the decisions of the church authorities, acting regularly, in ecclesiastical matters, we expressly disavow that doctrine. We approve the principle laid down by the Supreme Court of the United States in Watson v. Jones, 80 U. S. [13 Wall.] 726 [20 L. Ed. 666], and by the Supreme Court of this state in Horsman v. Allen, 129 Cal. 136, 61 P. 796, relating to this subject. 'Whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of the church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them' (Watson v. Jones, 80 U. S. [13 Wall.] 727 [20 L. Ed. 666]). This was said with reference to the Presbyterian Church, and it is declared to be the doctrine applicable to all churches having a similar system of ecclesiastical government."

[8] There then follows in this opinion a long list of authorities to which reference may be had supporting the rule. It also seems meet to say, in order to avoid subsequent possible confusion, that Watson v. Jones, supra, also quotes with approval from authorities to the effect that the supervisory power of the civil tribunals may not be invoked when the only property involved is the loss of clerical office and the salary incident thereto. Having determined that the respondent court has the authority to determine what the ecclesiastical tribunal decided, it also follows that it has the jurisdiction to determine whether one who has been deprived of the fellowship of the Los Angeles Association of Congregational Churches and Ministers can or cannot act or claim to act as pastor of one of the units constituting the Los Angeles Association. In fact, petitioner himself calls attention to the Law of Congregational Usage by William E. Barton, at page 235, wherein we find this statement:

> "An ordination requires the concurrent action of the churches of the vicinage. Such concurrence is appropriate but not indispensable in the settlement of a minister already ordained."

[9] There is another prepared finding of the court which also seems to render it necessary for us to deny the writ. The supplement to the complaint and the finding prepared responsive thereto is that the petitioner did during June, 1928, organize a new superdenominational church, not a Congregational church, and is conducting services for the new church in the edifice of the Wilshire Boulevard Congregational Church. As long ago at least as 1820, in the case of Baker v. Fales, 16 Mass. 488, it was determined that where a majority of the members of a Congregational church separate from the majority of the parish, the members who remain, although a minority, constitute the church in such parish, and retain the rights and property belonging thereto. This opinion is supported by sound logic, as is obvious when we consider that the property of the church has been set aside and dedicated to the particular benevolent purpose of the church in question, and that when any number of members see fit to forsake its covenant, they cannot take protesting and faithful members with them. Nor is the rule without former recognition in our own jurisdiction. In the two cases of Horsman v. Allen, supra, and Christian Church of Vacaville v. Crystal, 78 Cal. App. 1, 247 P. 605, the general doctrine receives approval. It cannot be doubted that the respondent court has the jurisdiction to determine as a fact the separation, nor is it doubted that the court has jurisdiction when it determines the separation to exist to declare that the petitioner has by this action forsaken his pastorate and that the property of the church is under the control of its members who have remained loyal.

The peremptory writ is denied.

We concur: WORKS, P. J.; CRAIG, J.

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94 Cal. App. 323

CONNER et al. v. LOWERY. (Civ. 6309.)

District Court of Appeal, First District, Division 2, California. Oct. 11, 1928.

1. Easements 🔑53—Stipulation in deed of right of way that each party pay half expenses of building and maintaining road held not condition subsequent, but mere agreement unenforceable for uncertainty.

Stipulation in deed of right of way that parties should each pay half the expenses of fencing, building, and maintaining road, *held* not a condition subsequent, but merely an agreement, unenforceable because indefinite and uncertain in not providing how expenses are to be incurred, who is to determine what is necessary for purposes, or when and in what manner expense is to be paid.

2. Deeds 🔑155—Provision in deed will not be held condition subsequent, if language will bear any other reasonable construction.

Conditions subsequent are not favored in law because they tend to destroy estates, and no provision in deed relied on to create such a condition will be so interpreted, if the language thereof will bear any other reasonable construction.

3. Easements 🔑12(1)—Deed of portion of right of way excepted by parties' prior deed held unenforceable as without consideration.

Deed of portion of right of way excepted by parties' prior quitclaim deed, releasing grantee's claim to portion over another's land, *held* unenforceable as wholly without consideration, since grantee gained nothing thereby.

4. Easements 🔑12(1)—Deed of portion of right of way excepted from grantee's prior deed of portion abandoned to relocate portion over another's lands created no new right.

Where portion of right of way released by quitclaim deed was abandoned merely as part of plan for relocation of small portion of road over lands owned by neither party by mutual consent of parties, grantor's rights were not affected by change, though new road was not in actual use at time of deed, and subsequent deed to him of portion of right of way excepted by quitclaim deed created no new right constituting consideration for later deed.

Appeal from Superior Court, Napa County; H. L. Preston, Judge.

Action by Adele Conner and another against J. E. Lowery. From a judgment quieting plaintiffs' title to certain land, subject to a right of way claimed by defendant, plaintiffs appeal. Affirmed.

Clarence N. Riggins, of Napa, for appellants.

Percy King, Jr., of Napa, and Frank W. Sawyer and William R. Lowery, both of San Francisco, for respondent.

NOURSE, J. Plaintiffs sued to quiet title to three parcels of land situated in Napa county. The defendant appeared and claimed an open right of way over parcels 1 and 3 of plaintiffs' land. Judgment went for plaintiffs, quieting their title subject to the right of way claimed by defendant. The plaintiffs have appealed on a typewritten transcript.

Plaintiffs concede that defendant, through his predecessors in interest, obtained, partly by grant, and partly by prescription, an open right of way over the land in question, and that this was used as a road and means of ingress to defendant's land from the county road from the year 1868. In the year 1918 James Mallock, the immediate predecessor in interest of the plaintiffs, conveyed to defendant "an open right of way—in common with the grantor over the road now being constructed by the parties from James Mallock's barn to the county road." This deed was made subject to the condition that the parties should each pay one-half the expenses of fencing, building, and maintaining the road, an obligation which should run with the land and be a condition to the enjoyment of the right granted. It is conceded that the road covered by this deed is the same as that used by the parties and their predecessors since 1868. The events leading to the execution of this deed are: Mallock was contemplating the purchase from Mrs. Adams of parcel 3 described in plaintiffs' complaint, but Mrs. Adams desired to have a portion of the road running through her orchard relocated along the line of a small creek. At the instance of Mallock, the defendant joined with him in the execution of the deed of May 31, 1918, releasing such portion of the road as was included in the lands to be retained by Mrs. Adams, and which, it is conceded, covered the portion running through the Adams orchard and did not cover any portion running through any lands belonging to the parties in this suit. On June 5, 1918, Mrs. Adams conveyed parcel 3 to Mallock, and the road thus became located wholly on Mallock's property except for the small portion running through the Adams orchard. It is the contention of the defendant that he obtained nothing from Mallock through the deed of June 6, 1918; that the new portion of the road was located by mutual consent of all parties; and that the deeds of May 31 and June 6, 1918, were both part of the same transaction to enable Mallock to effect his purchase from Mrs. Adams.

The controversy between the parties arose after the plaintiffs had purchased from Mallock and after they had performed some labor upon the road which they assumed was in excess of that performed by the defendant. A demand was made upon defendant that he perform additional labor upon the road and that he pay plaintiffs one-half the amount they had expended. When the defendant endeavored to perform work upon the road, the plaintiffs prevented him from doing so and failed to notify him at any time what amount they had expended or what amount they claimed from him.

The trial court found that no additional right was conveyed to defendant by the deed of June 6, 1918; that the language of this deed did not constitute a condition subsequent, but an agreement, for which there was no consideration. It was also found that the defendant had expended a large sum of money in building and maintaining the road since June 6, 1918; that prior to the commencement of the action he was prevented by plaintiffs from performing additional work thereon; that plaintiffs had also expended large sums upon the road, but had failed to notify defendant of any sum so expended or to demand payment of any portion thereof.

[1, 2] These findings are all amply supported by substantial evidence and the only question which requires consideration is whether the stipulation in the deed of June 6, 1918, is a condition subsequent or an agreement. We are convinced that it is merely an agreement, and an unenforceable one at that, because it is too indefinite and uncertain and because it is wholly without consideration. It is indefinite and uncertain because it does not provide how the expenses of fencing off, building, and maintaining the road are to be incurred, who is to determine what is necessary for those purposes, or when or in what manner the expense thereof is to be paid. Conditions subsequent "are not favored in law because they tend to destroy estates, and no provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction." Hawley v. Kafitz, 148 Cal. 393, 394, 83 P. 248, 249 (3 L. R. A. (N. S.) 741, 113 Am. St. Rep. 282). As respondent obtained nothing by reason of the deed, it would be an unreasonable construction of this provision to hold that it was intended as a condition subsequent working a forfeiture of a pre-existing right with no consideration to him.

[3] That respondent gained nothing is clear. He then held, by deed, an undisputed right to a right of way over all the lands owned by appellants. By the quitclaim deed of May 31, 1918, he joined with appellants' predecessor in releasing his claim to that portion of the right of way running over the land of Mrs. Adams, but they expressly excepted from such release the portion of such right of way included in the tract "which said Mallock is now about to purchase from said Lydia F. Adams." By this exception the respondent retained all the rights over appellants' lands which he had theretofore held, and his interest therein was expressly confirmed by Mallock by the deed of May 31, 1918, leaving nothing for him to convey to respondent on June 6.

[4] It is argued that, by the release of a portion of the road to Mrs. Adams, the old right was abandoned and thus a new right was created by the deed of June 6. But the abandonment was merely a part of a plan for a relocation of a small portion of the road over lands which neither party to the deed owned. Though the new road was not in actual use at the time of the deed, the relocation had been made by mutual consent of the parties and respondent's rights were not affected by the change. Vargas v. Maderos, 191 Cal. 1, 3, 214 P. 849; Ricioli v. Lynch, 65 Cal. App. 53, 58, 223 P. 88.

Judgment affirmed.

We concur: BUCK, Presiding Justice pro tem.; STURTEVANT, J.

94 Cal. App. 277

PURVIANCE v. COMPTON et al. (Civ. 6268.)

District Court of Appeal, First District, Division 1, California. Oct. 10, 1928.

1. Injunction 🔑75—Hearing by board of chiropractic examiners for revocation of practitioner's license held not exercise of "judicial power" against which injunction will lie (Chiropractic Act; Const. art. 6, § 1).

Hearing and determination by state board of chiropractic examiners under Chiropractic Act (St. 1923, p. lxxxviii; Deering's Gen. Laws 1923, Act 4811) whether chiropractic practitioner was guilty of acts warranting revocation of his license *held* not to constitute exercise of "judicial power" within Const. art. 6, § 1, against which an injunction will lie.

2. Officers 🔑82—Title or right to act as members of board of chiropractic examiners cannot be tried in injunction action against board by practitioner (Chiropractic Act; Code Civ. Proc. § 526; Civ. Code, § 3423).

Where state board of chiropractic examiners appointed under Chiropractic Act (St. 1923, p. lxxxviii, Deering's Gen. Laws 1923, Act 4811) were at least de facto officers, in that they had entered duties of office, were holding its indicia, and were actually serving the public as members of board, *held* that under Code Civ. Proc. § 526, and Civ. Code, § 3423, their title or right to hold such office cannot be tried in an injunction action brought by practitioner whose license is sought to be revoked.

Appeal from Superior Court, City and County of San Francisco; F. M. Jamison, Judge.

Action for injunction by P. Purviance against James Compton and others, as members of the State Board of Chiropractic Examiners. Judgment for defendants and plaintiff appeals. Affirmed.

Sawyer & Sawyer and F. W. Sawyer, all of San Francisco, for appellant.

Frank V. Kington, of San Francisco, for respondents.

CAMPBELL, Justice pro tem. This is an appeal from a judgment entered in favor of defendants upon the sustaining of the demurrer without leave being given to amend.

The plaintiff, a chiropractic practitioner, seeks an injunction against the defendants, members of the state board of chiropractic examiners. The action sought to be enjoined is the threatened act of placing on trial as to a fact, and the passing judgment upon such proof, in the investigation and revoking of plaintiff's license to practice chiropractic in this state.

The Chiropractic Act (Stats. 1923, lxxxviii; Deering's Gen. Laws, Act 4811) at section 10, provides that a license shall be revoked in proper cases. It further provides that a complaint shall be filed and other proceedings followed. Section 4 (c) empowers the board to revoke licenses, and section 4 (d) authorizes the summoning of witnesses and the taking of testimony.

The facts generally alleged in the complaint are: On February 10, 1923, the Governor of the state of California appointed the so-called "First Board of Chiropractic Examiners"; that on September 17, 1923, in an action prosecuted by the people of the state of California against such appointees, this "First Board" was ousted and removed from office upon the grounds that each member appointed thereon was unqualified and ineligible to act in that each had been a persistent violator of the state laws and that not one of them held a lawful license to practice, and that their appointment on such board was unauthorized and void; that after September 17, 1923, and before the commencement of this action said Governor of the state of California appointed or purported to appoint said defendants herein, James Compton, a member of the "First Board" to whom no license to practice chiropractic has ever been issued after an examination, and the other defendants, whose licenses were issued by the first illegal board, members of the state board of chiropractic examiners, being in fact the second board appointed under said initiative act, but in law the first board—as the so-called first board was no board; that said defendants were not then and are not now, nor is any one of them qualified to act as members of said board; that none of said defendants has practiced or did practice chiropractic in California for a period of three years next preceding the date upon which the act took effect or ever have been licensed to practice under any of the medical practice acts, but each of said defendants has assumed possession and control of said board of chiropractic examiners and as such members, claiming the right to act thereon and to perform the duties, threaten to and have actually commenced proceedings for the purpose of revoking the plaintiff's license to practice chiropractic and have fixed the time and place for the hearing before them of the question in respect to the revocation of said license, and caused citations and subpœnas to be issued directing various parties to be present and give testimony and that unless restrained, defendants will proceed with said hearing and render decision thereon, all to the irreparable loss and injury of plaintiff, for which there is no plain, speedy or adequate remedy at law. Upon these allegations plaintiff seeks an injunction enjoining and restraining defendants from doing anything in respect to the license of plaintiff to practice chiropractic.

Defendants demurred to the complaint upon several grounds, among which being that the complaint does not state facts sufficient to constitute a cause of action. From the judgment for defendants entered upon the sustaining of the demurrer without leave to amend, plaintiff has appealed.

[1] Appellant urges that the acts threatened to be performed by the board of chiropractic examiners are judicial and therefore in violation of the state Constitution—that the act is not a constitutional amendment but a law of the state as if passed by the Legislature, though passed by the people, and cites us to Department of Public Works v. Superior Court, 197 Cal. 215, 239 P. 1076, wherein it is said:

> "Under section 1 of article 6 of the Constitution 'the Legislature would be without authority to give judicial power to any general state board or tribunal. Except for local purposes the section disposes of the whole judicial power of the state and vests all of it in the courts expressly named therein, leaving none at the disposition of the Legislature.' "

The case cited concerns an application for a writ of prohibition to restrain the superior court from proceeding with the hearing and determination of a petition for a writ of review and not injunctive relief. However, in Brecheen v. Riley, 187 Cal. 121, 125, 200 P. 1042, it is held that the determination of facts going to show whether or not a real estate agent was guilty of acts calling for a revocation of his license by the commissioner, under the "Real Estate Act" (Stats. 1919, p. 1252) is not the exercise of "the judicial powers of the state," as that phrase is used in the Constitution conferring judicial power upon the courts. The court there quotes approvingly the following from Ex parte Whitley, 144 Cal. 167, 169, 77 P. 879, 884 (1 Ann. Cas. 13):

> "It is not at all uncommon for inferior boards or officers to be invested with power which calls for the determination of facts, and the exercise of discretion, in the discharge of the duties of their office. This power, it is true, is in a sense judicial; but it cannot be said that it is an exercise of 'judicial power' as that term is used in the Constitution in conferring judicial power upon courts. The question is, however, not an open one in this state, and seems to have been settled adversely to petitioner's contention in County of Los Angeles v. Spencer, 126 Cal. 670, 59 P. 202, 77 Am. St. Rep. 217."

It follows, therefore, that injunction will not lie on the theory that respondents in the present case are exercising judicial power.

[2] The allegation "that said defendants were not then and are not now, nor is any of them, qualified to act as members of said board" puts in issue the title or right to hold public office, which may not be tried in an injunction action. The jurisdiction to determine the title to public office or the qualifications of public officers belongs exclusively to the courts of law. As appears from the complaint, respondents had been appointed to the board by the Governor; had entered upon the duties of the office; were holding its indicia, and were actually serving the public as members of the board, when plaintiff sought relief by injunction. They were at least de facto officers, and, even if not qualified, the functioning of the office and the officers is not to be controlled by injunction. Barendt v. McCarthy, 160 Cal. 680, 118 P. 228; Town of Susanville v. Long, 144 Cal. 362, 77 P. 987; People v. Board of Supervisors, 75 Cal. 179, 16 P. 776; Randolph v. County of Stanislaus, 44 Cal. App. 322, 186 P. 625; Code Civ. Proc. § 526; Civ. Code, § 3423.

In our opinion the demurrer was properly sustained, and the judgment is therefore affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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94 Cal. App. 318

CITY AND COUNTY OF SAN FRANCISCO v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.★ (Civ. 6609.)

District Court of Appeal, First District, Division 2, California. Oct. 11, 1928.

Rehearing Denied Nov. 8, 1928. Hearing Denied by Supreme Court Dec. 10, 1928.

1. Mandamus 🔑3(1)—What is "plain, speedy and adequate remedy," as respects right to mandamus, is question of fact, to be determined from circumstances of case (Code Civ. Proc. §§ 1085, 1086).

What is a "plain, speedy and adequate remedy in the ordinary course of law," within Code Civ. Proc. §§ 1085, 1086, requiring writ of mandamus to be issued where there is not a plain, speedy, and adequate remedy in ordinary course of law, is a question of fact to be determined from circumstances of case, and, when ordinary remedies would not be plain, speedy, and adequate, the court has jurisdiction to entertain proceeding, and petitioner is entitled to the writ as a matter of right.

2. Mandamus 🔑4(4)—City held entitled to maintain mandamus proceeding to require trial court to modify interlocutory judgment to conform to verdict in condemnation proceeding, remedy by appeal being inadequate (Code Civ. Proc. §§ 1085, 1086).

Where interlocutory decree in condemnation proceedings by city, entered September 14, required that damages must be paid by city on or before October 13, remedy of city by appeal, because of trial court's increase in damages awarded by verdict of jury, would not be adequate, and city was therefore entitled to maintain mandamus proceeding, under Code Civ. Proc. §§ 1085, 1086, to compel trial court to modify judgment to conform to verdict.

3. Judgment 🔑199(1)—Trial court held without power to enter its own judgment notwithstanding jury's verdict assessing damages in condemnation proceedings (Const. art. 1, § 14; Code Civ. Proc. §§ 629, 664, 1248).

Under Const. art. 1, § 14, and Code Civ. Proc. §§ 664, 1248, where jury trial was de-

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★Rehearing denied. Hearing denied by Supreme Court.

manded in city's condemnation proceedings and was not waived by either party, trial court had no power to enter its own judgment notwithstanding jury's verdict, under Code Civ. Proc. § 629.

4. Eminent domain ⚷241—Recital in interlocutory decree that it was entered on city's motion held not to show city consented to all its terms; "consent" (Code Civ. Proc. § 664).

That interlocutory decree assessing damages in city's condemnation proceeding recited that it was entered on city's motion *held* not to establish city's consent to all terms of decree, including trial court's increase of damages awarded by verdict, where city protested against such increase, and decree was entered solely to comply with requirements of Code Civ. Proc. § 664, requiring judgment to be entered within 24 hours, unless court orders case reserved; "consent" being nothing more than a contract, one of prime essentials of which is intent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Consent.]

Original proceeding in mandamus by the City and County of San Francisco against the Superior Court of the State of California in and for the City and County of San Francisco and T. I. Fitzpatrick, a judge thereof, to compel modification of an interlocutory decree in eminent domain proceeding. Writ granted.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for petitioner.

Knight, Boland & Christin and Mervyn R. Dowd, all of San Francisco, for respondents.

NOURSE, J. This an original proceeding in mandamus to require the respondent superior court to modify an interlocutory judgment in eminent domain proceedings to conform to the verdict of the jury rendered after a trial of the issues.

The petitioner, city and county of San Francisco, instituted condemnation proceedings to condemn various parcels of real property owned by the various defendants. A trial by jury was demanded, and was not waived by any party to the suit. Such a trial was had, which resulted in a verdict assessing the damages to one of the defendants in the sum of $8,000 and to another in the sum of $500. When the verdict was returned to the court and entered, counsel for these defendants moved that it be modified, by increasing the amount of damages awarded to them by the jury. This motion was resisted by the city, but the trial judge ordered the awards increased, and thereupon entered an interlocutory decree in favor of the city, permitting it to take the property upon payment to these defendants of damages, which he assessed to be $9,000 in the one instance and $1,000 in the other. Upon the entry of this interlocutory decree, the city moved the trial court to modify the judgment to conform to the verdict, and this motion was denied.

The proceeding in this court is prosecuted on the theory that the trial judge was without jurisdiction to modify the verdict in the manner followed, and that, the interlocutory decree being void on its face for that reason, mandamus is the proper remedy to procure the entry of a proper judgment. The petition is resisted on the ground that petitioner has an adequate remedy by appeal. Counsel for respondent also states, but with apparent lack of confidence, that the trial court acted within its jurisdiction in modifying the verdict.

[1] Mandamus is an extraordinary remedy issuing to compel an inferior tribunal, body, or person, to perform an act which the law specially enjoins as a duty resulting from an office. It must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. Sections 1085, 1086, Code Civ. Proc. What is a plain, speedy, and adequate remedy in the ordinary course of law is always a question of fact, to be determined upon the circumstances of each case, and, when it appears that the ordinary remedies would not be plain, speedy, and adequate, the court has jurisdiction to entertain the proceeding, and the petitioner is then entitled to the writ as a matter of right. Gay v. Torrance, 145 Cal. 144, 148, 78 P. 540; Larkin v. Superior Court, 171 Cal. 719, 726, 154 P. 841, Ann. Cas. 1917D, 670.

[2] Here it appears that the interlocutory judgment was entered September 14 of this year and that the damages must be paid by the city on or before October 13. From this fact alone it is apparent that the remedy by appeal would not be adequate and no other remedy in the ordinary course of law has been suggested.

[3] The merits of the case are simple. The state Constitution provides that damages in condemnation proceedings must be ascertained by a jury, unless a jury be waived, "as in other civil cases in a court of record." Article 1, § 14. Section 1248, Code of Civil Procedure, provides that the court, jury, *or* referee must hear the evidence, "and thereupon must ascertain and assess" the damages to the property involved. Section 664, Code of Civil Procedure, provides that, when trial by jury has been had, judgment "in conformity to the verdict" must be entered within 24 hours, unless the court order the case reserved for special purposes.

The power of the trial court to enter its own judgment, notwithstanding the verdict of the jury, applies only to those cases where a motion for a directed verdict should have been granted (section 629, Code Civ. Proc.), a situation which does not arise here. The power to modify as an alternative to granting a motion for a new trial has been conceded, on the theory that the party moving for a new trial is deemed to have consented to the modification by agreeing to remit from the judgment the amount suggested by the trial court. But in cases where a trial by jury has been had as a matter of right the trial judge must enter judgment upon the verdict as rendered unless some such proceedings have been instituted. Respondent has not cited any authority, and we have been unable to find any, which holds that the trial judge may otherwise substitute his judgment for that of the jury and enter a judgment which is not based upon the verdict, in cases where a trial by jury has been had as a matter of right.

It is true the respondent has cited some cases which bear upon the general subject, but they are all readily distinguishable from the case at bar. Cheerer & Co. v. Hutton, 7 Cal. App. 524, 94 P. 849, was a case involving proceedings upon the report of referees in a condemnation proceeding in which a trial by jury was expressly waived. The appellate court held that the trial court had jurisdiction to modify the report of the referees under the express provisions of the act under which the proceedings were brought. Adamson v. County of Los Angeles, 52 Cal. App. 125, 198 P. 52, was an action in injunction seeking to restrain the court from expending money upon property which it had acquired for a public purpose under eminent domain proceedings. The appellate court, having held that the judgment in the eminent domain proceedings had become final, and could not be collaterally attacked in that proceeding, went on to say that the trial court possessed the power "on a motion for a new trial" to amend or modify the verdict of the jury County of Los Angeles v. Rindge Co., 53 Cal. App. 166, 200 P 27, merely held that in similar proceedings the trial court, upon a motion for new trial, had the power to deny the motion upon the stipulation of the county counsel that the verdict of the jury might be modified to correct a manifest error. The point involved in this case was that a miscalculation had been made in the mileage to be covered by fencing the property of one of the defendants whose land was condemned. The jury fixed the cost per mile at $650, and aggregated the total sum at what would represent 29 miles of fencing, rather than 31½, the agreed mileage to be covered. City of Los Angeles v. Hughes (Cal. Sup.) 262 P. 737, has no application to any point involved in the case. The damages were there fixed by referees appointed on the stipulation of the parties and the question was the propriety of the court's action in modifying the referees' report. This report having the effect of a special verdict (section 645, Code Civ. Proc.), the judgment which followed it could be set aside or modified, if based upon incorrect or erroneous conclusions of law not supported by the referees' findings. Section 663, Code Civ. Proc. The question involved in the Hughes Case was whether the damages assessed were computed upon an erroneous conception of the legal rights of the parties.

[4] Respondent argues that, inasmuch as the interlocutory decree recites that it was entered on motion of the plaintiff in that case, we must assume that the plaintiff consented to all terms of the decree, including the increased award. But the plaintiff protested against this feature and urged the lack of jurisdiction in the superior court to modify the verdict. The decree was entered solely to comply with the terms of section 664, Code of Civil Procedure, and does not indicate consent on the part of the plaintiff to this change. Consent is nothing more than a contract, and, of course, one of the prime essentials of a contract is intent. Here every presumption of intent is lacking.

We are satisfied that the trial court was without jurisdiction to modify the verdict on the motion of the defendants, and, as this want of jurisdiction appears upon the face of the interlocutory decree, it is a proper case for the modification of that decree to conform to the verdict as rendered.

Let a writ issue as prayed.

I concur: KOFORD, P. J.

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94 Cal. App. 281

WILLIAM A. DAVIS CO. v. BERTRAND SEED CO. (Civ. 6314.)★

District Court of Appeal, First District, Division 2, California. Oct. 10, 1928.

Rehearing Denied Oct. 27, 1928. Hearing Denied by Supreme Court Dec. 6, 1928.

1. Contracts 🔑163—Binding effect of statement printed on letterhead depends on whether one receiving it should understand, as reasonable man, that it contains terms of contract.

Binding effect of statement, printed on letterhead or other paper, delivered to acceptor of offer, depends on whether person receiving it should understand, as reasonable man, that it contains terms of contract, which he must read at his peril and regard as part of proposed agreement.

2. Sales 🔑267—Seller's printed disclaimer of intent to warrant seeds in all letters to buyer held binding on latter.

Disclaimer of intent to warrant description, quality, or productiveness of seeds, sold by one wholesale seed corporation to another, in printed statement preceding typewritten body of letter containing offer to sell, and in every letter received by buyer throughout correspondence, *held* binding on buyer, which was aware of contents, purpose, intent, and effect of statement

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★Rehearing denied. Hearing denied by Supreme Court.

and relied on claim of fraud and breach of honor and fair play in seller's representation that it exercised great care to have all seeds pure and reliable, rather than on disclaimer as such.

3. Sales 🔑260—Statement in letter that seeds offered for sale were all choice seedsmen's stock and double milled held not express warranty of variety and purity in face of printed nonwarranty clause.

Statement in typewritten portion of letter containing offer to sell seeds that "the stocks offered are all choice seedsmen's stocks and double milled" *held* insufficient to show intent to give express warranty as to variety and purity in face of printed nonwarranty clause; being capable of construction in reasonable sense simply in connection with statement as to care in selection and expressive of mere opinion in good faith as to general merits of seller's stock.

4. Sales 🔑260—Affirmation of fact, intended as warranty, is essential to sale on warranty.

For sale to be on a warranty, there must be an affirmation of a fact by the seller with reference to the thing sold and intention on his part that such affirmation shall be a warranty to the buyer.

5. Sales 🔑258, 260, 261 (2)—Statements in seller's letters after receipt and acceptance of and payment for seeds held not warranties, where each letter contained printed disclaimer thereof and no such intent was expressed nor any consideration received.

Written statements in seller's correspondence with buyer after receipt and acceptance of seeds sold and payment of price *held* not to constitute warranty thereof, where each letter contained printed disclaimer of warranty and no intent was expressed to give warranty nor any consideration received or accepted which would sustain any new or additional warranty of goods already sold and delivered.

6. Sales 🔑258—Representation or agreement to warrant without new consideration after sale without warranty is ineffective.

If seller's liability on a warranty is based on agreement to contract, consideration is essential, and, if no representation of warranty was made at time of sale, subsequent representation or agreement to warrant is of no legal effect, unless new consideration is given.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the William A. Davis Company against the Bertrand Seed Company. Judgment for plaintiff, and defendant appeals. Reversed.

Fred L. Dreher and J. Ed McClellan, both of San Francisco, for appellant.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for respondent.

BUCK, Presiding Justice pro tem. Action by buyer to recover back from seller the purchase price of certain garden seeds because of alleged breach of certain warranties, claimed to have been given by seller at time of the sale.

The case was tried by the court sitting without a jury, and the court found that at the time of the sale the defendant represented to and assured the plaintiff that the seeds sold were of certain specified varieties, to wit, "Alaska Variety" and "Hosford Market Garden Variety," and that, relying upon said representations, the plaintiff received the seeds and paid the purchase price. The court also found on conflicting evidence that as a matter of fact the seeds were not of the "Alaska" and "Hosford" varieties; and that as soon as such fact was discovered plaintiff offered to return the seeds, and demanded the return of the purchase price and certain charges paid on account of the transaction. Judgment was accordingly given for plaintiff, and defendant appealed.

One of the grounds of the appeal is that the evidence is insufficient to sustain finding that the defendant intended or manifested any intent to give the warranty charged or found, but that, on the contrary, the writing relied upon by the plaintiff to prove the warranty expressly shows that the defendant disclaimed any intent or purpose to give the warranty relied upon by the plaintiff.

The plaintiff and defendant corporations were wholesale seed dealers, the plaintiff being located in Montana and the defendant in California. The contract of sale relied upon and proven by the plaintiff was created by the plaintiff's acceptance of the following written offer:

> "San Francisco, Cal., July 3, 1919.
>
> "The William A. Davis Co., Bozeman, Montana. While we exercise great care to have all our seeds pure and reliable, we give no warranty, expressed or implied, as to description, quality, productiveness or any other matter of any seeds we sent out, and we will be in no way responsible for the crop. If the purchaser does not accept the goods on these terms, they are at once to be returned.
>
> "Gentlemen: We are in receipt of your favor of June 27th and in reply are pleased to quote you the following varieties of garden peas: (Here follow quotations, among others—Hosford Market Garden $.12 per lb. and Alaska Peas at $.14)
>
> "The stocks offered are all choice seedsmen's stocks and double milled. Prices are f. o. b. San Francisco, terms sight draft attached to bill of lading with privilege of inspection. Bags extra at cost. This offer is for immediate acceptance and is subject to stock being unsold upon receipt of your order.
>
> "Trusting that we may have the pleasure of booking your order for some of these varieties, we remain, yours very truly, Bertrand Johansen Seed Co., per A. A. Bertrand."

The portion above between the words "Montana" and "Gentlemen" was in print, while the remaining portions of the body of the letter were in typewriting.

[1] It is plaintiff's and respondent's contention that notwithstanding the foregoing matter in print, which by its terms disclaims any intent on the part of the seller to give any warranty, "expressed or implied as to description, quality, productiveness, or any other matters, of any seeds," nevertheless, by reason of other language in the letter, such express intent was absolutely nullified and abandoned.

And, first, as to the printed disclaimer: At the outstart it should be noted that there is no attempt made to plead or find fraud, or to put the defendant upon any defense as to fraud. Furthermore, the general rule as to the binding effect of "a statement printed upon a letterhead or tag upon goods, or in some other paper delivered to the acceptor," is well stated by Williston in his work on Contracts, volume 1, p. 165, par. 90d, as follows:

> "The sole question seems to be whether the facts present a case where the person receiving the paper should, as a reasonable man, understand that it contained terms of the contract which he must read at his peril, and regard as part of the proposed agreement. The precise facts of each case are important in reaching a conclusion"—citing many cases.

See, also, 1 Williston on Sales (2d Ed.) par. 239a, and cases cited at page 477.

[2] In the case at bar the facts unequivocally show the plaintiff corporation was well aware both of the contents and the purpose and intent of the printed matter, as well as of its effect as a disclaimer. Throughout the correspondence between the parties, the disclaimer appeared in every letter received by the plaintiff from the defendant; and as disclosing the extent to which the defendant recognized its binding effect as a disclaimer, the final exchange of courtesies between the parties is quite significant. In the letter of September 28, 1920, from defendant to plaintiff, the following appears:

> "We are in receipt of your claim against us of the 17th of this month, asking us to take back goods sold you in good faith, and on a high market, which makes your claim altogether out of reason. If, as you say, the peas did not look right to you when they arrived a year ago, that was the time to turn the shipment down, and not now, when the market value of the stock is about one-half of the price at which you bought. We regret that we cannot accept the peas."

To which plaintiff replied as follows:

> "Your letter of September 28th was very surprising to us, in so much that after having sold us seed stocks untrue to name and after we had protected you in this transaction, you are entirely unwilling to treat us fairly. Evidently you are one of the numerous firms operating under the protection which they feel the seedman's disclaimer affords them. It is possible that a sound business may be built up under this policy, but we are of the opinion that to continue long in the seed business it is necessary to recognize at least some degree of honor and fair play.
>
> "So far as your disclaimer is concerned, however, we wish to state that you did not exercise great care to have this seed pure or reliable and we feel it only just that methods such as you have been using should be given prominence and we will take immediate steps to advertise this transaction."

If it be a good rule that a writing is best understood by the construction which the parties themselves place upon it, it is quite evident from the foregoing that the plaintiff, who, by the way, appears in its own business to have used a printed disclaimer on its letterheads, understood that its proper remedy in this proceeding was not to attack or qualify the disclaimer as such, but to rely rather upon a claim that the defendant was guilty of fraud and breach of "honor and fair play" in the representation that "we exercise great care to have all our seeds pure and reliable." But as already noted, plaintiff's complaint makes no attempt to allege such charges or to give the defendant any opportunity on a fair trial to meet such charges.

The case of Miller v. Germain Seed & Plant Co., 193 Cal. 62, 222 P. 817, 32 A. L. R. 1215, is an instructive case as to the binding effect of a disclaimer by implication contained in a contract for the sale of garden seeds. In that case the plaintiff was engaged in raising celery for the market, and the defendant was engaged in the sale of seeds and plants. The plaintiff ordered from the defendant "celery seed of the golden yellow celery, California stock." The defendant forwarded two bags of celery seeds with the marking "Germain seeds Germinate." As a matter of fact, the seeds were of a different variety from the character of the seeds ordered. And as a result thereof the plaintiff recovered damages in the sum of $4,000. The case was tried before a jury, and the defendant seed dealer claimed that in each bag of seed there was inclosed loose leaf slips containing the same nonwarranty notice as was contained in the letterheads, in the case at bar, and, furthermore, that for a period of 15 years prior to the commencement of the action the plaintiff at various times purchased seed from the defendants, and in each instance there was inclosed in the package containing said seed a slip upon which was printed the same notice of nonwarranty; also the same notice was printed in defendant's catalogue and on its order blanks, and on other stationery used by defendant. But all this was denied by the plaintiff's witnesses, and all disputed facts were passed upon adversely to defendant's contention by the jury. The Supreme Court, however, reversed the case upon the ground that the trial court erred in refusing "to instruct the jury, as requested by the defendant, that if there was a general custom of nonwarranty the plaintiff would be bound thereby, even if he did not in fact know of such custom and usage." In that case, both in the prevailing and dissenting opinion, the rule was conceded, as it is in the case at bar, that "where a purchaser asks a seed dealer for a certain variety of seed and in pursuance of that request the seed is furnished, that in the absence of any additional facts the law will from the transaction imply a contract of warranty. This warranty partakes of the nature of both an express and implied warranty."

In the case cited, as already indicated, so far as the writings between the parties are concerned, it was found there was no writing, printed or otherwise, between the parties disclaiming the "express and implied warranty" that the seeds were of the variety known as "Golden Yellow Celery California stock." But the court held that the above instructions should have been given so that the jury, if they so found, could as against a farmer purchasing seed for use nullify the foregoing "express and implied warranty" by a mere custom unknown to the buyer himself. And by a parity of reasoning which led the court to arrive at the foregoing conclusion, it would seem to follow that as between two sophisticated wholesale seed corporations an express disclaimer of warranty inserted in their mutual correspondence should have even greater potency as a disclaimer of warranty than the seed sellers' custom which bound the farmer in the Miller-Germain Case.

In the prevailing opinion in the Germain Seed Case, supra, the court cited and followed the case of Ross v. Northrup, 156 Wis. 327, 144 N. W. 1124, on the potent effect of a general custom, and also cited the case of Leonard Seed Co. v. Crary Canning Co., 147 Wis. 166, 132 N. W. 902, 37 L. R. A. (N. S.) 79, Ann. Cas. 1912D, 1077, which was also a case from the same jurisdiction, upholding the potent effect of a provision of nonwarranty "very similar to the provision which it is alleged in the instant case," which was printed not on a mere slip inclosed in a bag, but printed in the body of a letter read and understood by the buyer himself.

[3] Furthermore, as regards respondent's claim that in the face of the nonwarranty clause the following language is sufficient to show an intent on the part of the seller to give an express warranty as to variety and purity, "The stock offered was all choice seedmen's stock and double milled," as shown at page 103 of 193 Cal. (222 P. 833), of the dissenting opinion in the case of Miller v. Germain Seed, etc., Co., supra, statements of much stronger import were contained in the seller's printed catalogue, and were evidently not considered by the court of sufficient import to nullify the effect of a mere custom. And in the case at bar the language relied upon should be and can be construed in a reasonable sense which will preserve and not do violence to the plain meaning of the express language of the nonwarranty clause; and be construed simply in connection with the statement touching care in selection and expressive merely of an opinion in good faith as to the general merits of the defendant's stock in trade.

[4] The case of Miller v. Germain Seed, etc., Co. was followed in the recent case from this district of Couts v. Sperry Flour Co. (Cal. App.) 259 P. 108. This case is conclusive authority as to the proposition that "in order that a sale shall be upon a warranty, there must be two factors present, first, an affirmation of a fact by the seller with reference to the thing sold, and, second, an intention on the part of the seller that his affirmation shall be a warranty to the buyer," and in the case last cited it was held that:

> "By the express declaration of the agent, and upon which the finding is based, defendant relieved itself of any implied warranty that the seed sold was of the variety desired"—citing Leonard Seed Co. v. Crary Canning Co., 147 Wis. 166, 132 N. W. 902, 37 L. R. A. (N. S.) 79, Ann. Cas. 1912D, 1077; also, 2 Williston on Contracts, p. 1870; 35 Cyc. 373.

[5, 6] But it is respondent's contention that after the receipt and acceptance of the goods and the payment of the price the defendant made certain written statements in its correspondence with the plaintiff which constituted a warranty. But in the first place each and every one of those statements relied upon was contained in a letter, which contained also the printed disclaimer of warranty and there was evidently no intent expressed to give a warranty, and, furthermore, there was no consideration received or accepted which would sustain any new or additional warranty for goods already sold and delivered. In fact, as stated in 1 Williston on Sales (2d Ed.) paragraph 211:

> "If the seller's liability on a warranty is based upon an agreement to contract, consideration is essential * * * still more clearly if no representation of warranty was made at the time of the sale, a subsequent representation or agreement to warrant will be of no legal effect unless new consideration is given to it"—citing many cases.

It will therefore not be necessary to consider the other points made by appellant herein for the reason that from the foregoing it sufficiently appears from the writing relied upon by the plaintiff to prove an intent to warrant that the defendant expressly disavowed and disclaimed any such intent.

The judgment will therefore be reversed.

We concur: NOURSE, J.; STURTEVANT, J.

94 Cal. App. 243

BAKOS v. SHELL CO. OF CALIFORNIA et al. (Civ. 3572.)

District Court of Appeal, Third District, California. Oct. 4, 1928.

1. Trial 🔑165—Motion for nonsuit admits truth of plaintiff's evidence and every legitimate inference therefrom.

A motion for nonsuit admits the truth of plaintiff's evidence and every inference which can be legitimately drawn therefrom, and evidence should be interpreted most strongly against defendants, without regard to contradictory evidence, on such motion.

2. Automobiles 🔑245(40)—Negligence in driving truck at excessive speed too near edge of pavement, with faulty coupling equipment permitting trailer to sway from side to side, held for jury.

In action for death of boy run over by truck trailer, testimony of eyewitness *held* sufficient to take to jury question of negligence in driving truck at excessive speed too close to edge of pavement, with faulty coupling machinery or equipment permitting trailer to sway from side to side.

3. Automobiles 🔑245(1)—Whether eyewitness of accident, in which boy was run over by truck trailer, could see what happened from her position, held for jury.

Whether eyewitness of accident, in which boy was run over and killed by truck trailer, could see what she testified to from position in her yard on opposite side of truck from boy, was a question of fact for the jury.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Gust Bakos against the Shell Company of California and another. From a judgment of nonsuit, plaintiff appeals. Reversed.

J. Edward Keating, F. E. Carleton, and Theodore E. Bowen, all of Los Angeles, for appellant.

George H. Moore, of Los Angeles, for respondents.

PRESTON, Justice pro. tem. This is an appeal by plaintiff, Gust Bakos, from a judgment of nonsuit in an action brought by him against the defendants for damages for the death of his minor son.

The complaint alleges that R. T. Kelly operated a heavy automobile oil truck belonging to defendant Shell Company of California, to which was attached a trailer in such a careless and negligent manner as to cause said trailer to collide with said minor child, Jimmie Bakos, who at said time was standing near the pavement of the road, awaiting an opportunity to cross the road in order to reach his home, which was on the opposite side of the road.

The answer of defendants denies any negligence on their part and pleads contributory negligence on the part of the deceased child. The answer also pleads negligence on the part of plaintiff in permitting said child to be upon the streets or roads unattended.

The evidence shows that plaintiff's son, Jimmie Bakos, was a child of the age of 6½ years. Between 2 and 3 o'clock on the afternoon of June 2, 1925, Jimmie Bakos, in company with a smaller boy, ran across the school yard towards the traveled and paved highway, leading from the city of Los Angeles to the town of Compton. The boys came to a complete stop about 3 feet from the edge of the pavement to permit a large Mack truck, with an 18-foot trailer attached to the rear end thereof, to pass in front of them. This truck and trailer belonged to defendant Shell Company of California. The truck was driven by the defendant Kelly on the right-hand side of the paved portion of the highway and about 2 feet from the edge of the pavement, towards the town of Compton, and at a speed of between 12 and 14 miles an hour. The children did not move, but continued to stand in the same place, off of the paved portion of the road, while the truck and trailer were passing in front of them. The deceased, Jimmie Bakos, was struck by the trailer, and the rear wheels of it passed over his body, killing him almost instantly.

Kelly, the driver of the truck, testified that he knew the school was located at that place and that he saw the children come across the school yard and approach the highway in front of him, but that they were 12 feet away when his truck passed them.

The case was being heard by a jury, and at the conclusion of plaintiff's evidence the defendants moved for a nonsuit upon the ground that the evidence showed no negligence upon the part of defendants. This motion was granted and a judgment of nonsuit entered.

We are of the opinion that the trial court committed error in granting this motion.

[1, 2] The court's power and limitations, with reference to the granting of a nonsuit, are clear and well defined. The motion admits the truth of plaintiff's evidence, and every inference which can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the defendants. Stieglitz v. Settle, 175 Cal. 131, 165 P. 436; Goldstone v. Merchants' Ice & Cold Storage Co., 123 Cal. 625, 56 P. 776; Estate of Arnold, 147 Cal. 583, 82 P. 252; Anderson v. Wickliffe, 178 Cal. 120, 172 P. 381; Berger v. Lane, 190 Cal. 452, 213 P. 45; Bloom v. Allen, 61 Cal. App. 28, 214 P. 481; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125. Here there is evidence of an eyewitness to the fatal accident, which shows that the truck and trailer approached the scene of the accident "at a fast rate of speed" and that "the trailer was zigzagging

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

and raising dust," and that "the rear end of the trailer became entangled with the boy's clothing" as he stood 2 or 3 feet off of the paved portion of the highway, in such a manner as to cause the rear wheels of the trailer to pass over his body. This evidence was given by the witness Rosa Abarissio, a Mexican woman, and given through an interpreter. She testified in part as follows:

> "Q. How far was Jimmie (deceased) from the paved portion of the street when you first saw him? A. About 3 feet back.
>
> "Q. How soon after you saw Jimmie did you see him struck? A. The child arrived first and stopped and waited for the truck to pass.
>
> "Q. Did you see Jimmie standing still or moving when you saw him first? A. He was standing still for the truck to pass.
>
> "Q. Did Jimmie move from the time you saw him standing beside the road until he was hit? A. He didn't move; no, sir.
>
> "The Court: Ask her again; go ahead and finish your question. Did he move or didn't he move? A. He did not move until the trailer struck him.
>
> "Q. Did the trailer move in any direction except straight ahead behind the truck before it hit Jimmie? A. The truck was going straight ahead, and the trailer was zigzagging (indicating), and Jimmie was standing still.
>
> "Q. And the next thing you saw was Jimmie on the pavement under the hind wheel of the trailer, isn't that true? A. I saw him when he became entangled by his clothes and turned him around (indicating); he fell.
>
> "Q. Did the truck or trailer make any dust at that time that you observed? A. Yes, sir."

From this evidence, alone, the jury could have reasonably inferred negligence on the part of defendants in the operation of their truck and trailer. The jury could have drawn the inference from this evidence that defendants were negligent in the following particulars: (1) That the truck and trailer were being driven at an excessive rate of speed; (2) that the truck and trailer were being driven too close to the edge of the pavement; (3) that the trailer was permitted to sway from side to side; and (4) that the coupling machinery or equipment was faulty. These were all questions of fact to be passed upon by the jury.

[3] Respondents contend that it was physically impossible for this witness, Rosa Abarissio, to have seen what she testified to, because she was standing on the east side of the road in her yard, and that the truck and trailer passed between her and the boy, and that the flat platform of the truck and trailer would be entirely above the head of the boy, and would obstruct her view. This, also, was a question of fact for the jury to determine. This woman, however, further testified that the ground where she was standing in her yard was 3 or 4 feet higher than the level of the road and that she could see the boy on the other side of the truck and trailer. She also testified positively that she saw the boys standing by the pavement as the truck approached them and the next thing she saw was Jimmie under the rear wheel of the trailer.

Respondents further contend that the only legitimate inference that can be drawn from the testimony in this case is that this child impetuously and thoughtlessly ran from a position of safety immediately to his death. It is true that Kelly, the driver of the truck, testified that the boys stopped about 12 feet from the truck and were stopped at the time he passed them, and that he did not know the boy had been injured until some time thereafter; but on a motion for a nonsuit contradictory evidence must be disregarded.

In Berger v. Lane, supra, the court laid down this rule as to how evidence should be viewed in the face of a motion for a nonsuit as follows:

> "Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence adduced must be considered as facts proved in favor of the plaintiffs. Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs. If contradictory evidence has been given it must be disregarded. (Estate of Arnold, 147 Cal. 583 [82 P. 252].) The plaintiff must also be given the benefit of every piece of evidence which tends to sustain his averments, and such evidence must be weighed in the light most favorable to plaintiff's claim. * * * Evidence, whether erroneously admitted or not, if relevant to the issues joined, must be given the credit and benefit of its full probative strength, and any question arising from the fact of variation between the evidence of the witnesses cannot be raised or considered. The evidence must be taken most strongly against the defendant, and if the plaintiff has introduced proof sufficient to make out a prima facie case under the allegations of his complaint the motion, if made upon the close of the case, should be denied."

If it be conceded that the testimony given by Mrs. Abarissio is in itself contradictory, still, viewing the entire case in the light of the foregoing well-established rules, we see no escape from the conclusion that the motion for a nonsuit should have been denied.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

94 Cal. App. 289

AMERICAN SEEDLESS RAISIN CO. v. JOSHUA HENDY IRON WORKS.
(Civ. 6404.)★

District Court of Appeal, First District, Division 2, California. Oct. 10, 1928.

Rehearing Denied Oct. 26, 1928. Hearing Denied by Supreme Court Dec. 6, 1928.

1. Sales 🔑267, 268(2)—Warranty of freedom of tractor sold from latent defects was implied, though express warranty merely contained agreement to replace defective parts (Civ. Code, § 1769).

Implied warranty that tractor sold was free from latent defects, under Civ. Code, § 1769, was part of contract of sale thereof, though express warranty merely contained agreement to replace parts requiring replacement by reason of defective workmanship.

2. Sales 🔑262½—Warranties implied by law are deemed incorporated in contract of sale.

It is the established rule that warranties implied by law on sale of goods may be deemed incorporated in the contract.

3. Sales 🔑445(4)—Evidence of gear shift trouble arising from improper alignment of tractor made issue for jury of existence of latent defect warranting buyer's recovery for breach of warranty (Civ. Code, § 1769).

Evidence of buyer's gear shift trouble after purchase of tractor, and of continuance of trouble after gears were replaced, which expect attributed to improper alignment, *held* to make issue for jury as to whether there was a latent defect arising from process of manufacture, authorizing buyer's recovery of damages for breach of warranty, under Civ. Code, § 1769.

4. Trial 🔑109—Plaintiff's claim of implied warranty was not waived by counsel's statement at beginning of trial, where evidence on that issue was admitted without objection.

Where facts relating to implied warranty were fully alleged in complaint in action for breach of warranty and evidence on that issue was admitted without objection, plaintiff's right to invoke recovery on that issue was not waived by counsel's statement at beginning of trial that they were relying only on written warranty and implied warranty under another Code section.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by the American Seedless Raisin Company against the Joshua Hendy Iron Works. Judgment for defendant, and plaintiff appeals. Reversed.

Hartley F. Peart, Charles V. Barfield, and Sylvester J. McAtee, all of San Francisco, for appellant.

Byrne & Lamson, of San Francisco, for respondent.

BUCK, Presiding Justice pro tem. This is an action to recover damages for breach of warranty arising out of the sale of a farm tractor. Defendant recovered judgment by nonsuit, and the plaintiff appealed.

[1] The tractor in question was manufactured by the defendant on the order of its inventor, Mr. Martin, but at the time of this sale to plaintiff was owned by defendant, and defendant corporation, in consummating the sale, availed itself of the services of the inventor in making such a successful demonstration of the merits of the tractor that the plaintiff purchased it and paid to the defendant the purchase price in the sum of $4,738.60. Though there were the not unusual representations touching the quality of workmanship and construction, the following constituted the only writing given by the defendant covering express warranties:

> "The undersigned warrants to the above purchaser full and legal title to the above described tractor, and hereby guarantees same against any litigation with reference to patents, or royalties or adverse claims of any kind or nature, and further agrees to replace free of charge, f. o. b. Sunnyvale, Cal., within one year from date hereof, any part or parts which may require replacement by reason of defective workmanship or material other than for electrical parts.
> "Joshua Hendy Iron Works,
> "By A. J. Behneman, Manager."

For comparison it may be noted that this in some of its features is not dissimilar to the written guaranty construed in the case of Moss v. Smith, 181 Cal. 519, 185 P. 385, which contains the following language:

> "To be free from defects in material or workmanship for one year from the 13th day of October, 1914, *and will replace such defective part or parts in the car absolutely free of charge when delivered at our place of business.*" (Italics ours.)

But as regards material and workmanship it is evident in the case at bar that the written warranty contains no direct statements that can be construed as an express warranty. In fact, the warranty in the case at bar absolutely omits any statement of any existing fact, or assurance of any existing fact, on the subject of material or workmanship. Consequently the court cannot, under the guise of construction, incorporate in the contract something which the parties to the contract expressly omitted to incorporate. But the law, as laid down in our Codes, does and will in certain circumstances incorporate, where the parties have failed expressly so to do in an agreement for sale, certain implied warranties, one of which is the following:

> "One who sells or agrees to sell an article of his own manufacture thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture." Section 1769, Civ. Code.

[2] And, as above shown, it is the established rule in this state that these warranties

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★Rehearing denied. Hearing denied by Supreme Court.

implied by law may be deemed incorporated in the contract. Remsberg v. Hackney Mfg. Co., 174 Cal. 799, 805, 164 P. 792; Bancroft v. San Francisco Tool Co., 5 Cal. Unrep. 587, 47 P. 684; Hoult v. Baldwin, 67 Cal. 610, 613, 8 P. 440; Snyder v. Holt Mfg. Co., 134 Cal. 324, 328, 66 P. 311; Mechem on Sales, vol. 2, p. 1094, § 1258; 2 Williston on Contracts, 1872, par. 993.

In this connection, however, it is respondent's contention, in support of the judgment of nonsuit, that "section 1769 of the Civil Code has no application for the reason that there was no evidence that there was any latent defect arising from the process of manufacture," and also that it is too late to invoke this section on appeal "as counsel for appellant announced at the beginning of the trial that they were relying only on the so-called written warranty, and on the implied warranty found in section 1770 of the Civil Code."

[3] And first as to whether "there is any such substantial evidence which, with the aid of all legitimate inferences available to plaintiff" would support a finding that there was a latent defect in the tractor arising from the process of manufacture. The testimony on behalf of the plaintiff shows, from the time the tractor was paid for, on or about March 10, 1921, up to the time it was finally abandoned in April, 1922, that numerous defects and weaknesses were observed in the different parts of the machinery, noticeably in the gearing, shafting, bearings, differentials, and transmission, some of which, however, were replaced. As stated by one of the witnesses:

"We had more or less gear shift trouble, right along, but not so bad, it gradually got worse. The gear shift trouble started about the 8th or 10th of March. * * * I notified Mr. Martin respecting that * * * with respect to the gears he attempted to fix them—to install them to act properly; he tried to repair them but they did not act properly after that. He changed some of the levers, he changed the levers somewhat, the parts. * * * After we had opened up the machine, when the levers would not change gears we found that the shaft on which the bevel gears were, were worn. They were worn enough that you couldn't change gears. * * * The teeth of the gears were worn, I should say they were worn one-eighth of an inch. * * * These gears were eventually replaced by new ones. * * * I discovered the bevel gear was worn when we opened the case. * * * We found the teeth in the gears were worn."

In April respondent wrote to appellant as follows:

"It will be a day or two before I can straighten out that situation, as I want to go into the matter and ascertain the reason for the trouble. If I find it is necessary to make the shafts harder I will have to have same treated before I can send them to you."

And on April 21st:

"We are hardening and heat treating two shafts to go in the transmission and these should be finished by tomorrow night, at which time we will send a man to Livingston to install them. We regret the delay in this matter but the writer feels as if it is better to have ascertained just what the difficulty was and rectify it permanently, than to stab at it in the way of temporary matter."

On May 16, 1921, respondent wrote as follows:

"We have completed the layout for transmission for your machine and expect to have the gears and shafts finished by the latter part of the week. We are putting in an alloyed steel shaft with six splines instead of four, as around the Cotta, and are making the bearing on the splines twice the length as well as making the splines harder. I am sending you herewith B/P D 472 which shows the transmission which we are going to send you and you will note from same that there are only four gears operating at one time in place of having all the gears operate, as heretofore. This will reduce the friction heat in the case and there should be no more running hot in the transmission case. We have given this matter a great deal of study and it has cost us all considerable time and money, and we are sure that this will eliminate all your difficulties. I sincerely want to thank you for your patience and I am sure you will eventually be rewarded when the new transmission is put in the tractor. * * *"

In regard to the replacements, plaintiff's witnesses testified as follows:

"Q. Now, with those new gears in there, will you state what happened?

"A. The same trouble again developed; the same trouble again. It wouldn't operate and we couldn't change the clutches, couldn't change the gear shift.

"Q. There is some mention in the correspondence about heating. Did you have any trouble in that connection?

"A. As the transmission wore, it was inclined to heat more; it was heating as it was wearing."

And in regard to another defect, respondent on April 5th wrote as follows:

"Referring to the links for the universal; we are sending you a new set which are more accurately punched than the ones now in use, and I would suggest that your mechanic puts them in at his earliest convenience."

And later in November, after continual breakdowns of the tractor, respondent wrote as follows:

"Since taking the Stutes-Mar tractor apart I have come to the conclusion that it will be a waste of money, material and time to replace those parts unless there is some means of preventing the sand from entering the drums. The bearing on the right hand side in bull gear had not moved for several days prior to the breakdown, and still the shaft revolved. This bearing was packed so full of sand and oil that it required a chisel to remove it. The bevel gears also, in the transmission, replaced by Mr. Shoemaker and Mr. Martin, are worn one-eighth of an inch. It seems to me the felts inside the drum are useless, therefore, if you assemble any more tractors after this fashion you know what you will be up against. As soon as these parts arrive, please notify me and I will come to Sunnyvale."

After this letter in the fall of 1921, the following occurred on the ranch:

"Mr. Rexworthy and Mr. Lyle came there late in the fall, stating that Mr. Martin wasn't any longer in their employ, and looked over the machine and came to the conclusion that they would have to put an entire transmission in."

And the same witness further testified:

"The new transmission was not installed until February, 1922, and it was after that time that the tractor operated 11½ days. * * * After the full new transmission was put in we were able to operate the machine 11 days. After that we had gear trouble again and engine trouble developed.

"Q. Well, now, would it operate at the end of that 11 days under its own power at all?

"A. After we had put a new star or transmission connection in; that was the greatest trouble then; we couldn't hold the universal together.

"Q. Well, now, it broke down in the field at that time?

"A. Yes.

"Q. And what did you do with it then?

"A. We towed it in.

"Q. And you made a further effort to fix it after towing it in?

"A. No.

"Q. It was finally given up then, was it?

"A. As far as I remember. That was the third connection we had in the universal and each one lasted about a day and a half. We ceased to operate the tractor in April of 1922, if I am correct.

"Q. Now what was its condition when you ceased to operate it, Mr. Mackay?

"A. We couldn't change the gears, shift the gears, couldn't change from one gear to another.

"Q. How did they act?

"A. They didn't move; they were stuck, froze or something, didn't move at all, one of them didn't move.

"Q. Couldn't move at all?

"A. No. On that date, April, 1922, when we ceased to operate the tractor we towed the tractor in from the vineyard and put it in storage, in one of the buildings. It was not capable of operating at all on its own power.

"Q. Why not?

"A. Couldn't change the gears, it was always in gear, wouldn't release. I do not recall who was driving the tractor at the time we discontinued its use. We had trouble with the pistons involved in the tractor, in 1922. The rings were broken and one of the push rods was broken."

The testimony further shows that as a result of the foregoing and other deficiencies, the tractor was laid up as unfit for work for a period of 143 days during a working period of 188 days. The evidence does not show that the foregoing defects were cured by replacements. In fact, the evidence is reasonably to the effect that the replacements did not cure the defects. Furthermore, from the testimony of competent experts it could be reasonably inferred, in the absence of any testimony to the contrary, that the foregoing defects were "latent defects arising from the process of manufacture," and were inherent and existing at the time of sale. The expert witness, H. C. Montgomery, after having had his attention called to the foregoing, and other defects, stated that:

"The trouble outlined * * * would indicate to me that the tractor was not properly aligned; that the transmission power from the motor to the tracks was not in such alignment that the parts, gears particularly, meshed exactly as they should, and thereby caused trouble both with the gears and with the shafts.

"Q. Now, would you call that defect in material or workmanship?

"A. The fact that some of the parts were taken out and new parts given a different sort of heat treatment would indicate that the original parts were too soft, and that would be a question of material; as to the alignment, that would be a question, in my mind, of workmanship."

Also the same witness gave testimony, from which, in the absence of contradiction, it could reasonably be inferred as the result of the foregoing that the value of the tractor at the time of the sale with these defects inherently existing was around $400 or $500.

Also the expert witness Charles W. Gebhardt testified as regards the source of the trouble outlined as follows:

"Well, the general trouble seems to come about from defective workmanship, and possibly defective material; they overlap; because the materials evidently did not hold up for the purpose they were intended * * * as far as the bearings giving trouble is concerned, it seems to me they did not have the proper protection if sand and grit got into them * * * as far as the gears or the shaft being worn—and the gears not sliding—that can be due to the improper treatment of the materials; * * * and with respect to inaccurately punched links for the universal * * * and misalignment of the parts of the universal itself throw the shafts out of their respective angular line, so that you have a vibration set up, and this vibration is a destructive feature in any machine."

[4] As regards the contention of respondent that appellant waived his right to rely upon the foregoing implied warranty, it appears that the facts pertaining to such warranty are fully alleged in the complaint, and it further fails to appear that during the taking of evidence, which would sustain the issue so raised, that the defendant moved either to strike out such evidence or limit it to other issues. And, furthermore, since he placed his whole reliance upon a motion for a nonsuit, he was not precluded from himself introducing evidence to meet the evidence adduced by plaintiff which, as already indicat-

ed, tended to support, and did support, the foregoing issue.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

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PEOPLE v. PETTINGER. (Cr. 1725.)

District Court of Appeal, Second District, Division 1, California. Oct. 10, 1928.

1. Criminal law 🔑1023(8), 1134(10)—Order denying arrest of judgment is not appealable, but may be reviewed on appeal from judgment.

No appeal lies from an order denying a motion in arrest of judgment, but the order may be reviewed on the appeal from the judgment.

2. Burglary 🔑20—Information charging felonious entry into service station of named persons at particular street and boulevard in named city and county held sufficiently definite as to place of crime.

Information charging that defendant feloniously entered "Murr Bros. Service Station * * * at A street and Oxnard boulevard in the city of Oxnard, in said county of Ventura," with intent to commit the crime of theft, *held* not defective for failure to definitely locate place where burglary was committed.

3. Burglary 🔑4—"Service station," used for sale of gasoline and auto supplies, held "building," entry into which may constitute burglary (Pen. Code, § 459).

Service station, used for sale of gasoline and auto supplies and for general merchandising, which contained door and window, and which was locked, *held* "building," within purview of Pen. Code, § 459, defining burglary as entry of "any house, room, apartment, tenement, shop, warehouse, store * * * or other building"; "service station" commonly meaning a building from which gasoline and auto supplies are sold.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Building.]

4. Burglary 🔑9(2)—Defendant's breaking of window in service station and introduction of arm into building held sufficient "entry" in burglary prosecution (Pen. Code, § 459).

Defendant's entry into service station by breaking window and abstracting sales register, through introduction of his arm into the building, constituted sufficient "entry" in prosecution for burglary, under Pen. Code, § 459; introduction of defendant's entire body into building being unnecessary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Enter—Entry (in Criminal Law).]

5. Jury 🔑10, 31(11)—Constitutional guaranty of jury trial merely requires that jury shall try facts according to common law and does not cover procedural requirements.

Constitutional right of trial by jury merely guarantees jury trial as exercised according to the common law, and does not direct the procedure or guarantee separate trials; essence of trial by jury being that jury shall decide the controverted facts.

6. Criminal law 🔑1137(8)—Jury 🔑31(11)—Consolidation of issues of guilt and insanity, consented to by defendant by voluntary introduction of evidence of insanity at main trial, held not to require reversal, as prejudicial or as denying jury trial (Pen. Code, § 1026, as added by St. 1927, p. 1149).

Consolidated trial of issues of guilt and insanity, in disregard of Pen. Code, § 1026, as added by St. 1927, p. 1149, *held* not to require reversal, in view of Const. art. 6, § 4½, as prejudicial or as denying right of defendant to jury trial, where defendant voluntarily advanced evidence on issue of insanity in the main trial, and thus expressly consented to consolidation of the issues.

7. Criminal law 🔑1137(2)—Appellate court will not reverse for error in proceedings to which defendant consented, or which he expressly invited.

Appellate court will not reverse a case by reason of an alleged error in the proceedings which defendant invited, or which were occasioned by his express consent, unless bound to do so by some controlling rule of law.

8. Witnesses 🔑37(4)—Examination of witnesses generally as to reputation of defendant, accused of burglary, without qualifying them as character witnesses, was improper.

In prosecution for burglary, examination of witnesses who had not qualified as character witnesses as to defendant's reputation was improper; question as propounded not including traits of character involved in the crime charged.

9. Criminal law 🔑829(1)—Refusal of instructions, adequately covered by instructions given, is not error.

Refusal of instructions requested is not error, where the instructions are adequately covered by those given.

10. Criminal law 🔑726—District attorney's statements, by way of objection to unwarranted statements in argument of defendant's counsel, held not improper.

Statements made by district attorney, by way of objection to statements previously made by counsel for defendant, which were outside record, *held* not improper.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Fred Pettinger was convicted of burglary, and he appeals. Affirmed.

E. W. Howell, of Ventura, for appellant.

U. S. Webb, Atty. Gen., James S. Howie, Deputy Atty. Gen., and James C. Hollingsworth, Dist. Atty., and Don R. Holt, Chief Deputy Dist. Atty., both of Ventura, for the People.

CRAIL, Justice pro tem. [1] No appeal lies from an order denying a motion in arrest of judgment, but the order may be reviewed on the appeal from the judgment. People v. Bundy, 168 Cal. 777, 145 P. 537; People v. Rogers, 163 Cal. 476, 126 P. 143. The information reads as follows:

> "The said Fred Pettinger, on the 8th day of May, A. D. nineteen hundred twenty-eight, within the said county of Ventura, state of California, and before the filing of this information, did then and there, willfully, unlawfully, feloniously and burglariously enter the Murr Bros. Service Station, of N. Murr and Ellis Murr, at A street and Oxnard blvd. in the city of Oxnard, in said county of Ventura, with the felonious intent then and there to commit the crime of theft."

To this information defendant pleaded "not guilty," and "not guilty by reason of insanity." Only one trial was had and one verdict rendered, to wit: "Guilty as charged." Respondent proved that appellant, on the night of May 8, or in the early morning of May 9, 1928, drove up to the said service station in a Ford car, and, after waiting a short time, with a pair of pliers broke out a window light. He then lifted out and placed in his car a sales-registering device, and drove off. All of which the defendant subsequently admitted to the officers who arrested him, and to the court when he was sentenced.

[2] Appellant first contends that the information does not state a crime because it is indefinite as to the place where it was committed, and contends that "the location given is only a street intersection." An examination of the information, set out above, shows that the city, county, and state were given, and the location was not indefinite.

[3] It is next contended that the words "service station" do not come within the purview of section 459 of the Penal Code, which in defining burglary refers to "any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building," etc. The evidence showed that the place which defendant entered was a store with a door containing a glass top and a window; that it was used for the sale of gasoline and auto supplies and for general merchandising. It had been closed on the night of the burglary by one of the owners, and was locked with a Yale lock. "Service station," in modern parlance, commonly means a building from which gasoline and auto supplies are sold. This use of the words "service station" indicates a building, just as do the words railway station and police station.

[4] It is next contended that the only proof of entry was that appellant broke a window and lifted out through the opening the sales register. Such an entry, however, is sufficient. It is not necessary to the commission of burglary that the defendant get his whole body into the building. The introduction of his arm is sufficient. People v. Allison, 200 Cal. 404, 253 P. 318.

It is next contended that the statute of 1927, at page 1149 (section 1026, Pen. Code), provides that, where the pleas are as in this case, there shall be two trials and two verdicts; whereas, the jury returned but one, and in that respect appellant was convicted without due process of law. Section 1026 of the Penal Code, in so far as it affects this case, reads as follows:

> "When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he had entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was committed shall be promptly tried, either before the same jury or before a new jury, in the discretion of the court. In such trial the jury shall return a verdict either that the defendant was sane at the time the offense was committed or that he was insane at the time the offense was committed. If the verdict or finding be that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law. * * *"

An examination of the reporter's transcript shows that the people called four witnesses to prove the crime alleged in the information and rested. The defendant then called four witnesses in his behalf. By each of these witnesses the defendant attempted to prove his defense of insanity, and proceeded to offer what evidence he had on the question. Without any suggestion or direction from the court, the defendant proceeded under the method of trial prevailing prior to the adoption of section 1026; himself adopting the procedure, and voluntarily accepting the burden of advancing the evidence on the issue of insanity, thus expressly consenting to and inviting the order and the method of trial adopted. He made no request for separate trials, but, on the contrary, by his own conduct and by the acquiescence of the district attorney, proceeded to consolidate the trials of the issues under the plea of not guilty and not guilty by reason of insanity. The court on its part instructed the jury on the question of insanity, and likewise instructed the jury on the forms of verdict which it should return, including a form of verdict in case it found the defendant not guilty by reason of insanity.

Now, after conviction, the defendant claims the trial court erred in proceeding as it did. It will be noticed that the statute authorizes the trial court in its discretion to submit the issue of insanity to the same jury which tries the general issue. And in this case there was a mere consolidation of the trial of the two issues.

[5, 6] While the Constitution of the state of California provides that the right of trial by jury shall be secured to all persons and shall remain inviolate, the only right which it guarantees is that the citizens of the state shall have an opportunity to be tried by a jury in cases in which it is exercised in the administration of justice according to the common law. People v. King, 28 Cal. 265. It does not guarantee two separate trials by jury, and "it does not purport to direct what procedure is to be followed in the exercise of the right." People v. Hickman (Cal. Sup.) 268 P. 909. The essence of trial by jury is that controverted facts shall be decided by a jury. In the instant case the defendant had every controverted fact raised by his pleas submitted to and decided by the jury. He was permitted to interpose and to submit to the consideration of the jury every issue and every defense that would have been open to him if he had had two trials and every essential right of defendant involved in a trial by jury was safeguarded.

[7] An appellate court will not reverse a case by reason of an alleged error in the proceedings occasioned by express consent of the defendant and his counsel, unless bound to do so by some controlling rule of law. People v. Patrich, 118 Cal. 332, 50 P. 425. And it is well settled that a defendant cannot complain of errors invited by him. People v. Witty, 138 Cal. 576, 72 P. 177.

Section 4½ of article 6 of the Constitution was not designed to repeal or abrogate the guaranties accorded persons accused of crime by other parts of the same Constitution or to overthrow all statutory rules of procedure in criminal cases. For example, a denial to a defendant accused of a felony of a trial by jury would necessitate a reversal, even though there had been the clearest proof of guilt. People v. O'Bryan, 165 Cal. 55, 130 P. 1042. But in the instant case there was no constitutional guaranty denied and no essential right of the defendant disregarded. It appears to the satisfaction of this court that the result was just and that it would have been reached if the statutory rule of procedure had been followed.

[8] Complaint is made that the defendant was not permitted to prove his "good character and reputation." In this connection the following question was put to one of the witnesses: "Q. What kind of a reputation has he out there?" The witness had not been qualified as a character witness, and the question as propounded did not include the traits of character involved in the crime charged. Therefore, an objection was properly sustained. "Practically the same question was put to five witnesses," says the appellant, with the same objection and the same ruling.

[9] Appellant complains of the refusal of the trial court to give to the jury three instructions offered by him. These instructions, where correct and proper, were adequately covered by the instructions which were given.

[10] Lastly, appellant accuses the district attorney of improper conduct in his statements during the trial. The statements made by the district attorney were in objection to statements being made by counsel for defendant. The defendant's attorney was stating facts which were not in the evidence, and the district attorney had a right to object. But the trial court through an abundance of caution, instructed the jury to disregard the statements made by the district attorney.

Judgment and order denying motion for a new trial are affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

94 Cal. App. 303

LITTLE v. LOS ANGELES RY. CORPORATION. (Civ. 3567.)★

District Court of Appeal, Third District, California. Oct. 10, 1928.

Rehearing Denied Nov. 9, 1928. Hearing denied by Supreme Court Dec. 6, 1928.

1. Carriers 🔑283(2)—Street railway is not liable for injury resulting from act of conductor which does not fall within scope of his duties.

Any act of street car conductor, although done while he is actively engaged in discharging his duty as such, but which does not fall within scope of such duties, cannot bind street railway if injury to passenger or other person or his property be directly caused thereby, since street railway can only be held liable under doctrine of respondeat superior.

2. Carriers 🔑280(1)—Carriers of passengers for hire or reward are required to use all reasonable means to secure safety of passengers (Civ. Code, § 2100).

Under Civ. Code, § 2100, it is duty of carriers of passengers for hire or reward and their agents and employees to use all reasonable means to secure safety of their passengers, though they are not required to use every possible preventive which highest scientific skill might suggest.

3. Carriers 🔑283(2)—Conductor advising passengers to leave street car stopped in path of approaching train was acting within scope of duty.

Street car conductor, who on street car stopping on railroad track in path of approaching train, shouted for passengers to leave car, was acting within scope of his duties as such conductor.

★Rehearing denied. Hearing denied by Supreme Court.

4. Carriers 🔑305(5)—Injury to street car passenger thrown on sudden starting of car, which stopped on railroad tracks in path of approaching train, held result of concurrent negligence of conductor and motorman.

Where street car was stopped on railroad tracks in path of approaching train because of alleged stalling of motortruck directly in front of it, and on truck being moved motorman without signal from conductor started car after conductor had advised passengers to leave, resulting in plaintiff being injured on being thrown from car, *held* that it was concurrent negligence of conductor and motorman which constituted proximate cause of plaintiff's injury.

5. Appeal and error 🔑1078(1)—Assignments of errors not argued in briefs will be presumed to have been abandoned.

Where appellant's counsel specified large number of alleged errors in trial court's rulings permitting and excluding answers, but argued only two of such assignments in their briefs, appellate court will presume that they have abandoned all others of specifications in that particular.

6. Witnesses 🔑276—Asking motorman whether he had ever before stopped car in path of approaching train held proper to rebut motorman's statement that he was not nervous (Code Civ. Proc. § 2055).

In action against street railway for injury to passenger, injured on sudden starting of street car after it had stopped on railroad track in path of approaching train, questions asked motorman, examined as witness by plaintiff under Code Civ. Proc. § 2055, as to whether he had ever before stopped on railroad track when there was train approaching, were proper to rebut motorman's statement that he was not at all nervous.

7. Witnesses 🔑414(1)—Passenger's testimony that she heard conductor call, "Everybody off," held competent as corroborative of plaintiff's testimony, which was contradicted.

In action against street railway by passenger injured on street car suddenly starting after it had stopped on railroad track in path of approaching train, testimony of another passenger that conductor called "Everybody off," was competent and relevant as corroborative of plaintiff's testimony that such exclamation was made by some one, where other passengers declared that they heard no such exclamation uttered at all.

8. Trial 🔑296(3)—Instruction that carriers for hire are responsible for even slightest negligence causing injuries to passengers held not erroneous when read with other instructions.

Instruction, in action by passenger against street railway for injuries, that carriers of persons for hire are responsible for any even the slightest negligence causing injury to their passengers, *held* not erroneous as failing to state that such negligence must be proximate cause of injury, in view of numerous charges that plaintiff could not prevail unless it was shown that injuries she received were proximately caused by negligence of defendant.

9. Trial 🔑295(1)—Instructions should be considered as whole, and if they correctly state applicable law, error in instruction taken alone does not require reversal.

Instructions given by court should be considered together or as a whole, and if as so considered they correctly state law applicable to case, reversal should not be had because one instruction taken alone would embrace an erroneous announcement of true rule as to one particular element of case.

10. Trial 🔑260(8)—Refused instruction that plaintiff could not recover if injury was proximate result of mutual fault of herself and defendant held fairly covered by given instruction.

Refused instruction requested by defendant that if plaintiff was injured as proximate result of mutual fault of herself and servant of defendant, verdict must be for defendant, *held* clearly covered by given instruction, from which jury could readily understand that if injuries to plaintiff were proximately caused by concurrent or mutual negligence of both plaintiff and defendant, then plaintiff could not recover.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by Ramona Little against the Los Angeles Railway Corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Gibson, Dunn & Crutcher, of Los Angeles, for appellant.

Bertrand J. Wellman, of Los Angeles, for respondent.

HART, J. This action is by the plaintiff to recover damages in the sum of $20,000 from the defendant for personal injuries alleged to have been caused by the negligence of the latter. The jury, to whom the issues of fact were submitted for decision, awarded the plaintiff damages in the sum of $15,000. Judgment was entered accordingly. A motion for a new trial was presented and pressed by the plaintiff on all the statutory grounds (Code Civ. Proc. § 657), and the same was denied. This appeal is by the plaintiff from the judgment and supported by a bill of exceptions.

The plaintiff received the injuries of which she herein complains in the city of Los Angeles between the hours of 5 and 6 p. m. ("just in the twilight," the conductor testified) of the 12th day of November, 1924. She and other persons were, at the time mentioned, passengers on a street car of the defendant, which was traveling in an easterly direction on Macy street, in said city. It appears that a steam train of the Southern Pacific Company runs along and upon Alameda street, which street runs in a northerly and southerly direction. The defendant's tracks on Macy street run in an easterly and westerly direction. The latter's tracks on Macy street and the Southern Pacific's tracks on Alameda street cross at right angles at Macy and Alameda streets. The tracks of the steam railroad make a curve as they run into Alameda street. This curve is several hundred feet from and north of the intersection of Macy and Alameda streets. On the day and at the hour thereof stated, the defendant's car, on which the plaintiff was riding, approached from the west the point at which Macy and Alameda streets intersect. The motorman of said car proceeded to cross Alameda street. When the street car got onto the steam railway tracks the motorman of the streetcar suddenly stopped his car while it was still on the steam railway tracks. This (he stated) was because a large autotruck was stalled in front of the street car. However, coincidentally with the stopping of the street car as indicated, a train of the steam railway turned into Alameda street and proceeded in the direction of the point where the street car had been stopped and was still standing. Simultaneously with the appearance of the steam railway train on Alameda street, and as it rounded the curve at Main street, the safety gates maintained across Macy street by the defendant were closed, or "went down" behind the street car. As the steam train turned into Alameda street the towerman's bell was ringing and continued to ring as the steam train was approaching the Macy street crossing, and the headlights on the locomotive propelling the latter train reflected a bright light before the train and along Alameda street and into the street car. Upon observing the approach of the steam train, the passengers, or a large number of them, became frightened and greatly excited, and many of them about the same instant of time hurriedly left their seats and started towards the rear end of the car, where was located the only door in said car used for the egress of passengers. The passengers were for an instant bunched together at the rear end of the car, and some fell from the platform of the car, while others, from the consternation which had been produced among them, were shoved or pushed to the ground from the platform or the steps by other persons. The plaintiff in this action fell from the steps of the car and sustained the injuries complained of. These injuries were serious, so the doctor who professionally attended her testified. They consisted of a fracture of the ankle, "involving," the doctor said, "an outside bone, the fibula, about an inch above the ankle, which was broken in five pieces, and a fracture of the inside bone, which was broken once straight across; the ankle bone on which the weight of the body comes was dislocated backwards and inwards. It was a severe fracture," continued the doctor's testimony, "and there is always a good deal of swelling with a bad fracture. There was a fracture of two bones. One of them was in five or six pieces, and the other had one piece broken off." The doctor further testified that at the time of the trial (March, 1926, some 16 months after the injuries were received) the plaintiff was lame, "and it is a painful ankle, and one that does not support the body weight well. * * * She is liable to suffer pain from this injury in the future. * * * She would not be able to do anything that requires her standing on her feet, or anything of that kind." The physician expressed the opinion that she would never in the future be able to do any kind of work which might require her to stand on her feet, but that she could, of course, do work which may be done while in a sitting position.

The complaint as originally framed and filed joined the conductor and the motorman of the street car as defendants with the defendant corporation, but after both sides completed the taking of testimony in support of their respective positions in the case as made by their respective pleadings, and rested, upon motion of the plaintiff the action as to the conductor and the motorman was dismissed.

The seventh paragraph of the complaint sets forth the particular acts of negligence of the defendant which, it is alleged, were the proximate cause of the injuries plaintiff sustained, as follows:

> "That the defendant railway corporation by and through its motorman, John Doe Bidwell, then and there carelessly, negligently and unlawfully caused, allowed and permitted the said street car on which the plaintiff was a passenger for hire to stop upon the said Southern Pacific steam railroad tracks, and upon which said steam railway train was approaching with a bright headlight focused upon said street car, and the conductor of said street car, Richard Roe Fort, then and there, while the said street car was stopped called, 'All out,' to the passengers on the said street car, and the motorman then and there started said street car forward with a sudden and violent jerk, while the passengers in said car were pushing and crowding to get off the same and because of the sudden starting and jerking of the said car, and the crowding and pushing of the passengers thereon, the plaintiff and other passengers were pushed and thrown off from the said street car onto the pavement where the plaintiff was left lying, and the said street car proceeded on its way; that because of the aforesaid negligence of the defendants the plaintiff received injuries as stated in the following paragraph:" (Here follows a description of the personal injuries received by the plaintiff and which is substantially the same as that given by the physician, as above shown.)

The answer specifically denies each of the material averments of the complaint, and, by way of a special defense, pleads contributory negligence on the part of the plaintiff, which negligence, it is alleged, was the direct or proximate cause of the injuries she received.

There was received at the trial a vast amount of testimony, largely that of passengers on the street car at the time of the accident, describing the excitement and the confusion among the passengers, consisting of the rushing promiscuously and frantically of the passengers towards the exit door at the rear end of the street car, when the steam railway train entered upon Alameda street and proceeded towards the point where the street car stood on the tracks of the former. It is not necessary to recite herein that testimony or the substance thereof, since counsel for the defendant, in their opening brief, make this very candid admission:

> "In our opinion, the evidence was insufficient to justify a verdict against the defendant, but under the rules governing the determination of appeals, we doubt if this court can say, as a matter of law, that the defendant was not negligent, or that the plaintiff was guilty of contributory negligence. We do believe, however, that the verdict was the result of errors in law committed by the learned trial court in the admission and rejection of evidence and in the giving and refusing of instructions."

But the testimony of the plaintiff and that of another witness (a Miss Delura, who was also a passenger on the street car at the time of the mishap) may properly and, we think, should be given herein in substance. The plaintiff testified that she was a passenger on the street car at the time mentioned herein, and that, while said car was approaching the Alameda street crossing, she, with other passengers, was standing at the rear end of the car, which was then "crowded with passengers"; that, when the car had reached the tracks of the steam railway, it stopped on said tracks, at which instant of time she observed the conductor of the street car leave the car for a few seconds and then return; that she did not know whether or not the conductor, after stepping to the pavement from the car, went towards the front end thereof, but that just before or at the time he returned to the interior of the car, there was considerable excitement among and noise produced by the passengers, some of them "screaming" and rushing towards the rear end of the car; that about the same time, but after stooping and looking toward the north (the direction from which the steam railway train was approaching the street car), through a window of the street car the conductor exclaimed or yelled, "Everybody off"; that thereupon many of the passengers, including herself, in great confusion, pressed towards the steps of the car, and that while she and a few others were near the steps and about to step down and make their exit, the car was suddenly started with a jerk or lurch, with the result that she, with several other passengers were violently thrown to the pavement. On cross-examination, plaintiff stated that she did not attempt to leave the car before it was started, that it was standing still when she started to get off the car, and that (repeating) it was while she and a few others were near the steps, heeding the warning given by the conductor, that she and other passengers, in attempting to leave the car, were thrown with great force to the street by a sudden lurching forward of the car. The plaintiff was asked many questions on cross-examination relative to the circumstances immediately attending the accident, but she, in all vital particulars, faithfully adhered to the story of the accident as she told it on direct examination.

Miss Winifred Delura (above referred to) a passenger on the street car on the occasion the plaintiff received her injuries, testified, on direct, in part as follows:

> "I was a passenger on an east-bound street car on Macy street, where the same crosses the railroad tracks on Alameda street, Los Angeles, on this date. The gates were down; street car stopped; gates went up and the car started again—stopped in middle of the track. The engine was approaching and everybody got excited, and the conductor said, 'Everybody off.' Just as we started to get off the car started and threw us all to the street. * * * It was about 5 or 5:15—it was just about dark. The locomotive headlight was burning; the engine bell was ringing. The locomotive was moving and about 75 or 100 feet away from the street car. When the street car stopped on the railroad track, the conductor said, 'Everybody off.' Then the passengers began to get off and got excited. Just at that moment the car started up. Miss Little and I was on the steps; the street car started with jerks and threw us both to the street, and I fell on top of her. Miss Little and I and another fellow were thrown to the street—I cannot recall his name. Miss Little was lying in the middle of the street and I was on top of her, and that man fell on top of me. * * * The car never stopped, kept right on going. A passing motorist picked us up and took us to the Receiving Hospital."

Cross-examined, Miss Delura said that at the time of the accident she was not a friend or a personal acquaintance of the plaintiff; that for the first time she learned her (plaintiff's) name "when she went to the hospital"; that she (witness) and the plaintiff were on the steps of the car when the car started with a sudden jerk. She further testified, on cross-examination:

> "I was seated in the back end of the street car. The middle of the car is closed. * * * I could not see the front of the car at all; there were too many people on the car. I was seated on the left of the car, and the engine was on the left. * * * It seemed like 15 minutes from the time the street car stopped and when I got off the car; I could not say just how long. When I first saw the engine it was about 75 or 100 feet away; when I started to get out of the car, it seemed to me it was right upon us, from the arc light of the engine; * * * the engine was moving at the time I got off the car; I heard the bell ringing; I was considerably excited at the time; I thought I was going to be run into and was afraid I would be seriously hurt. I did not see the conductor, and do not know where he was—I did not turn around to look."

She stated that the exclamation, "Everybody get off," came from behind her; that she did not know the conductor, nor was she familiar with his voice, and did not know his voice from that of any other person; that she could not say definitely that it was the conductor who exclaimed "Everybody off," but that she felt sure that "it was him" who uttered those words. A statement by Miss Delura relative to the circumstances of the accident was taken and reduced to writing the day following that upon which the accident occurred. That statement was introduced in evidence by the defense. Therein she stated that, as the steam train was approaching the point at which the street car stood, some one exclaimed, "Everybody off," but that she did not know who made the exclamation. She in that statement further said that both she and the plaintiff jumped from the car.

There is other testimony, given by other witnesses, that the street car started to move as some of the passengers were in the act of stepping or jumping from the car.

[1-3] Since it is conceded by counsel for the defense that the state of the evidence is such that the question of the negligence of the defendant and that of contributory negligence of the plaintiff were for the jury to determine, it is not necessary to proceed further herein with an examination and review of the evidence. We will therefore proceed to consider the points of law raised herein by the defendants. First, we should notice the suggestion by counsel for the defense that it is very doubtful whether the act of the conductor in warning the passengers to leave the car, as above explained, was within the scope of his duties as conductor or agent of the defendant. Waniorek v. United Railroads, 17 Cal. App. 121, 131, 118 P. 947, is cited as lending some support to the suggestion. It is, of course, true that the defendant can only be held liable for the damage done to the plaintiff upon the doctrine of respondeat superior, and therefore any act of the conductor, although done while he is actively engaged in discharging his duties as such, but which does not fall within the scope of such duties, cannot bind the defendant, if physical injury or other damage to a passenger or other person or his property be directly caused thereby. These are elementary propositions. But common carriers of passengers for hire or reward (and plaintiff was in this case of that class) are charged with the "utmost care and diligence" for the safe carriage of their passengers (Civ. Code, § 2100). It is the duty of such carriers or their agents and employees having direct control of transportation agencies (railway trains, street cars, or other vehicles so used) to use and be prepared to use all reasonable means to secure the safety of their passengers. In other words, a carrier of persons for reward, while not required to use, for the safeguarding of its passengers against injury, "every possible preventive which the highest scientific skill might suggest," is, nevertheless, "bound to use the best precautions in known practical use to secure the safety of its passengers." Treadwell v. Whittier, 80 Cal. 574, 22 P. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175; Marovich v. Central California T. Co., 191 Cal. 295, 301, 216 P. 595. Applied to the situation as presented in the instant case, that statement of the rule means, as in effect it has been stated above, that it was the duty of the conductor to resort to any reasonable means which human agency would permit, or his judgment, under the circumstances, might suggest, that would secure the safety of the passengers. His judgment, according to plaintiff's testimony, was that the best course to be pursued by the passengers was to leave the car, and in expressing or manifesting such judgment by the warning given by him to that effect, he was clearly acting within the sphere or scope of his duties as such conductor. The case of Waniorek v. United Railroads, supra, as we understand the opinion, lays down no different rule. And it would, indeed, be strange if it did.

[4] By the foregoing observations it is not to be understood that we are holding that the act of the conductor in giving the warning or direction to the passengers to leave the car was alone the proximate cause of the accident or plaintiff's injuries. If that were all that there was to the case as to proximate cause, the direction by the conductor to the passengers that they leave the car might well have been found by the jury to have been, under the circumstances, the safest course to pursue to secure the personal safety of his passengers. But this is not the only alleged act of negligence relied upon by the plaintiff. It is alleged in the complaint, and there is testimony supporting the allegation, that as some of the passengers, including plaintiff, were in the act of leaving the car, in response to the direction by the conductor that they do so, the motorman suddenly started the car and in such manner as to cause it to start with a jerking or lurching movement. The stopping of the car on the steam railway tracks was caused, so the motorman and some other witnesses testified, by the stalling of a motortruck directly in front of the street car, and immediately upon the truck being moved from the street car tracks and the way being clear, the motorman, without any signal from the conductor, started the car. The conductor himself testified that the signal which he was required to give the motorman to stop the car or to proceed on after it had been stopped was by means of a bell, and that on the occasion in question he gave no signal at all to the motorman. It was the motorman's duty to remain standing where he stopped the car until signaled by the conductor to proceed. It was his duty, before starting, to signal the conductor that the track was clear, a fact which he was in a better position to know than the conductor, and the duty of the conductor, on receiving such signal from the motorman, to signal the latter to proceed, only, however, when the situation in the car

with regard to the passengers was such as to make it safe to proceed. These were, under the circumstances, the respective duties of the conductor and the motorman, irrespective of whether there were formal rules or regulations from any source requiring such a course. That such are the customary duties of conductors and motormen of street cars is a matter of common knowledge. Thus it is plain that it was the concurrent negligence of the conductor and the motorman of the car which, as there is evidence to show and as the verdict implies, constituted the proximate cause of plaintiff's injuries.

[5, 6] As to the legal points urged for a reversal, it is to be remarked that, while counsel for the defendant specify a large number of alleged errors in the trial court's rulings permitting and excluding answers to certain questions to certain witnesses, they argue in their briefs two of such assignments only, from which it is to be presumed that they have abandoned all others of the specifications in that particular. The motorman was called and examined as a witness by the plaintiff under section 2055 of the Code of Civil Procedure, and, among other questions propounded to him by counsel for the plaintiff, were the following: (1) "Did you ever stop before on a railroad track when there was a railroad train coming?" To which objection was made by counsel for the defendant and overruled by the court, but to which no answer was returned by the witness. (2) "Did you ever stop before on a railroad track when there was a steam train coming towards you in the nighttime with a bright headlight shining on your car?" To which objection was interposed by counsel for the defendant and the same overruled, and to which the witness answered in the negative. The purpose in asking those questions, say counsel for the plaintiff, was to rebut the statement of the motorman that, although he saw the steam railway train on the track, and the headlight of its locomotive was reflecting a bright light on the street car and the bells of warning were ringing, he was not at all nervous. The significance of the fact of the nervousness of the motorman, if he was nervous, was in that it would tend to show that, having never before as a motorman been so suddenly thrown into a situation beset by so great a peril, he became excited and nervous and as a consequence bereft of his normal mental poise, in which condition he would probably start the car with a suddenness equal to the suddenness of the appearance of the perilous situation, and thereby cause it to jerk or start with a lurching movement. Upon that theory the questions objected to were not improper. But, in any event, the questions and the answer to the last propounded were not so baleful as to justify us in holding that they played any part in bringing about the verdict. The motorman positively stated that he was not excited or nervous at the time and likewise declared that he started his car in the usual way, or without a jerking or a lurching movement.

[7] The second assignment under the present head is in the refusal by the court to strike from the testimony of Miss Delura the statement that the conductor called, "Everybody off." The ground of the motion was that the witness' statements that it was the conductor who made that exclamation involved only her conclusion or a mere assumption on her part, since she admitted that, when the exclamation was made, she did not see or was not looking at the conductor, and that she could not definitely say who made it. The motion was properly denied for at least one reason, to wit: That it was corroborative of the testimony of the plaintiff that such an exclamation was made by some one, the plaintiff positively asserting that it was the conductor. Certain of the other witnesses (passengers) declared that they heard no such exclamation uttered at all. With that testimony the testimony of Miss Delura that it was made, even if she did not know who made it, was at variance or in sharp conflict. Her testimony was competent and relevant. Its weight was, of course, a question for the jury to decide.

[8, 9] The following portion of an instruction, given by the court, is among those likewise given which the defendant contends involves a misstatement of the law:

> "The plaintiff was a passenger for hire upon the street car of the defendant. The defendant is a common carrier, and common carriers of passengers bind themselves to carry safely those whom they take into their cars so far as human care and foresight will do so; that is, with the utmost care and vigilance of a very cautious person, and such carriers are responsible for any, even the slightest, negligence, causing injury to their passengers."

The criticism directed against the instruction, as it is above set forth, is that the statement therein that carriers of persons for hire "are responsible for any, even the slightest, negligence, causing injury to their passengers," is not a correct announcement of the legal principle thereby attempted to be stated, in that it fails to state that such negligence must be shown to be the *proximate* cause of the injury. The court, in its charge in numerous instances, stated in clear and readily understandable language, that the plaintiff could not prevail unless it was shown that the injuries she received were proximately caused by the negligence of the defendant. The instructions given by the court should be considered together, or as a whole, and if, as so considered, they correctly state the law applicable to the case, a reversal should not be had because it may happen that one instruction, taken alone, would embrace an erroneous announcement of the true rule as to any one particular phase or element of the case. See Phillips v. Hobbs-Parsons Co., 67 Cal. App. 199, 210, 227 P. 622; People v. Mendenhall, 135 Cal. 344, 346, 67 P. 325; People v. Del Cerro, 9 Cal. App. 764, 769, 100 P. 887. But, as stated, the instruction under review, and as hereinabove quoted, is a detached part of an instruction given by the court in this case. The part omitted is as follows:

> "They (carriers of passengers) are required to do all that human care, vigilance and foresight reasonably can do under all circumstances to prevent accidents to their passengers, consistent with the practical operation of such cars, and if they fail in these regards and because thereof a passenger is injured who is in the exercise of reasonable care, they are liable to said passenger for all damages for injuries sustained."

The foregoing and the part hereinabove set forth were given as separate instructions in Rystinki v. Central Traction Co., 175 Cal. 336, 343, 165 P. 952, 955. The part first hereinabove quoted was criticized in that case as involving a misstatement of the law, but the court said that when the two instructions were considered together, "they correctly stated the law." It is true that the specific criticism here directed against the part of the instruction first hereinabove given was not evidently made in the case cited, as nothing is therein said regarding the omission to state in the instruction that the negligence for which the carrier would be responsible, if such negligence caused injury to a passenger, must, to bind the carrier, be the *proximate* cause thereof. We may assume, though, that in other parts of its charge the trial court in that case clearly explained to the jury, as was done in the instant case, that liability for the injury received by the passenger could not attach to the carrier unless the negligence of the latter was the direct or proximate cause of such injury.

[10] The defendant requested the following instruction, which the court refused to embrace within its charge:

> "If the plaintiff was injured as the direct and proximate result of the mutual fault of herself and any servant or agent of the defendant, * * * then your verdict must be for the defendant. * * *"

Counsel for the defendant assert that no such instruction was given to the jury by the court. We think the principle stated in the refused instruction was fairly covered by the following, which was given by the court:

> "In order, therefore, to find a verdict for the plaintiff, you must not only find from a preponderance of all the evidence that the defendant was negligent, but also that such negligence was the proximate cause of the injury to plaintiff, and you must further find that the evidence fails to show by a preponderance thereof that the plaintiff was guilty of negligence, however slight, contributing proximately thereto; otherwise your verdict must be for the defendant."

That instruction, under a fair and reasonable construction thereof, states that a verdict for the plaintiff would not be justified if it was found that, although the negligence of the defendant was a proximate cause of the injuries, if plaintiff's negligence also contributed thereto. In other words, the instruction under a reasonable interpretation of its language, says, and the jury could readily have so understood it, that if the injuries to plaintiff were proximately caused by the concurrent or mutual negligence of both the plaintiff and the defendant, then the plaintiff would not be entitled to recover.

There are many other specifications involving the action of the trial court in giving, and also in refusing to give, certain instructions proposed by the defendant. We cannot give specific attention herein to all those assignments of error. Nor is it deemed necessary to do so. We have painstakingly examined the entire charge of the court and also those instructions requested by the defendant and disallowed by the court which are not specially noticed above. It is hence considered sufficient to say, in a general way, that the charge of the court embraces a full, fair and correct statement of the law applicable to a personal injury case and pertinent to the situation as it was developed and presented by the evidence. Thus also have we found that every principle of law stated in the rejected instructions which were proposed by the defendant was covered by the given instructions.

No claim is made that the damages awarded are excessive. Therefore consideration in the nature of argumentative analysis of the testimony of the physician professionally attending the plaintiff as to the extent and nature of her injuries is not called for.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

On Hearing by Supreme Court.

PER CURIAM. The petition for a hearing in the Supreme Court is denied, but such denial should not be taken as an approval of what is said by the district court of appeal with reference to the duties, as a matter of law, of the motorman and conductor under the circumstances shown in this case.

205 Cal. 402

THOMSON v. CATALINA et al. (L. A. 9391.)

Supreme Court of California. Oct. 24, 1928.

1. Malicious prosecution 🔑56—Malice of each joint tort-feasor in malicious prosecution action must be proved to authorize compensatory or exemplary damages (Civ. Code, § 3294).

In actions for malicious prosecution, existence of malice in fact must be proved against each of the point tort-feasors, in order to justify an award of either compensatory or exemplary damages under Civ. Code, § 3294.

2. Trial 🔑335—Jury may make awards for exemplary damages in different amounts against joint tort-feasors in malicious prosecution or other actions (Civ. Code, § 3294).

Since, under Civ. Code, § 3294, exemplary damages in addition to actual damages are to be awarded for sake of example and punishment, where defendants, though joint-feasors, in actions for malicious prosecution or other actions, have been guilty of different degrees of oppression, fraud, or malice, jury may apportion exemplary damages to make the example as well as punishment fit offense.

Department 2.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by A. S. Thomson against Mike Catalina and others. Judgment for plaintiff, and named defendant and certain other defendants appeal. Affirmed.

Julius V. Patrosso and C. C. Mishler, both of Los Angeles, for appellants.

Clyde C. Triplett, of Los Angeles, for respondent.

RICHARDS, J. This action for malicious prosecution was instituted by the plaintiff

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

and respondent against the defendants, who are the appellants herein, and certain other persons, as to whom the action was subsequently, on motion of the plaintiff, dismissed. The plaintiff in his complaint alleged that the defendants entered into a conspiracy to wrongly and falsely charge the plaintiff with the crime of petit larceny in the recorder's court of the city of Watts, and that, in pursuance of this conspiracy, and on May 14, 1924, Mike Catalina, one of said defendants, at the instance and instigation of the others of said defendants, filed a complaint in said court charging the plaintiff with said crime and caused his arrest and prosecution therefor, that said cause was transferred for trial to the justice's court of San Fernando township, and that upon the trial of said cause before the latter tribunal the plaintiff was acquitted of said crime. He thereupon commenced this action, alleging his right to the recovery of both compensatory and punitive damages. The answers of these several defendants put in issue the averments of the complaint, and upon a trial thereof before a jury three separate verdicts in favor of the plaintiff were returned—one against the appellant Mike Catalina in the sum of $300 compensatory damages and $200 exemplary damages, one against the appellant L. A. Edwards in the sum of $300 compensatory damages and $500 exemplary damages, and one against appellant Oscar E. Winburn in the sum of $300 compensatory damages and $1,000 exemplary damages. Upon these three several verdicts, several judgments were entered in favor of the plaintiff and against the respective appellants in the amounts named therein. A motion for new trial having been made by each of said appellants, and denied, they each took and are here prosecuting separate appeals, which by stipulation of the parties have been presented in a single transcript and also upon a single set of briefs.

The first and in fact the main contention which the appellants urge upon each of these appeals is that each of these judgments must be reversed for the reason that the jury, while awarding the same amount of compensatory damages against each of said appellants, have made an award of different amounts as exemplary damages against each, and that in an action for malicious prosecution against joint tort-feasors the damages, whether compensatory or exemplary, cannot be thus apportioned. In making this contention, the appellants place their main reliance upon two cases decided by this court. The first of these was the case of McCool v. Mahoney, 54 Cal. 491. That was an action for malicious prosecution against two defendants, wherein the jury awarded a verdict in damages against one of the defendants in the sum of $300 and against the other in the sum of $500. The judgment rendered upon such verdict was reversed by this court, which held that, in an action for malicious prosecution against several joint tort-feasors the damages could not be thus severed. An examination of the record in that case, however, shows that the sole damages sought to be recovered were compensatory damages. There can be no doubt as to the correctness of the rule thus laid down with reference to such damages. The question of the right of the jury to make such severance in an award of exemplary damages when sought was not presented in that case. The other case upon which the appellants rely is the case of Davis v. Hearst, 160 Cal. 143, 116 P. 530. That was an action for libel brought against several defendants, wherein both compensatory and exemplary damages were sought. The court instructed the jury that it was entitled to render a verdict for compensatory damages against all of the joint tort-feasors in said action, but that, as to exemplary damages, it would be justified in rendering a verdict therefor only against such of the defendants as they might find to have been actuated by actual malice in the publication of the libel complained of. It was contended upon appeal that such instruction was erroneous, but this court, while reversing the case upon other grounds, held that a proper rule of law was declared in said instruction. In its decision, however, this court, speaking through Mr. Justice Henshaw, used the following language:

> "In an action for compensatory damages against joint tort-feasors—the action contemplated by section 3333 of the Civil Code—the law will not permit an apportionment of the damages, since it will not attempt to measure the degrees of culpability of the joint tort-feasors; nor in an action for malicious prosecution, where the existence of malice in fact must be found against every tort-feasor before any judgment can be rendered against him, will the law, for the same reason, admit or permit an apportionment of damages."

It is the contention of the appellants that in the reference above made to actions for malicious prosecution this court has declared it to be the rule that neither compensatory nor exemplary damages may be apportioned. It is to be noted, however, that, in the use of the language above quoted, the court was dealing with an action for libel and not an action for malicious prosecution, and hence that its reference to the damages recovered in the latter form of action is purely obiter. It is to be further noted that in the language above quoted the court appears to have been dealing solely with the question of compensatory damages, and that it was not the intention of the court to lay down in a case not before it the rule that exemplary damages may not be apportioned against the joint tort-feasors in an action for malicious prosecution, and that, on the other hand, if the writer of that opinion did intend to declare the rule that exemplary damages may not be apportioned as against several joint tort-feasors in an action for malicious prosecution, such a rule would not be supported either by reason or authority.

[1, 2] It is true that in actions for malicious prosecution the existence of malice in fact must be proven against each of the joint tort-feasors in order to justify an award of either compensatory or exemplary damages. But, since exemplary damages are, under the terms of section 3294 of the Civil Code, to be awarded in addition to the actual damages and as damages "for the sake of example and by way of punishing the defendant," it would seem to be a rule of reason that, where the defendants, though joint tort-feasors, in an action for malicious prosecution, as well as in other actions, have been guilty of different degrees of oppression, fraud, or malice so as to justify a verdict or verdicts for exemplary damages under the above-quoted section of the Code, and where such damages under said section are to be awarded "for the sake of example and by way of punishing" each particular defendant according to the measure of his offending, juries should be allowed so to admeasure and apportion such exemplary damages as to make the example as well as the punishment fit the offense. This very case furnishes a most apt example of the justice of such a rule, since the evidence sufficiently showed that the defendant Mike Catalina was merely the tool of his codefendants Winburn and Edwards, the first of whom was the judge of the recorder's court and who instigated the prosecution of the plaintiff in his said court, while the latter was the city marshal of the city of Watts, who actively promoted said prosecution and sought to have the same returned to and tried before his coconspirator in said court. It was upon a showing of these facts that the trial court, upon the inquiry of the jurors, made during their consideration as to the amount of their verdict with reference to whether punitive damages could be apportioned among the several defendants, gave the following instruction:

> "You are instructed that it is not necessary; the punitive damages may be found in different amounts against different defendants, if you so find."

The reasoning indulged in by this court in the case of Davis v. Hearst, supra, when that decision is read as a whole, fully justifies the application of this rule of reason to the several joint tort-feasors having different degrees of culpability and accordingly deserving different penalties in the way of exemplary damages in cases of this character; and, while the direct question has not heretofore been decided in this state, the decisions of the courts in other jurisdictions are persuasive. In Sedgwick on Damages (9th Ed.) § 352, the author quotes approvingly from the case of Day v. Woodworth, 13 How. (U. S.) 363, 14 L. Ed. 181, wherein it was said:

> "In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money.' This has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case."

In the case of Nelson v. Halvorson, 117 Minn. 255, 135 N. W. 818, Ann. Cas. 1913D, 104, also cited with approval by the above author, which was an action against two defendants for alleged false imprisonment wherein the question directly arose, the court held that a verdict in different amounts as to punitive damages against each of the defendants, depending upon their degree of culpability, should be upheld, the court saying:

> "The practice of rendering verdicts against the several defendants in an action in different amounts, where their participation in the wrong sought to be redressed has not been the same in kind and motive, is not unknown in this state."

In the case of Mauk v. Brundage, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 478, 482, it was held that a jury might properly allow a recovery in an identical amount against all of the joint tort-feasors as compensatory damages, and a further amount against some as exemplary damages, depending upon the state of the evidence. In the case of St. Louis Southwestern Ry. Co. of Texas v. Thompson, 102 Tex. 89, 113 S. W. 144, 19 Ann. Cas. 1250, which was a case wherein Thompson sued a number of defendants for damages for an alleged conspiracy resulting in the wrongful expulsion of plaintiff from a labor organization, it was held that, if the jury should find that the defendants were actuated by malice in making the charges against Thompson and in wrongly procuring his expulsion, the plaintiff would be entitled, in the discretion of the jury, to recover exemplary damages against either or all of the defendants in such sum as the jury may believe should be assessed against the defendants or either of them, and that it was not necessary, as in the case of actual damages recovered, that all of the defendants should be subjected to the same verdict by way of exemplary damages.

Upon the foregoing authorities we are constrained to hold that there was no error in the instruction or in the action of the jury in relation to the making of awards for exemplary damages in different amounts in this action, depending upon what the evidence showed and the jury found to be a differing degree of culpability among these several defendants.

The next contention of the appellants is that the evidence was insufficient to justify a verdict against the appellants Winburn and Edwards. We have examined the evidence in the case, and, without attempting to review in detail the facts as shown by a somewhat extensive record, we are of the opinion that the evidence was sufficient to support the verdict of the jury, both as to compensatory and exemplary damages against each and all of the said defendants.

The further contentions of the appellants relate to alleged errors in the rulings of the trial court upon the admission and rejection of evidence. An examination of the several objections made in the foregoing regard, in the light of the entire record in the case, convinces us that the errors thus assigned were inconsequential, and that the evidence educed as a result of these alleged erroneous rulings of the trial court was stricken out, or, if allowed to stand, was not sufficiently prejudicial to justify a reversal.

Upon an examination of the entire record, we are satisfied that no prejudicial error was committed by the trial court, and hence that each of these judgments should be and is hereby affirmed.

We concur: LANGDON, J.; SHENK, J.

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205 Cal. 408

Ex parte STEIGER. (Cr. 3081.)

Supreme Court of California. Oct. 26, 1928.

1. Habeas corpus 🔑22(1)—Writ of habeas corpus by petitioner, pleading guilty to unlawful possession of liquor and prior convictions, under return showing valid process by court of competent jurisdiction, must be discharged (Pen. Code, § 1486).

Where petitioner for habeas corpus entered plea of guilty to complaints charging unlawful possession of intoxicating liquor and prior convictions, and was sentenced to imprisonment in county jail and fine, and where return showed valid process was issued by virtue of final judgment of competent court of criminal jurisdiction under Pen. Code, § 1486, there was nothing before Supreme Court requiring action, and writ must be discharged and petitioner remanded.

2. Criminal law 🔑93—Offense of possessing liquor in violation of Wright Act, held "misdemeanor" within jurisdiction of Los Angeles municipal court (Wright Act; Pen. Code, § 1486).

Offense of unlawful possession of intoxicating liquor in violation of provisions of Wright Act (St. 1921, p. 79) *held* "misdemeanor" within Pen. Code, § 1486, and municipal court of city of Los Angeles had jurisdiction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Misdemeanor.]

3. Intoxicating liquors 🔑242—Imprisonment in county jail and fine for possessing liquor after prior convictions for similar offenses, held proper penalty (Wright Act).

Imprisonment in county jail and fine for possessing intoxicating liquor, in violation of the Wright Act (St. 1921, p. 79), after prior convictions for similar offenses, *held* proper penalty under provisions of state prohibition statute.

4. Holidays 🔑5—Sentences, if imposed after 12 o'clock on Saturday afternoon, would be void.

Sentences, if imposed after 12 o'clock on Saturday afternoon, a holiday, would be void.

5. Holidays 🔑5—Court had jurisdiction to pronounce judgment when it was competent to act if sentences were imposed after 12 o'clock on Saturday afternoon.

If sentences were imposed after 12 o'clock on Saturday afternoon, a holiday, court had jurisdiction to pronounce judgment at time when it was competent for it to act.

6. Criminal law 🔑991(1)—Sentences based on three several judgments for possessing liquor held properly made to run consecutively (Wright Act).

Where petitioner for habeas corpus was convicted under three several judgments for unlawful possession of intoxicating liquor, in violation of Wright Act (St. 1921, p. 79), provision that sentences should run consecutively was not error.

7. Criminal law 🔑1213—Punishment of imprisonment in county jail and fine for unlawful possession of liquor after prior convictions for similar offenses held neither cruel nor inhuman (Wright Act).

Punishment for unlawful possession of intoxicating liquor, in violation of Wright Act (St. 1921, p. 79), under complaint charging two prior convictions of similar offenses, of imprisonment in county jail and fine, *held* neither cruel nor inhuman.

In Bank.

Application by Louis A. Steiger for writ of habeas corpus, prayed to be directed to the Chief of Police of the City of Los Angeles to secure the release of petitioner on the ground that the court was without jurisdiction. Writ denied.

See, also, 261 P. 1048.

Cooper & Collings, of Los Angeles, for petitioner.

E. J. Lickley, City Pros. Atty., and Joe W. Matherly and F. W. Fellows, Deputy Pros. Attys., all of Los Angeles, for respondent.

WASTE, C. J. Petition for habeas corpus. Petitioner is held in restraint under and by virtue of commitments based on three several judgments rendered by the municipal court of the city of Los Angeles, certified copies of which, together with certified copies of the complaint in each referred to, are attached to the return to the writ. (Other than treating the petition for the writ as a traverse, the petitioner has not denied or controverted any of the facts or matters set forth by the respondent.)

[1] Petitioner was charged in each complaint with the unlawful possession of intoxicating liquor, in violation of the provisions of the Wright Act. St. 1921, p. 79. In each of the complaints it is also alleged that the petitioner had suffered two prior convictions of a similar offense. He entered a plea of guilty to each complaint of the crime of unlawful possession of intoxicating liquor after prior convictions of similar offenses, and was sentenced to imprisonment in the county jail, and fined. From the return it appears that the situation is one in which valid process has been issued by virtue of the final judgment of a competent court of criminal jurisdiction. Pen. Code, § 1486. It is patent, therefore, that there is nothing before the court requiring action, and the writ may well be discharged. In re Kolb, 60 Cal. App. 198, 199, 212 P. 645; In re Collins, 151 Cal. 340, 342, 90 P. 827, 91 P. 397, 129 Am. St. Rep. 122.

[2, 3] Even were that not so, we are of the view that the contention made by the petitioner must be decided against him. The offenses charged were misdemeanors within the definition of the Penal Code of this state, and the municipal court of the city of Los Angeles had jurisdiction. In re Wilson, 196 Cal. 515, 523, 238 P. 359; In re Luna, 201 Cal. 405, 257 P. 76. The penalties to which the petitioner was subjected were properly imposed under the provisions of the state prohibition statute. Ex parte Humphrey, 64 Cal. App. 572, 222 P. 366.

[4-7] It is claimed that the sentences were void because the petitioner was first sentenced after 12 o'clock on a Saturday afternoon, a holiday. That fact does not appear in the record, and, if that were so, the sentences were void. But the court had jurisdiction to pronounce judgment, as it later did, at a time when it was competent for it to act. In re Dal Porte, 198 Cal. 216, 244 P. 355. No legal obstacle stood in the way of making the sentences of the petitioner run consecutively, and the punishment inflicted was neither cruel nor inhuman.

The writ is discharged and the petitioner is remanded.

We concur: SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

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205 Cal. 411

Ex parte IRVIN. (Cr. 3129.)

Supreme Court of California. Oct. 26, 1928.

1. Intoxicating liquors ⇨93—Los Angeles municipal court had jurisdiction over prosecutions for unlawful possession and sale of liquor after prior convictions (Wright Act).

Prosecution for unlawful possession and sale of intoxicating liquor after prior convictions of similar offenses, in violation of Wright Act (St. 1921, p. 79), *held* within jurisdiction of municipal court of city of Los Angeles.

2. Criminal law ⇨94—$500 fine or imprisonment until paid, not exceeding 50 days for possessing liquor, and $200 fine and 18 months imprisonment for selling liquor after prior convictions, held within Los Angeles' municipal court's jurisdiction (Volstead Act, § 29; 27 USCA § 46).

Under Volstead Act, § 29 (27 USCA § 46), adopted in California Prohibition Act, penalty for unlawful possession of intoxicating liquors of fine of $500, or, in default thereof, imprisonment in city jail in proportion of one day's imprisonment for each dollar of fine until paid, not exceeding 50 days, and penalty for sale of liquor after prior conviction of $200 fine and imprisonment for 18 months in city jail, *held* not in excess of jurisdiction of municipal court of Los Angeles.

3. Fines ⇨12—Imprisonment for possessing liquor if fine was not paid, not exceeding 50 days, held proper (Wright Act; Pen. Code, § 1446; Volstead Act, § 29; 27 USCA § 46).

Provision in commitment by municipal court for unlawful possession of intoxicating liquor in violation of the Wright Act (St. 1921, p. 79), directing imprisonment until fine be satisfied, in proportion of one day's imprisonment for each dollar of fine, not exceeding 50 days, was proper, though Volstead Act, § 29 (27 USCA § 46), adopted in California Prohibition Act, made no provision for imprisonment for nonpayment of fine, since, in absence of such provision, section 1446 of the Penal Code controls.

In Bank.

Application by John Irvin for writ of habeas corpus, prayed to be directed to the Chief of Police in the City of Los Angeles to secure the release of petitioner on the ground that the court was without jurisdiction. Writ discharged, and petitioner remanded.

Cooper & Collings, of Los Angeles, for petitioner.

E. J. Lickley, City Pros. Atty., and Joe W. Matherly and F. W. Fellows, Deputy Pros. Attys., all of Los Angeles, for respondent.

WASTE, C. J. Complaints were filed against the petitioner in the municipal court of the city of Los Angeles, charging him with the unlawful possession of intoxicating liquor and the unlawful sale of intoxicating liquor after prior convictions of similar offenses, all in violation of the provisions of the Wright Act. St. 1921, p. 79. Upon arraignment, the defendant pleaded guilty to the offense of the sale of intoxicating liquor, as charged in the complaint, and admitted the prior conviction. He also pleaded guilty to the unlawful possession of intoxicating liquor. Thereafter the court pronounced judgment and sentence that, for the crime of unlawful possession of intoxicating liquor, the petitioner pay a fine of $500, or, in default thereof, be imprisoned in the city jail of the city of Los Angeles in the proportion of one day's imprisonment for each and every dollar of said fine, until the fine was wholly satisfied, not exceeding 50 days; and that, for the crime of the sale of intoxicating liquor after prior conviction of a similar offense, the petitioner pay a fine in the sum of $200 and be imprisoned in the Los Angeles city jail for the term of 18 months.

In this proceeding the petitioner contends that the municipal court of the city of Los Angeles was without jurisdiction to entertain the complaints, and further, that, if the offense was a misdemeanor only, the imprisonment imposed was in excess of the court's jurisdiction, it being his contention that the offense was one for which the court could impose only a fine.

[1-3] The contention that the court was without jurisdiction is answered by the decision of this court in Re Steiger (Crim. No. 3081) 271 P. 201, this day handed down. The question is not new, and the decisions cited in the Steiger Case dispose of the matter.

The penalties imposed upon the petitioner were not in excess of the court's jurisdiction. Section 29 of the Volstead Act (27 USCA § 46) prescribing the penal provisions which were adopted in the California Prohibition Act, provides that:

> "Any person who manufactures or sells liquor in violation of [the act] shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years."

The provision in the first commitment directing the imprisonment of the defendant until the fine be satisfied in the proportion of one day's imprisonment for each and every $1 of the fine, not exceeding 50 days, was proper. In re Kennerly, 190 Cal. 774, 214 P. 857. The fact that the Volstead Act makes no provision for imprisonment for nonpayment of a fine did not prevent the municipal court from committing the petitioner to jail in default of payment of the fine imposed. In the absence of such provision, section 1446 of the Penal Code controls. Ex parte Garrison, 193 Cal. 37, 223 P. 64.

The writ is discharged, and the petitioner is remanded.

We concur: SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

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94 Cal. App. 420

PEOPLE v. BODEY. (Cr. 1480.)

District Court of Appeal, First District, Division 2, California. Oct. 22, 1928.

1. Criminal law 🔑678(1)—All lewd acts testified to by prosecutrix as committed at same time and place were of res gestæ, and showed one transaction (Pen. Code, § 288).

In prosecution under Pen. Code, § 288, for committing lewd conduct with child, testimony by prosecutrix that seven separate acts were committed on same afternoon, at same place, and by same person, on same person, showed one transaction, prosecution resting on first act mentioned, and all facts recited were of res gestæ.

2. Criminal law 🔑678(5)—Failure to require election, not requested, of specific act of lewdness from acts occurring at same time and place, held not error (Pen. Code, § 288).

In prosecution under Pen. Code, § 288, for committing lewd conduct with child, where prosecutrix testified to seven separate acts by defendant occurring at same time and place, and information specified act committed on or about certain date, and defendant made no request for election of specific act, court did not err in failing of own motion to specify specific act or to require district attorney to elect specific act.

3. Criminal law 🔑789(8)—Instruction to acquit if satisfied to moral certainty beyond reasonable doubt of innocence, followed by instruction to acquit if jury had reasonable doubt of guilt, held proper (Pen. Code, § 288).

In prosecution under Pen. Code, § 288, for committing lewd conduct with child, instruction to acquit if jury was satisfied to moral certainty beyond reasonable doubt that defendant did not commit acts charged, followed by instruction to acquit if jury had reasonable doubt whether or not defendant committed alleged acts, was not error.

4. Criminal law 🔑823(1)—Instruction to ignore instructions found inapplicable held improper but not prejudicial, where following instruction against prejudice (Pen. Code, § 288).

In prosecution under Pen. Code, § 288, for committing lewd conduct with child, instruction that jury might ignore any instruction which they found was not applicable to case, though improperly given, was not prejudicial, where instruction immediately followed instruction against passion, prejudice, and sympathy.

Appeal from Superior Court, City and County of San Francisco; Ruben S. Schmidt, Judge.

John Ross Bodey was convicted of violating Pen. Code, § 288, and he appeals. Affirmed.

John J. Taaffe, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The defendant was convicted of violating section 288 of the Penal Code, he made a motion for a new trial, the motion was denied, and he has appealed from the order and from the judgment of conviction.

We will discuss all of the points made by the defendant, but not in the order stated in his brief.

When instructing the jury, the trial court read to it a charge containing nineteen paragraphs. Among others, were the following:

> "XI. Testimony has been permitted by the court tending to prove other alleged acts of lewd and lascivious conduct of the defendant toward said Eleanor Torosian prior to the alleged act charged in the information. This evidence was permitted to be introduced for the purpose, and only for the purpose of proving lewd and lascivious disposition and tendency of the defendant to commit lewd and lascivious acts. This evidence is not introduced to prove distinct offenses and the defendant is not on trial for any such other alleged acts, other than are set forth in the information.
>
> "XII. If from all the evidence you are satisfied to a moral certainty beyond a reasonable doubt that on or about the first day of May, 1927, in the City and County of San Francisco, the defendant John Ross Bodey did commit lewd and lascivious conduct upon and with the body and members of one Eleanor Torosian, then and there a female child of about ten years of age, as charged in the information, then it is your duty to return a verdict finding the defendant guilty.
>
> "XIII. If from all the evidence you are satisfied to a moral certainty beyond a reasonable doubt that the defendant did not commit the alleged acts charged in the information, then it is your duty to return a verdict finding the defendant not guilty.
>
> "XIV. If from all the evidence you entertain a reasonable doubt whether or not the defendant did commit the alleged acts charged in the information, then it is your duty to return a verdict finding the defendant not guilty."
>
> "XVIII. The fact that the court has instructed you upon certain phrases of law is not to be deemed by you that the court necessarily feels that such instructions are necessarily applicable to the case. If from the facts you find that any such instruction is not applicable to the case, then it is your duty to ignore such instruction."

[1, 2] The defendant contends that the court erred in its failure to elect and specify in its instructions to the jury a single or specific crime out of several, shown by the evidence to have been committed on or about the 1st day of May, 1927. The question arises in this manner. The prosecutrix testified to seven separate acts on the afternoon of the 1st day of May, 1927. The information specified an act committed "on or about the 1st day of May, 1927." The district attorney did not elect to stand on any one specific act of the seven acts testified to. The defendant made no request that an election be made. The court gave the jury instruction XI, supra, and did not give any other instruction regarding an election. The defendant claims that the trial court erred because it did not of its own motion specify a specific act out of the seven acts or require the district attorney to do so. He cites and relies on People v. Hatch, 13 Cal. App. 521, 109 P. 1097, and People v. Martinez, 57 Cal. App. 771, 208 P. 170. Neither case is in point under the facts. Every one of the acts testified to by the prosecutrix was, she testified, committed on the same afternoon, on the same couch, in the same basement, of the same house, by the same person, on the same person. Under these circumstances the prosecution's case rested on the first act mentioned by the prosecutrix. The facts showed one transaction, and all of the facts recited were of the res gestæ. People v. Kafoury, 16 Cal. App. 718, 117 P. 938; People v. Gilmore, 17 Cal. App. 737, 121 P. 697; People v. Cornell, 29 Cal. App. 430, 155 P. 1026; Renfroe v. State, 84 Ark. 16, 104 S. W. 542, 544.

[3] The defendant quotes instruction XIII, supra, and claims it is error. It is not. It is unquestionably sound as far as it goes. But it does not go as far as the defendant is entitled to have it go. However, in the very next instruction, XIV, supra, the court stated the rule as clearly and as broadly as the defendant could possibly ask. The verdict of the jury shows that in the minds of the jurors the case of the defendant did not fall under either instruction, but did fall under instruction XII, supra, which is not questioned as being sound in law. The argument of the defendant assumes that the instruction XIII was worded as follows:

> "If from all of the evidence you are not satisfied to a moral certainty beyond a reasonable doubt that the defendant did not commit the alleged acts charged in the information, then it is your duty to return a verdict finding the defendant guilty."

Had it been so worded, it would have been erroneous for many reasons, and would have created a conflict. However, it will be noted at once that the instructions as given contained no conflicts.

[4] Finally, the defendant complains because the court gave instruction XVIII, supra. The complaint is not without merit. The instruction should not have been given. In some cases it might lead to confusion and perhaps to a greater degree of error. But in the instant case we cannot say that it did any harm. In the instruction immediately preceding, the court had instructed against

"passion, prejudice and sympathy," etc. Now if the jurors concluded that they and each of them were not imbued with passion, prejudice, or sympathy, certainly they were entitled to take the next step and conclude that although the rule as stated was sound it had no application to them. So concluding, the jurors might with all propriety "ignore the instruction" and proceed to deliberate on the matters of import that were in truth and in fact before them. Be this as it may, there is nothing in the entire record on which we can base a conclusion that the defendant was in the least prejudiced by the instruction as given.

We think the judgment and order should be affirmed. It is so ordered.

We concur: KOFORD, P. J.; NOURSE, J.

94 Cal. App. 341

PEOPLE v. PASSINTINO. (Cr. 1487.)★

District Court of Appeal, First District, Division 1, California. Oct. 16, 1928.

Rehearing Denied Nov. 15, 1928. Hearing Denied by Supreme Court Dec. 13, 1928.

1. Intoxicating liquors ⊂⇒236(19)—Conviction of possession of still held supported by the evidence.

Evidence on prosecution for possession of still used in manufacture of intoxicating liquor *held* to support conviction, notwithstanding defendant's claim of lease to another.

2. Criminal law ⊂⇒720½—Prosecuting attorney's statement, in argument, that he would not ask for conviction if he did not believe defendant guilty, held within proper limits and not prejudicial.

Prosecuting attorney's statement that, if he did not believe defendant guilty, he would not stand before the jury and ask for a conviction, made in the course of argument to the jury, and in reply to a suggestion that the prosecution had some connection with the dry issue, and after he had denied such connection, was within the latitude in argument to which he was entitled under the circumstances, and was not prejudicial.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Frank Passintino was convicted of possession of a still, and he appeals. Affirmed.

J. B. Peckham, of San Jose, and Hugh L. Smith and Chas. J. Wiseman, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

CASHIN, J. The defendant was charged by an information filed in the superior court of Santa Clara county with a felony, to wit, that on January 24, 1928, he did willfully, unlawfully, and knowingly have in his possession and control a still and stilling device intended for use and used in the manufacture and production of intoxicating liquor for beverage purposes. A jury returned a verdict of conviction, and from a judgment entered thereon and an order denying a new trial the appeal was taken.

It is contended as grounds for reversal that the evidence was insufficient to support the verdict; that the verdict was against law; that the court erroneously instructed the jury; and that certain statements by the prosecuting attorney constituted prejudicial misconduct.

[1] The evidence showed that the defendant with his family occupied a dwelling situated on a 40-acre ranch the title to which stood in the name of defendant's wife; that in the rear of the dwelling distant about 60 feet was a barn, a part of which was used as a garage; that between 350 and 400 feet further to the rear was a shed or stillhouse in which was found the still in question. Between the garage and stillhouse wires were strung, by means of which a bell in the stillhouse could be rung, and it was also shown that electric wires used for lighting the stillhouse were connected with the dwelling mentioned. On the evening of defendant's arrest, which occurred at the dwelling, the officers found no fire burning under the still; but its contents, consisting of a mash of apricots and other ingredients, were hot, and from a pipe leading therefrom alcohol was dripping into a container. The officer testified that the clothing worn by the defendant at the time of his arrest bore the odor of the contents of the still, and defendant admitted at the trial that he knew that the still was being operated and that he had seen it in operation, and also that the electricity used for lighting the stillhouse was charged to him. He denied ownership or possession of the still, however, claiming that the premises with the exception of the dwelling house and the part of the barn used as a garage had been leased to one Ferrente, and that the latter or his agents were in possession of the stillhouse and its contents. Instruments purporting to show the interest of Ferrente to be as claimed were introduced in evidence, but the character of the testimony of the defendant and one Di Salvo as to the identity of the lessee and the circumstances under which the lease was executed were such that the jury might reasonably have believed the transaction to have been contrived to conceal the true facts and that the lessee named had no existence. The conclusions of the jury were fully supported by the evidence and should not be disturbed.

[2] The prosecuting attorney in the course of his argument to the jury stated, in substance, that if he did not believe the defendant to be guilty he would not stand before the jury and ask for a conviction. This state-

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⊂⇒For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

ment appears to have been made in reply to a suggestion by the defense that the prosecution had some connection with the dry issue. This the prosecuting officer denied, and in his argument made the remark to which defendant excepted. As stated by the trial court, counsel was under the circumstances entitled to some latitude in his argument, and we are of the opinion that the remark was not prejudicial.

It is further contended that the court in its instructions unduly emphasized certain evidence which bore most strongly against the defendant, and that its conduct in this respect materially prejudiced his rights. Defendant offered no instructions, and a reading of those given, by which the jury was fully advised as to the law of the case, shows no reasonable ground for complaint in the respect claimed by defendant. The record shows that the verdict was fully supported, and discloses no error which could fairly be said to have resulted in a miscarriage of justice.

The judgment and order are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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94 Cal. App. 330

HOBSON v. KING. (Civ. 6313.)

District Court of Appeal, First District, Division 2. California. Oct. 13, 1928.

Judgment ⚷587—Judgment for defendant in suit to set aside contract held not res judicata against right to recover on the contract (Code Civ. Proc. §§ 1908, 1911).

Judgment for defendant in suit to set aside for fraud contract, entered into by spouses to settle and adjust their property rights prior to obtaining divorce, in view of issues, and Code Civ. Proc. §§ 1908, 1911, declaring a judgment, as to matter directly adjudged, conclusive between the parties in subsequent action, and that that only is deemed to have been adjudged in former judgment which appears on its face to have been so adjudged, or which was actually and necessarily included therein, *held* not res judicata against right of plaintiff in subsequent action, to recover moneys due under the contract, as claimed by defendant, based on a claimed finding in prior suit that plaintiff had received articles exceeding in value what defendant was required to pay under the contract, and that therefore judgment was given for defendant in such suit.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Leona H. Hobson against Loui F. King. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Owen D. Richardson, of San Jose, for appellant.

Clarence M. Booth, of Los Angeles, for respondent.

BUCK, Presiding Justice pro tem. This is an action brought by the plaintiff to recover from the defendant the balance due upon a written contract for the payment of money in the sum of $3,500. The contract in question was entered into between the parties who were at that time husband and wife, for the purpose of settling and adjusting their property rights prior to the obtaining of a divorce. After the divorce was obtained, the plaintiff brought an action to rescind and set aside the contract in question upon the grounds of fraud and undue influence exercised by the defendant, and in such action also sought to have the court adjudicate the property rights of the parties. The court, adopting the advisory verdict of the jury, found that the contract in question was procured through the fraud and undue influence of the defendant, but further found in accordance with a separate defense of the defendant that "an interlocutory judgment of divorce was duly and regularly made, given and entered wherein and whereby it was adjudged that all property rights between the parties hereto had been settled."

Judgment was accordingly given in favor of the defendant and against the plaintiff. In the present action upon the contract it is alleged in the complaint that no part of the sum agreed to be paid under the contract except the sum of $1,300 has been paid, and the court so found. But the court further found that the action herein on the contract was barred by the judgment in the prior suit brought to set aside and to rescind the contract, and gave judgment for defendant, from which plaintiff appeals.

The rule of course is clear as laid down in sections 1908 and 1911 of our Code of Civil Procedure, that a judgment or order is, in respect to the matter directly adjudged, conclusive between the parties litigating for the same thing under the same title and in the same capacity; and—"that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

An examination of the judgment roll in the prior suit in equity fails to reveal that the parties therein litigated or sought to litigate anything except plaintiff's rights to have the contract rescinded on the grounds of defendant's alleged fraud and undue influence, so that the property rights between the parties could be adjudicated irrespective of such contract. Furthermore, it does not appear upon the face of the judgment in such prior suit that anything else was adjudged or that any matter pertaining to the present suit on the contract was "actually and necessarily included" in the judgment in the prior action in equity, or necessary thereto.

As stated by this court in a recent decision, Hutchison v. Reclamation Dist. No. 1619 et al., reported in volume 81 Cal. App. 427, 437, 254 P. 606, at page 610:

> "It is unnecessary to analyze the cases cited by respondent which support the general rule that a judgment is conclusive not only as to the subject-matter in controversy, but also as to every other matter that was or might have been litigated in the action. It is sufficient to say that this rule is not always applicable literally, but that: 'What is really meant by this expression is, that a judgment is conclusive upon the issues tendered by the plaintiff's complaint.' Concannon v. Smith, 134 Cal. 14, 18, 66 P. 40, 42; Brown v. Brown, 170 Cal. 1, 6, 147 P. 1168; Lang v. Lang, 182 Cal. 765, 768, 190 P. 181; Linforth v. Montgomery, 195 Cal. 49, 58, 231 P. 735. Thus, where a right has accrued subsequent to the former trial, and an issue was not tendered or determined in the former trial and was not necessary to a complete disposition of the issues tendered, it could not be said that the former judgment would, in every case, be conclusive as to that issue."

Also, as stated in Freeman on Judgments (5th Ed.) Vol. 2, par. 679, at page 1435:

> "More than one cause of action may grow out of the same contract. So also more than one may arise respecting the same piece of property. Hence, the identity of the contract or the property is not conclusive as to the identity of causes of action. Thus, the denial of relief in a suit in equity to rescind a contract for alleged fraudulent representations inducing it does not bar a subsequent action at law to recover the consideration paid, after a rescission for failure to perform the contract. Newhall v. Enterprise Min. Co., 205 Mass. 585, 91 N. E. 905, 137 Am. St. Rep. 461."

But in *this* court, and in the face of the foregoing, the sole and only contention of learned counsel for the respondent in support of his judgment is that:

> "The whole point of controversy in the previous action was the contract upon which the present suit was based, and which the court in the previous case found has been fully complied with by respondent," and "the court in the previous case found that appellant had received from respondent money and furniture exceeding in value the amount required to be paid to appellant by respondent under the contract, and therefore gave judgment in favor of respondent."

But, as already indicated, in the prior action the only reference to property would be for the purpose of enabling the court, in the event the contract was set aside, to proceed to make a proper division of the separate and community property of the parties. And in this connection it was alleged in the complaint in the prior action that—

> "At the time of the execution of said purported separation agreement, the community property of this plaintiff and said defendant, Loui F. King, consisted of * * * also certain household furniture which was and still is of the value of about three thousand ($3,000) dollars, and also silverware and glassware which was and still is of the value of about two thousand ($2,000) dollars. * * *"

Answering that particular allegation, the defendant in his answer—

> "denies that the household furniture of the plaintiff and Loui F. King was community property, and alleges that the same was separate property of Loui F. King; and denies that said household furniture was of the value of $3,000 or any other sum, except as hereinafter stated, and denies that said silverware or glassware or any portion thereof was community property, or that its value was $2,000 or any other sum except as hereinafter stated, and in that behalf this defendant alleges that furniture, silverware and glassware was the separate property of this defendant, and was of the value of $4,000 and no more."

And on the foregoing subject-matter of furniture, etc., the court made the following and only findings:

> "That the furniture, silverware and glassware, including the furniture received and accepted by the plaintiff, was and now is of the value of $2,500, and all said furniture, silverware and glassware now in the possession of the defendant was and now is his separate property, except a certain lot of silverware of the value of $285 which was community property."

And, as a separate attempted defense to the prior suit in equity to set aside the contract, the defendant further alleged in his answer:

> "That subsequent to the execution of the written agreement mentioned and set forth in plaintiff's complaint, plaintiff, without the consent of defendant, obtained possession of a large part of the furniture, silverware and glassware mentioned in plaintiff's complaint and converted the same to her own use. That said property so converted was and is of the value of $2,500.
>
> "That defendant is informed and believes, and therefore alleges that since the execution of said agreement plaintiff has had and received, to and for the use of defendant the sum of $2,500, and no part of said sum has been repaid to defendant, and the whole thereof is now due, owing, payable and unpaid from plaintiff to defendant."

And, on the above matter covered by the separate defense, the court made the following and only findings:

> "Regarding the separate defense set forth in the answer of the defendant, the court finds that it is not true that subsequent to the execution of the written agreement mentioned and set forth in plaintiff's complaint, plaintiff, without the consent of the defendant, or otherwise or at all, has had and received, or had or received, to and/or for the use of defendant the sum of $2,500 or any sum."

Furthermore the suit in equity was begun prior to March 6, 1922, and at that time about

$2,000 under the contract was not yet payable.

From all of the foregoing it is therefore evident that in the suit in equity the court neither made nor expressly or impliedly attempted to make any finding as claimed by respondent that:

> "The contract upon which the present suit is based * * * had been fully complied with by respondent."

Nor does the above record bear out the contention that:

> "The court in the previous case found that appellant had received from respondent money and furniture exceeding in value the amount required to be paid to appellant by respondent under the contract and *therefore* gave judgment in favor of respondent."

And furthermore there was no proper issue made upon which any such finding could be based.

It appearing from the record on appeal that, in defendant's answer, the execution of the contract sued on is admitted, and it further appearing that the court specifically found that "no part of the sum agreed to be paid by defendant to plaintiff under the terms of said written agreement has been paid, save and except the sum of one thousand three hundred ($1,300) dollars, which is the aggregate amount of payments provided for in said written agreement up to and including the 10th day of August, 1921," it is ordered that the judgment be reversed, and that the trial court enter judgment in favor of plaintiff and against defendant in the sum of $2,200 with interest on the monthly installments of $50 per month, said interest to be computed from the due date of each unpaid installment commencing with September 10, 1921, and costs.

We concur: NOURSE, J.; STURTEVANT, J.

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94 Cal. App. 335

DA ROCHA v. CORSE. (Civ. 6201.)★

District Court of Appeal, First District, Division 1, California. Oct. 15, 1928.

Rehearing Denied Nov. 14, 1928.

1. Appeal and error 🔑1011(1)—Trial court's determination of fact issue about which there was apparent conflict is binding on appellate court.

Appellate court is bound by trial court's determination of issue of fact in case about which there was an apparent conflict.

2. Evidence 🔑397(1)—Contract cannot be varied by evidence of what one of parties supposed it to mean.

The plain terms of a contract cannot be varied by evidence of what one of parties supposed it to mean.

3. Evidence 🔑457—Under contract calling for broken white bottle glass, buyer cannot show that broken white glass bottles were intended because previous sales had been of latter commodity.

Where contract for sale called for broken white bottle glass, *held* that, there being no claim of fraud or mistake, buyer could not show that, because in several sales prior to one in question goods were described as broken white glass bottles, contract in question was intended to cover broken white glass bottles, since it would be in effect asserting in written contract term not found therein and contradicting unambiguous terms thereof.

4. Sales 🔑87(3)—Breach of contract for sale of broken white bottle glass on theory that broken white glass bottles should have been delivered held not shown.

Breach by seller of contract for sale of broken white bottle glass *held* not shown by contention of buyer that broken white glass bottles should have been delivered, since, if there is no difference between two, delivery of either would satisfy contract, and, if there is a recognized trade difference, terms of contract prevail, and delivery of broken white bottle glass satisfied contract.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Action for breach of contract by J. M. Da Rocha, an individual doing business under the name of J. M. Da Rocha & Co., against G. H. Corse, Jr., an individual doing business under the name of G. H. Corse, Jr. & Co. From the portion of the judgment in favor of plaintiff, defendant appeals. Reversed.

Resleure & Light, of San Francisco, for appellant.

F. Eldred Boland and Knight, Boland & Christin, all of San Francisco, for respondent.

PARKER, Justice pro tem. Plaintiff brought his action in two counts, seeking damages alleged to have been sustained by him from defendant's breach of contract. Plaintiff recovered on the first count, and judgment was for defendant on count No. 2.

Defendant appeals from the judgment in favor of plaintiff on count 1, and plaintiff makes no appeal from that part of the judgment adverse to him. Therefore throughout we will deal exclusively with the cause of action involved in this appeal; namely, count No. 1.

The complaint alleges that in December, 1924, plaintiff and defendant entered into a contract whereby defendant agreed to sell to plaintiff and plaintiff agreed to buy from defendant 100 tons broken white glass bottles at $19 per ton, cost and freight delivered at Hongkong; that prior to the delivery of said merchandise plaintiff paid to defendant the sum of $1,900, and, in addition thereto, paid freight and insurance to Hongkong from San Francisco; that defendant delivered to plain-

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★Rehearing denied.

tiff certain broken glass bottles of an inferior quality, in that the same were a mixture of white bottle glass as distinguished from broken white glass bottles, and white glass residue, with a percentage of powdered glass, to the damage of plaintiff in the sum of $420.76. The answer of defendant denied specifically the allegations of the complaint.

The court below found the allegations of the complaint to be true, and judgment was awarded plaintiff for the full amount prayed.

On this appeal the appellant presents two principal grounds for a reversal: First, it is his claim that the evidence is uncontradicted that he fully complied with his contract; second, even if it can be determined that there was a breach on his part, nevertheless plaintiff has not shown wherein any damage, actual or constructive, followed.

It appears that in December, 1923, the business relations between the parties commenced. There is no evidence as to what, if any, negotiations preceded the first sales, or whether those sales occurred in the nature of an ordinary "over the counter" transaction without written or other contract than the generally implied contract attached to all sales. From December 10, 1923, to and including October 4, 1924, defendant made eight shipments of merchandise to plaintiff, all of which were apparently satisfactory; at least no complaint was made concerning the same. In the invoices accompanying these shipments, we find in six instances the goods described as "broken white glass bottles," and in the other two the description is "broken white bottle glass." Practically the whole contention here is that plaintiff ordered and paid for broken white glass bottles and received broken white bottle glass; that is, in so far as the claim of damages here made is concerned. By way of explanation, it may be here noted that the term "broken white glass bottles" means just what the words indicate; in other words, white glass that has been blown or manufactured into bottles and broken up. The term "broken white bottle glass" means white glass that has not been blown into bottles. The material in either case is exactly the same, of the same chemical composition, and each possessing the same qualities, chemically and otherwise.

The only contract between the parties appears from certain writings as evidenced by letters and cablegrams. On October 7, 1924, appellant offered to furnish respondent certain quantities of *broken white bottle glass*. After certain bargaining as to price, the respondent on December 4, 1924, cabled appellant as follows:

> "We accept $19.30 50 short tons *broken white bottle glass* Feby. clearance, 50 tons March clearance."

It will be seen from the above that the contract was to buy and sell broken white bottle glass.

The court below stated that the only question before the court was whether the merchandise to be delivered should have been broken bottles or bottle glass, and this theory of the issues was affirmed by all counsel.

[1] The theory of respondent here advanced is that, irrespective of the written contract, the buyer respondent had a right to rely upon the previous course of dealing, and that, notwithstanding the use of the term "broken bottle glass," he had the legal right to demand broken glass bottles as had been theretofore shipped. There is nothing before us, nor was there anything presented in the court below, indicating the nature of the contract or the order or agreement under which the prior shipments had been made. If it is true that the commodities named are each of a distinct trade class, it must be assumed that those dealing therein knew the classification. If, on the other hand, the terms were used interchangeably, the difference would be one of quality only, and any representations as to the quality would be necessarily a matter of contract.

Respondent offered evidence to show that in the trade there is a recognized distinction between broken glass bottles and broken bottle glass, while appellant sought to show that both terms referred to one and the same thing. Accepting this as an issue in the case, we are bound by the trial court's determination thereof; a conflict being apparent. Therefore we accept as a fact the distinction existing, and will treat the commodities as separate as though reference were being made to coal and ice.

From this standpoint it would result in an absurdity if one could argue that he had received seven or eight shipments of coal, and that thereafter upon a contract specifying ice he ought to again receive coal. The respondent further showed that broken bottle glass, conceding all that respondent claims, was not a worthless article or a thing without a commercial use and value. His evidence in this respect showed that it differed from broken glass bottles only in saleability, in that the Chinese, the chief users thereof, were not equipped to use it as readily as the broken bottles, and for that reason there was a price differential of $4 per ton in Hongkong. This condition was known for many years, according to respondent's contention.

With all of these facts, respondent nevertheless contracted for and received broken bottle glass, an inferior article of distinct grade and classification. His contention here amounts to no more than a claim then that his contract must have included a warranty separate and distinct from the written provisions thereof and resting upon prior dealings or upon an assumption. Such a warranty cannot be read into the contract that is before us. It might be that, if it had been shown that the term "white bottle glass" had by a general custom and usage been understood as meaning broken glass bottles, the evidence of prior shipments would be material in support of the proof of custom. But the mere fact that it happened that broken bottles had been previously shipped stands here alone. For aught that appears in the record before us, the price may have been different and the order might have specifically referred to broken white bottles. It seems quite clear that, if plaintiff was familiar with the grades and classification, he should have specified the same in his contract. There is no question of fraud, mistake, or misrepresentation involved here; the issue is solely on the breach of contract, with the damages alleged to have ensued.

[2, 3] As indicated, there is no claim that broken bottle glass meant or was understood in the trade to mean broken glass bottles, and in fact all of the case of plaintiff is to the effect that the two were in no wise identical. The plain terms of a contract cannot be varied by evidence of what one of the parties supposed it to mean. Estate of Gurnsey, 177 Cal. 211, 170 P. 402. It would be clearly beyond any recognized principle of law, in the absence of a claim of fraud or mistake, to permit a buyer to show that, because in prior dealings with the seller he had purchased certain articles, a contract calling for an article of different class or grade was intended to describe the commodity originally purchased. It would in effect be inserting in the written contract a term not found therein and varying and contradicting the unambiguous terms thereof. United Iron Works v. Outer Harbor Co., 168 Cal. 81, 141 P. 917. See, also, Germain Fruit Co. v. Armsby, 153 Cal. 585, 96 P. 319; Kullman, Salz & Co. v. Sugar Co., 153 Cal. 725, 96 P. 369. The doctrine of the cited cases is affirmed and approved in the more recent case of Nimmo v. Fitzgerald (Cal. Sup.) 261 P. 1015.

[4] Summing up, we find respondent in this situation: If there is no difference between broken white glass bottles and broken white bottle glass, there was no breach of contract if he received either. If there is a recognized trade difference, then the terms of the contract prevail, and the contract is satisfied by the delivery of broken bottle glass. We conclude the contract was not breached.

Finally, while not necessary to go further, we find the evidence of damage intrinsically weak. The only testimony thereon was that of plaintiff, who placed the differential in Hongkong at $4 per ton, predicating his estimate upon the fact that his buyers demanded a refund in that amount—incidentally this being at a time apparently after the American holidays, when broken bottles were more plentiful, at least at a time, according to the evidence, when the broken glass market was glutted.

Judgment reversed.

We concur: TYLER, P. J.; CASHIN, J.

94 Cal. App. 327

STENZEL v. KRONICK. (Civ. 6337.)

District Court of Appeal, First District, Division 2, California. Oct. 13, 1928.

1. Brokers 🔑8(3)—Evidence in action for fraudulently inducing exchange of realty for note and mortgage held to support finding that defendant was plaintiff's agent in transaction.

In action for damages for fraudulently inducing plaintiff to convey realty in exchange for note and mortgage on land worth much less than amount of note, evidence *held* to support finding that defendant was plaintiff's agent in transaction.

2. Fraud 🔑49—Defenses, not pleaded, that plaintiff waived fraud and lost rights by laches, are unavailable.

Defenses that plaintiff waived fraud by his actions and lost his rights by laches are not available in action for damages, where not pleaded.

3. Fraud 🔑34—Award of damages for fraudulently inducing plaintiff to convey realty for note and mortgage before foreclosure of mortgage held not error (Code Civ. Proc. § 726).

In action for damages for fraudulently inducing plaintiff to convey realty in exchange for note and mortgage on land worth much less than amount of note, court did not err in awarding damages before foreclosure of mortgage, where it was not claimed that plaintiff did not get full value on sale of note and mortgage; Code Civ. Proc. § 726, requiring that action on note secured on any property be exhausted against security, relating only to action for recovery of debt or enforcement of right secured by mortgage.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by A. E. Stenzel against Harry S. Kronick. Judgment for plaintiff, and defendant appeals. Affirmed.

Rose & McTavish, of Los Angeles (H. E. Forster, of Los Angeles, of counsel), for appellant.

John C. Packard, of Los Angeles, for respondent.

STROTHER, Justice pro tem. This is an appeal from a judgment in favor of plaintiff for damages claimed to have been suffered as the result of defendant fraudulently inducing plaintiff to convey real property in exchange for a mortgage.

[1] Plaintiff was the owner of real property in Los Angeles county which he wished to sell in order to supply an urgent need for money. In a conversation with the defendant, plaintiff told him of his necessity, and defendant asked what price he would take for the property. Plaintiff named a price, net to himself. A few days later defendant told plaintiff that he had a cash buyer for the property, but that, in order to turn it, plaintiff would have to increase a mortgage on the property to about half the price. Defendant negotiated and procured a loan for plaintiff.

Thereafter defendant told plaintiff that the trade he had in mind was the transfer to plaintiff of a note for $8,000 secured by mortgage on land in San Bernardino county; that the maker of the note was then in San Francisco raising the money to pay it off, and it would be practically a cash transaction.

Plaintiff, at defendant's instance, gave escrow instructions to a bank to deliver the deed of his property upon receiving in exchange, for him, the note and mortgage and assignment of the same. Plaintiff executed his deed to defendant as grantee; the latter having represented to him that the real party in interest did not wish to take the title to the property at that time.

This transaction was consummated in the latter part of April, 1924, and the original complaint in this action was filed August 13, 1924. Plaintiff's subsequent investigations disclosed that there was no prospect of the mortgage note being paid and that the property securing the mortgage was worth about $2,500. He made a sale of the note and mortgage after the commencement of the action, and realized about $2,000 net.

This case was tried without a jury, and findings of fact were made by the court establishing the truth of all of the allegations of the complaint, and the conclusions of law drawn from the findings were in favor of the plaintiff, and judgment was rendered accordingly. In his opening brief, appellant states that:

> "The testimony being in open conflict on practically every material issue involved, appellant on this appeal concedes that unless the judgment is erroneous as a matter of law it cannot be disturbed in view of the conflicting nature of the testimony."

In view of this frank statement we are somewhat at a loss to know why this appeal was prosecuted, as all of appellant's assignments for reversal seem to be based on alleged defects in the evidence. The first assignment is that there is no evidence to support the finding that defendant was plaintiff's agent in the transaction. A consideration of the brief recital of facts appearing in evidence, given above, shows that the objection is without foundation.

[2] The second and third assignments are as follows:

> "The judgment is erroneous, as the plaintiff by his actions waived the fraud."
>
> "The judgment is erroneous, as the plaintiff's rights were lost by laches."

Neither of these matters is set up as a defense by appellant, or was presented to the trial court, and the court made no findings as to either of them. In the absence of pleadings, such defenses are not available. Wienke v. Smith, 179 Cal. 220, 176 P. 42; Larkin v. Mullen, 128 Cal. 449, 60 P. 1091. Furthermore, the defenses are not supported by the evidence.

[3] The fourth and last assignment is that the court "erred in awarding damages prior to foreclosure of the mortgage." It is not claimed that the plaintiff did not get full value on his sale of the note and mortgage, and the only argument made in support of the contention is that "the Code provision of this state directs that an action founded on any note secured on any property must be exhausted against the security itself." Presumably this is a reference to section 726 of the Code of Civil Procedure, relating to actions for recovery of a debt or enforcement of a right secured by a mortgage. As this is not such an action, the Code provision has no application.

The judgment should be affirmed, and it is so ordered.

We concur: KOFORD, P. J.; NOURSE, J.

MULLER v. COAST COUNTIES GAS & ELECTRIC CO. (Civ. 6385.)★

District Court of Appeal, First District, Division 1, California. Oct. 22, 1928.

Rehearing Denied Nov. 21, 1928. Hearing Granted by Supreme Court Dec. 20, 1928.

1. Corporations ⇨252—Creditor's remedies against corporation need not be exhausted before action is commenced against stockholders (Const. art. 12, § 3; Civ. Code, § 322).

It is not necessary that creditor's remedies against corporation be exhausted before action is commenced against stockholders, under Const. art. 12, § 3, and Civ. Code, § 322.

2. Corporations ⇨252—Separate actions may be instituted independently against stockholders and corporation (Const. art. 12, § 3; Civ. Code, § 322).

Separate actions may be instituted independently against corporation and stockholders under Const. art. 12, § 3, and Civ. Code, § 322, since liability of each is original, direct, and primary.

3. Abatement and revival ⇨9—Plea of another action pending cannot be made in later suit on stockholder's liability because of pending of earlier action against corporation (Const. art. 12, § 3; Civ. Code, § 322).

Plea of another action pending cannot be made in a later suit on stockholder's liability under Const. art. 12, § 3, and Civ. Code, § 322, on account of pending of an earlier action against corporation, since parties are not the same in the two proceedings.

4. Corporations ⇨253—Stockholder is not prevented by prior judgment against corporation from defending suit on stockholder's liability on merits (Const. art. 12, § 3; Civ. Code, § 322).

In suit on stockholder's liability under Const. art. 12, § 3, and Civ. Code, § 322, stockholder is not prevented by prior judgment against corporation from defending on merits and proving that corporation does not owe debt asserted.

5. Torts ⇨22—Plaintiff may sue all tort-feasors together, or may sue them separately.

Plaintiff may sue all tort-feasors together, or may sue each or less than all separately.

6. Corporations ⇨253—Judgment against corporation is not res judicata as to liability of stockholder and does not constitute an estoppel (Const. art. 12, § 3; Civ. Code, § 322).

Judgment against corporation is not res judicata as to liability of stockholder under Const. art. 12, § 3, and Civ. Code, § 322, and does not constitute an estoppel, since neither parties nor law imposing liability is the same in the two actions.

7. Corporations ⇨253—Liability of corporation is open question in creditor's suit against stockholder so long as there has been no satisfaction of first judgment against corporation (Const. art. 12, § 3; Civ. Code, § 322).

Liability of corporation is an open question in creditor's suit against stockholder under Const. art. 12, § 3, and Civ. Code, § 322, so long as there has been no satisfaction of first judgment against corporation itself; "liability" and "judgment" being two different things.

8. Corporations ⇨253—Liability of stockholders in an action against them for personal injuries sustained in street railway accident is not limited to amount of unsatisfied judgment recovered in former action against street railway corporation (Const. art. 12, § 3; Civ. Code, § 322).

Liability of stockholders of corporation under Const. art. 12, § 3, and Civ. Code, § 322, in an action against them for personal injuries sustained through negligent operation of street railway car, is not limited to amount of unsatisfied judgment recovered in former action against street railway corporation.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action for damages for personal injuries by Mildred Muller against the Coast Counties Gas & Electric Company. From the judgment, plaintiff appeals. Reversed and remanded.

Ford, Johnson & Bourquin, of San Francisco, for appellant.

Leo. H. Susman, Thos. J. Straub, and Robert Duncan, all of San Francisco, for respondent.

CAMPBELL, Justice pro tem. Appellant, Mildred Muller, on July 21, 1921, sustained a personal injury through the negligent operation of a street railway car in the city of Santa Cruz. This car at the time of the accident was operated by a corporation known as Union Traction Company. As a result of the accident appellant's spinal cord was completely severed in the lumbar region, resulting in complete permanent paralysis of all the muscles and organs of the body below the point of severance.

Following the injury so sustained appellant brought suit against Union Traction Company for damages, and recovered judgment in the sum of $38,000. From this judgment defendant Union Traction Company appealed. Following such judgment plaintiff commenced the present action against Coast Counties Gas & Electric Company, which was and is the sole stockholder of Union Traction Company. The latter case was brought for trial before a jury, and resulted in a verdict in favor of plaintiff and against Coast Counties Gas & Electric Company in the sum of $118,000. Entry of judgment following the return of this verdict was stayed by the court. While this stay was effective, Union Traction Company dismissed the appeal in the prior action, and the judgment therein became final. Union Traction Company then made a written offer to pay the plaintiff the then amount owing on the first judgment, which amounted at the time to

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★Rehearing denied. Hearing granted by Supreme Court. Dismissed per stipulation and remittitur issued Dec. 21, 1928.

$44,275. Plaintiff refused the tender. The trial court directed that judgment be entered for the sum of $44,275, although its findings and order found that plaintiff sustained damage in the sum of $118,000. From this judgment, and particularly from the part thereof denying plaintiff judgment in the sum of $118,000 and limiting the liability of defendant to the sum of $44,275, plaintiff has appealed.

[1-4] The appeal presents a single question of law, viz.: May a stockholder of a corporation in an action for tort be held to a greater liability than that found due from the corporation in a former action brought by the same plaintiff, which judgment in the former action remained unsatisfied; or, as stated by appellant, did the trial court err "in concluding that it was compelled to reduce plaintiff's recovery in the present action from $118,000 to an amount not in excess of the judgment against the corporation in the earlier action"?

The court in its findings and order specifically finds that the plaintiff sustained damage in the sum of $118,000; that the sum of $118,000 was a reasonable amount to be awarded plaintiff for the injury sustained by her, and specifically found and so states that the sole reason for directing the entry of the judgment in the sum of $44,275 instead of $118,000 was that the liability of the stockholder could not exceed the amount of the prior adjudication against the corporation.

The liability of stockholders for the debts of the corporation did not exist at common law, and is a creation of the statutes and constitutional provisions. Bank of San Luis Obispo v. Pacific Coast S. S. Co., 103 Cal. 594, 37 P. 499. In California the stockholder's liability is regulated by article 12, § 3, of the state Constitution and section 322 of the Civil Code. Article 12, § 3, so far as relevant to the present issue, reads:

> "Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association. * * *"

Section 322 of the Civil Code provides in part:

> "Each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation. Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith."

The California scheme of stockholder's liability differs radically from that of practically all other states. Authorities from other states are therefore of no avail in determining questions arising under the California system. Ellsworth v. Bradford, 186 Cal. 316, 199 P. 335; Buttner v. Adams (C. C. A. 9th) 236 F. 105. In most of the other states the liability is secondary. The stockholder standing in the position of a surety or guarantor, a judgment must be obtained against the corporation and execution returned before the stockholder can be sued. In California, on the contrary, the Constitution makes the liability of the stockholder direct and primary, and the Civil Code provides that the stockholder may be sued upon his liability without joining the corporation as a party. It is not necessary that the creditor's remedies against the corporation be exhausted before action is commenced against the stockholders. Morrow v. Superior Court, 64 Cal. 383, 1 P. 354; Dolbear v. Foreign Mines Dev. Co. (C. C. A. 9th) 196 F. 646. And this stockholder's liability in California extends to torts. 6 Cal. Jur. 991; Damiano v. Bunting, 40 Cal. App. 566, 181 P. 232; Lininger v. Botsford, 32 Cal. App. 386, 163 P. 63. It is settled in this state that separate actions may be instituted independently against the corporation and stockholders, as the liability of each is original, direct and primary. Mokelumne Hill v. Woodbury, 14 Cal. 265; Faymonville v. McCullough, 59 Cal. 285; Sonoma Valley Bank v. Hill, 59 Cal. 107; Mitchell v. Beckman, 64 Cal. 117, 28 P. 110; Morrow v. Superior Court, 64 Cal. 383, 1 P. 354; Hyman v. Coleman, 82 Cal. 650, 23 P. 62, 16 Am. St. Rep. 178; Eva v. Andersen, 166 Cal. 420, 137 P. 16; Aronson v. Pearson, 199 Cal. 286, 249 P. 188, 51 A. L. R. 1380; Niles State Bank v. Jennings, 22 Cal. App. 66, 133 P. 329; Ellsworth v. Bradford, supra. It is also the settled rule that the plea of another action pending cannot be made in a later suit on a stockholder's liability on account of the pending of an earlier action against the corporation, as the parties are not the same in the two proceedings. Each may proceed to trial and judgment. Herman v. Hecht, 116 Cal. 553, 48 P. 611; Union Trust Co. v. Journeay, 29 Cal. App. 502, 156 P. 999; Bridges v. Fisk, 53 Cal. App. 117, 200 P. 71; Chase v. Swain, 9 Cal. 130. There is no merger of the claim in the first judgment, so as to bar a judgment in the second suit, nor does the judgment constitute an estoppel. Ellsworth v. Bradford; Bridges v. Fisk, supra. A stockholder is not prevented by a prior judgment against the corporation from defending on the merits and proving that the corporation does not owe the debt asserted. 6 Cal. Jur. 1031; Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626;

Partridge v. Butler, 113 Cal. 326, 45 P. 678; Ellsworth v. Bradford; Bridges v. Fisk, supra. This conclusion follows naturally from the principle of constitutional law that every defendant is entitled to his day in court. Where the stockholder is not a party to the proceeding against the corporation, he is not bound by the judgment, but is still entitled to defend upon the merits of the claim asserted against him. A judgment binds only parties and privies, and a stockholder is not in privity with the corporation for this purpose. His liability is not derivative but direct. Since the judgment against the corporation does not conclusively fix the liability of the stockholders to pay anything, it would seem that neither does it fix the maximum of the liability. If the stockholder can claim that there is no indebtedness, the creditor can enforce the actual original indebtedness, whatever it may be, under the principle of mutuality. The liability of the stockholder is either the original debt to be fixed by appropriate proof in the suit against him to a sum certain, or it is that as provided and liquidated in the judgment against the corporation. If the former, and it has been so held (Partridge v. Butler, 113 Cal. 326, 45 P. 678; Bridges v. Fisk, 53 Cal. App. 117, 200 P. 71; Damiano v. Bunting, 40 Cal. App. 566, 181 P. 232; Ellsworth v. Bradford, supra; 6 Cal. Jur. 1018, 1019), the judgment against the corporation does not conclude either party. There can, of course, be but one payment; hence satisfaction clearly destroys the other judgment (Butler v. Ashworth, 110 Cal. 614, 618, 43 P. 4, 386; Young v. Rosenbaum, 39 Cal. 646, 654), but until the debt is paid, there is no such other extinction or even limitation by one proceeding upon the other.

[5] In Buttner v. Adams, supra, the court holds that while the stockholders' liability is contractual and they are not tort-feasors, they are liable as if they were. In Ellsworth v. Bradford, supra, the respective liabilities of stockholders are said to be comparable to the liabilities of partners, and it is settled that the liabilities of partners for torts are those of joint feasors. Rogers v. Ponet, 21 Cal. App. 577, 581, 132 P. 851; Murphy v. Coppieters, 136 Cal. 317, 320, 68 P. 970. A plaintiff may sue all the tort-feasors together, or may sue each or less than all separately. Grundel v. Union Iron Works, 127 Cal. 438, 59 P. 826, 47 L. R. A. 467, 78 Am. St. Rep. 75; Cole v. Roebling Co., 156 Cal. 443, 105 P. 255; Fowden v. Pacific Coast S. S. Co., 149 Cal. 151, 86 P. 178; Dawson v. Schloss, 93 Cal. 194, 29 P. 31. Separate judgments for different amounts may be obtained against each, and one judgment does not constitute a bar to a judgment against another joint tort-feasor until there has been satisfaction of one judgment. Cole v. Roebling; Grundel v. Union Iron Works, supra. It is further held that a claim for damages for a single tort against several tort-feasors is not merged in the judgment against one or more of them, but each judgment remains separate and independent until satisfactior (15 Cal. Jur. 170; Fisher v. L. A. Pac. Co., 21 Cal. App. 677, 132 P. 767; Cole v. Roebling, supra), and in Young v. Rosenbaum, 39 Cal. 646, the court says:

> "A judgment against the corporation does not extinguish or suspend the liability of the stockholders, and it clearly does not merge it."

[6] The only way in which two separate claims upon the same debt may be so brought into unity that a judgment upon one remaining unsatisfied could or would affect the other by way of bar, abatement or limitation as to the amount recoverable, would be by the application of one of the following doctrines: (1) Res adjudicata; (2) merger; (3) estoppel by judgment. The judgment against the corporation is not res adjudicata as to the liability of the stockholder, for the reason that neither the parties nor the law imposing the liability is the same in the two actions. This is so held in numerous cases already cited, as also is the doctrine of merger repudiated in the cases referred to, and estoppel by judgment is but another name for the application of the rule of res adjudicata and by virtue of the identical authorities does not apply. 15 Cal. Jur. 99.

The recent case of Ellsworth v. Bradford, supra, is the leading case in this state upon the question of stockholder's liability and the effect of a prior judgment against the corporation. The learned and painstaking opinion in that case sets at rest the position of the courts of California with respect to the relationship between the two classes of judgments. The nature of the stockholder's liability and the distinction between the California system and those of other states are fully discussed and the conclusion reached that the actions are independent of each other because they involve different parties, different liabilities, different statutes of limitation, and that the claim against the stockholder is enforceable independently of proceedings against the corporation, and further, in reiteration of the previously expressed opinions, holds that the action against the stockholders is always upon the original indebtedness, regardless of any judgment against the corporation, and that therefore a judgment against the corporation is not evidence conclusively fixing the liability of the stockholder. The three distinct viewpoints of the various jurisdictions are discussed and classified, and the middle course adopted, namely, that a prior judgment against the corporation is only prima facie evidence of liability subject to rebuttal. This being true, it follows that a higher verdict may be returned than the amount awarded in the first judgment, if the evidence warrants a higher verdict, or it might readily be that a verdict in favor of the defendant could be rendered.

In Ellsworth v. Bradford, supra, the New York case of Assets Realization Co. v. Howard, 70 Misc. Rep. 651, 127 N. Y. S. 798 (affirmed 211 N. Y. 430, 105 N. E. 680) is referred to as authority in support of the California rule, which case holds that while a judgment against the corporation undoubtedly binds the assets and property of the corporation, yet it does not bind the stockholders. That case is the only one from other jurisdictions involving substantially similar constitutional and statutory provisions which has been brought to our attention. In that case it appears that the New York Banking Act provided, like the California Constitution and statutes, that the liability of the stockholder was direct and primary. In 1892 the New York statute was amended to provide that no action should be brought against a stockholder until judgment had been entered against the bank and execution returned unsatisfied. There the court uses this language:

> "It is somewhat argued that the force of the foregoing authorities is destroyed by an amendment adopted in 1892. * * * Previous to this amendment it was provided that no action should be brought against a stockholder for any debt of the corporation until judgment therefor had been rendered against the corporation and an execution issued thereon had been returned unsatisfied in whole or in part. The amendment then provided: 'And the amount due on such execution shall be the amount recoverable, with costs against the stockholder.' It is asserted that this amendment is equivalent to saying that the judgment and execution shall be all the evidence that is necessary to fix the amount recoverable from the stockholder. That interpretation does not appeal to us. The section now containing said amendment is entitled 'Limitation of Stockholders' Liability.' It contains the requirement as limiting the stockholder's liability that a judgment must be recovered and execution issued before such liability attaches. Under these circumstances, I think that the meaning of the amendment was that the amount due on the execution thus required to be issued should be a limitation of liability and not proof of an indebtedness for which the stockholder is liable."

In California the statutory limitation limiting the stockholder's liability is absent from the statute, and, following the reasoning of the New York court as to the effect of the amendment, the amount in controversy under our statute is open to adjudication in the second suit against the stockholder in the same manner as is the question of liability.

Respondent urges that the judgment against the corporation is the debt of the corporation, and that therefore the judgment sets the upper limit to the corporate liability so far as appellant is concerned. The idea that the judgment is the debt is not expressly stated by respondent, but appears mostly through the fact that it uses the words "judgment" and "liability" interchangeably and that it refers to the judgment as the debt of the corporation. That the debt and the judgment are not one and the same is held in Hunt v. Ward, 99 Cal. 612, 613, 34 P. 335 (37 Am. St. Rep. 87) in which the court says:

> "The complaint bases the right to recover on the making of the note and the judgment against the corporation; but, as the liability of a stockholder is a separate and independent one, commencing with and dependent upon the original indebtedness, it is doubtful if the averments of the complaint in the case at bar are sufficient."

And in Bridges v. Fisk, 53 Cal. App. 117, 120, 200 P. 71, 73, we find this language:

> "The gist of appellant's objection to the complaint is that it does not state a cause of action upon the original indebtedness, but that, instead, it attempts to state a cause of action upon the judgment against the corporation. If the averments of the complaint justified any such criticism, then unquestionably that pleading would fall short of a statement of a cause of action on appellant's statutory liability as a stockholder; for the stockholder's liability under our statute is a separate and independent one, commencing with and dependent upon the original indebtedness."

That is to say, the stockholders can be held only for the original liability of the corporation, not for a judgment against it. Again, the liability exists before the payment, and a judgment may be taken against the stockholders without previous suit against the corporation. 6 Cal. Jur. 995; Favorite v. Superior Court, 181 Cal. 261, 184 P. 15, 8 A. L. R. 290; Knowles v. Sandercock, 107 Cal. 629, 40 P. 1047; Ellsworth v. Bradford, supra. In short, the judgment against the corporation is not the debt or liability for which the stockholders are responsible.

In support of its claim that the judgment sets the upper limit of the corporation's debt, respondent advances the argument that as the judgment limits the liability of the corporation it also limits the liability of the stockholders, and, furthermore, as the stockholders would be discharged by payment of the judgment, they cannot be held to a liability greater than the amount of the judgment.

We have already seen that the liability exists entirely independent of the judgment. It exists and may be measured whether there has been a judgment or not. This follows from the fact that the stockholder may be sued before the corporation. The debt exists without the judgment; its amount is determined by occurrences out of court, not by the judgment, where the question is not res adjudicata. Respondent is no doubt led to its conclusion by the fact that between plaintiff and the corporation neither one may question the correctness of the judgment. This does not mean that the judgment is necessarily correct, for as between the original parties it is none the less a bar by reason of its being erroneous. Curtis v. Upton, 175 Cal. 322, 331, 165 P. 935; Lamb v. Wahlenmaier, 144 Cal. 95, 77 P. 765, 103 Am. St. Rep. 66.

It is true that had the first judgment been paid, plaintiff would have been barred from bringing the second action. "The bar arises not from any particular form in which the action is brought, but arises from the fact that the party complainant has been compensated for his injury." Adams v. Southern Pacific Co. (Cal. Sup.) 266 P. 541.

[7, 8] The appeal presents a unique question so far as the adjudicated cases are concerned. Strangely, the question has never before been passed upon in this state; but, applying the well-settled principles of analogous cases, it is not difficult of solution. By way of recapitulation it may be said that the "liability" and the "judgment" are two different things. The stockholders can be held only on the original liability. The judgment against the corporation fixes the existence of this liability conclusively only as between the corporation and plaintiff. The liability of the corporation is an open question in the creditor's suit against the stockholder, the former judgment being merely prima facie evidence. It remains an open question as long as there has been no satisfaction of the first judgment. Consequently, the creditor may enforce his verdict against the stockholder, even though the jury found the original liability against the corporation in the action against the stockholder to be greater than the judgment against it showed.

It has long been settled that the same matter may be litigated twice. In short the rule that before satisfaction a creditor may recover different judgments against the corporation and the stockholders in this state is the natural and logical conclusion from well-settled rules of law.

Here the single question presented is whether the liability of the stockholders of a corporation in an action against them is limited to the amount recovered in a former action against the corporation. Whether the verdict is excessive or is supported by the evidence is not involved on this appeal.

The verdict having been reduced for the sole reason that the liability of the stockholder could not exceed the amount of the prior adjudication against the corporation, it follows that the judgment must be reversed and the cause remanded for proceedings in accordance with the views here expressed.

We concur: TYLER, P. J.; CASHIN, J.

94 Cal. App. 450

LOS ANGELES CITY HIGH SCHOOL DIST. OF LOS ANGELES COUNTY v. KENNARD et al. (Civ. 5955.)★

District Court of Appeal, Second District, Division 1, California. Oct. 24, 1928.

Rehearing Denied Nov. 23, 1928.

1. Appeal and error ⇨989—Appellate court only determines whether there is substantial evidence to support trial court's finding.

Appellate court will not weigh evidence, pass upon credibility of witnesses, nor substitute its judgment on these matters for that of trial court, even where there is no conflict in evidence and the inferences fairly deducible from facts and circumstances in evidence are such that different conclusions might reasonably be drawn therefrom; it being appellate court's duty to determine only whether there is substantial evidence to support finding.

2. Dedication ⇨45—Whether offer to dedicate easement for road purposes on property was revoked by erection of wire fence before acceptance of easement by city held for trial court.

Whether wire fence, built across premises after offer to dedicate an easement for road purposes thereon was made, which prevented ingress and egress upon the property, constituted a formal revocation of the offer of dedication before acceptance of the easement by the city, *held* for trial court in condemnation proceedings.

3. Dedication ⇨34—What constitutes reasonable time for acceptance of offer of dedication depends upon particular facts.

What constitutes reasonable time in which to make valid acceptance of offer of dedication depends upon the facts and circumstances of each particular case.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Condemnation proceedings by Los Angeles City High School District of Los Angeles County to secure for public use certain property, against the Clark & Sherman Land Company, Teresa Kennard, and John W. Maltman. From an interlocutory decree condemning the property, the last two named defendants appeal. Affirmed.

Hill, Morgan & Bledsoe and John W. Maltman, all of Los Angeles, for appellants.

Everett W. Mattoon, Co. Counsel, and Homer I. Mitchell, Deputy Co. Counsel, both of Los Angeles, for respondent.

CRAIG, Justice pro tem. In this action the school district, the plaintiff, obtained an interlocutory decree condemning for public use certain property, which it alleged was already subject to an easement for road purposes. It was the contention of the appellants and defendants on the trial that the property was not already subject to an easement for public purposes. But the trial court found against the defendants on this question and awarded damages on that basis.

On October 31, 1894, a map known as "Maltman's First Street Addition" was recorded by the owner in the county recorder's office, showing Park drive platted thereon. Park drive included the parcel of land in question. At that time the property was outside the city, but it was annexed on April 2, 1896.

On February 15, 1897, an ordinance was adopted by the city changing the name from Park drive to Juanita street. Again, on December 27, 1897, it changed the name to

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★Rehearing denied.

Juanita avenue. On December 30, 1899, the owner recognized the street under its new designation by conveying certain property, describing one of the boundaries as "the center line of Juanita avenue, formerly Park drive, as shown on the map" above described. And on October 7, 1901, the city passed an ordinance accepting generally all streets which had been theretofore offered to be dedicated in the city. Never at any time has the property actually been used as a street.

Appellants rely upon "five theories of defense," as follows: (1) That the offer of dedication was revoked before acceptance by the city; (2) that there never was a valid acceptance of the offer of dedication; (3) that, if accepted, the easement was impliedly abandoned; (4) that the award was too small if no easement existed; (5) that the award was too small if the easement existed.

[1] It is axiomatic that it is the province of the trial court to find questions of fact and of the appellate court to review errors of law. This court will not exercise the functions of a jury. While the question of the sufficiency of the evidence, as a matter of law, to support a finding may be presented to this court for review, its duty in that event is to determine whether or not there is some substantial evidence to support the finding. The court will not weigh the evidence, nor pass upon the credibility of the witnesses; and it will not substitute its judgment on these matters for that of the trial court. Even where there is no conflict in the evidence, if the inferences fairly deducible from the facts and circumstances in evidence are such that different conclusions might reasonably be drawn therefrom, the conclusion drawn by the trial court should not be disturbed. MacDermot v. Hayes, 175 Cal. 95, 170 P. 616.

[2] There was no formal revocation of the offer of dedication. Appellants rely upon certain acts of the owner which they claim indicate an intention to revoke the offer. It is the contention of appellants that a wire fence was built across the premises after the offer was made, which prevented ingress and egress upon the property. It is the contention of respondent that the wire fence was built prior to the offer of dedication for the purpose of keeping cattle on a large tract of land and without any thought of revoking the offer of dedication; and this is a reasonable inference from the evidence. While there is some evidence which indicates the owner's intention to revoke the offer, there are other facts and circumstances in evidence from which the inference may reasonably be drawn that he did not intend to revoke his offer.

[3] It is appellants' contention that there was no valid acceptance of the offer of dedication because it was not accepted within a reasonable time. But what is a reasonable time depends upon the facts and circumstances of each particular case. It is a question of fact for the determination of the trial court, and we would not be justified in reversing the finding of that court in this regard.

What has been said heretofore applies with equal force to appellants' contention that the easement, if accepted, was impliedly abandoned, and as to the amount of the award, either without or with the existence of an easement. There was substantial evidence to sustain the findings of the trial court on all the above matters.

Judgment affirmed.

We concur: HOUSER, Acting Presiding Justice; YORK, J.

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94 Cal. App. 349

BURKE v. MEYERSTEIN. (Civ. 6262.)★

District Court of Appeal, First District, Division 1, California. Oct. 18, 1928.

Rehearing Denied Nov. 17, 1928. Hearing Denied by Supreme Court Dec. 17, 1928.

1. Specific performance ⟹123—Finding in specific performance suit, that suit to reform contract was instituted and that findings made in such suit were attached and by reference made part thereof, was not finding that findings in first case were true.

In specific performance suit, court's findings, with reference to previous suit to reform contract, "that an action was instituted as therein stated; that the pleadings were therein stated; that the findings made by the court in said action are attached hereto, marked Exhibit A, and by this reference made a part hereof for all purposes"—*held* not in effect a finding that findings in first case were true.

2. Trial ⟹404(5)—Findings not necessary to judgment are not conclusive as to matters found.

Findings not necessary to the judgment or inferentially contrary thereto are not conclusive as to matters found.

3. Trial ⟹404(5)—Finding in suit for reformation that contract's terms were identical with those agreed upon by parties was conclusive on parties to action.

Finding in suit for reformation of land contract that its terms were identical with those which had been agreed upon by parties was conclusive as to issue which it determined, and was binding on both parties to action.

4. Judgment ⟹948(1)—Plaintiff need not plead finding in reformation suit as estoppel in specific performance suit, where defendant's defense and evidence disclosed adjudication of such issue.

In suit for specific performance of land contract, it was unnecessary for plaintiff to plead finding in previous suit to reform contract to effect that terms of contract were identical with those which parties agreed upon as an estoppel, where defendant's defense and evidence offered in its support disclosed adjudication of such issue in previous case.

★Rehearing denied. Hearing denied by Supreme Court.

5. Contracts 🔑167—When law affects validity, etc., of contract, it enters into and forms part of contract.

When law affects validity, construction, discharge, or enforcement of contract, it enters into contract and forms part of it, measuring obligations of one party and rights acquired by the other, since parties are presumed to have contracted with reference to laws in existence at time contract was made.

6. Vendor and purchaser 🔑172—Where land contract did not provide otherwise, interest on deferred payments was allowed only from time payments fell due (Civ. Code, § 1917).

Where contract for sale of land did not provide otherwise, interest on deferred payments could be allowed only from time payments fell due, under Civ. Code, § 1917.

7. Vendor and purchaser 🔑172—Land contract having paragraph relating to interest payments deleted, but having other paragraphs containing references to interest, did not provide for interest on deferred payments.

Contract for sale of real estate having paragraph providing for interest deleted, but containing other paragraphs containing references to interest payments, *held* not to provide for interest on deferred payments, but it was reasonable to assume that in absence of express provision for payment of interest on deferred installments, delinquent installments were contemplated.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action for specific performance by Frank J. Burke against Alfred L. Meyerstein. From the judgment, defendant appeals. Affirmed.

Joseph C. Meyerstein, of San Francisco, for appellant.

John D. Harloe, of San Francisco, for respondent.

CASHIN, J. The parties to the above action entered into a written contract on August 30, 1916, by the terms of which the defendant agreed to sell and the plaintiff to buy certain real property. The action was brought by the plaintiff to specifically enforce the contract, and from the judgment entered therein the defendant appealed.

The latter claimed that his assent to the contract was given under the influence of mistake and misapprehension. It is urged as grounds for reversal that, in view of the evidence and the findings respecting the mistake alleged, the court erred in granting specific performance of the contract, as well as in its conclusion that under the contract as executed no interest was chargeable upon deferred installments of the purchase price.

The court found that the contract was prepared by defendant's secretary, who deleted from a printed form of contract a clause providing for interest on unpaid installments of the principal; that in preparing the contract the secretary acted under the direction of defendant's agent, who had negotiated the sale on behalf of the defendant; that the contract so prepared was in accordance with the actual terms agreed upon between the agent and the plaintiff, it having been expressly agreed between them that no interest should be charged upon deferred payments; that after the contract was prepared the defendant signed the same without reading it or observing that the printed clause providing for interest on deferred payments had been deleted; and that the failure was due to defendant's negligence and not to any act of the plaintiff. The court also found that plaintiff, in reliance upon the contract and within the consent of the defendant, took possession of the property and has punctually made the payments as provided, and, further, that such occupancy was advantageous to defendant in furtherance of the latter's plan to sell neighboring lots, and one of the inducements to the remission of interest on the deferred payments.

[1] Some time before the present action was commenced an action, entitled, "Alfred L. Meyerstein v. Frank J. Burke," was brought in the superior court in and for the city and county of San Francisco to reform the contract in the above particular. The court made certain findings therein and entered its judgment, denying the relief asked. [See 193 Cal. 105, 222 P. 810.] In the present action the defendant set up as special defenses by way of estoppel portions of the pleadings, together with certain of the above findings, and in the course of the trial introduced in evidence the judgment roll in that action. With respect to these findings the court found as follows:

> "That an action was instituted as therein stated; that the pleadings were as therein stated; that the findings made by the court in said action are attached hereto, marked 'Exhibit A,' and by this reference made a part hereof for all purposes."

Plaintiff contends that by the above finding the court in effect found that the findings in the first case were true. We do not so construe the findings, it being clear that the court found only that the findings referred to and attached were those filed in the first action.

[2-4] The findings referred to were in effect that the secretary employed by Meyerstein negligently deleted the provision in the printed form of contract for the payment of interest, and that Meyerstein at the time he signed the contract supposed that it contained the deleted provision. It was also found, however, that the writing as executed expressed and was identical with

the actual agreement between the parties and that Burke understood that the deleted portion should not be included.

Defendant contends that the above findings constituted an affirmative adjudication of his claim that his assent was given under the influence of mistake and misapprehension, and that specific performance of the contract cannot be enforced, citing subdivision 4, § 3391, of the Civil Code.

The only finding necessary to support the judgment denying the prayer for a reformation of the contract was that its terms were identical with those which had been agreed upon by the parties, and other findings not necessary to the judgment (Estate of Heydenfeldt, 127 Cal. 456, 59 P. 839; Chapman v. Hughes, 134 Cal. 641, 58 P. 298, 60 P. 974, 66 P. 982; Bank of Visalia v. Smith, 146 Cal. 398, 81 P. 542), or inferentially contrary thereto, were not conclusive as to the matters found (Estate of Funkenstein, 170 Cal. 594, 150 P. 987). The essential finding, however, was for the reason stated conclusive as to the issue which it determined, and was binding on both parties to the action (Estate of Clark, 190 Cal. 354, 212 P. 622); and although the finding was not pleaded by the plaintiff as an estoppel such pleading was unnecessary in view of the defense and the evidence offered in its support, which disclosed the adjudication of this issue in the previous case (Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 P. 1017, 45 P. 252; Guy v. Leech, 47 Cal. App. 704, 709, 190 P. 1067; Zenos v. Britten-Cook Land Co., 75 Cal. App. 299, 242 P. 914). While, according to the testimony of the defendant, his assent to the execution of the contract as the same was written was influenced by mistake and misapprehension, the implied conclusion of the trial court to the contrary is supported not only by the adjudication in the former action, but by the circumstances attending its execution as shown by other facts in evidence and found by the trial court.

[5-7] It is further claimed that the contract as executed provides for interest on deferred payments. As stated, in the preparation thereof a printed form was used a portion of which was deleted. Two of the remaining paragraphs, however, contained references to interest payments. The contract contained an express promise by the vendee to purchase the property and pay therefor the sum of $7,000 at the times and in the manner following: $1,000 upon the execution of the agreement, receipt of which was acknowledged; the sum of $50 each month thereafter until the whole purchase price had been paid—no provision being there made for the payment of interest on deferred payments. The paragraph mentioned relates to the deed to the property which the vendor agreed to execute upon full payment of the sum of $7,000, "with interest at the rate and for the time above specified; * * *" and the second, which referred to the rights of the vendor in case of default, provided as follows: "If said party of the second part (the vendee) shall fail, and such failure shall continue for a period of sixty (60) days, to make any of the aforesaid payments of principal or interest, etc., * * *"—in which event it was provided that the vendee should forfeit all interest in the property and the payments made thereon.

Parties are presumed to have contracted with reference to laws in existence at the time the contract was made; and when a law affects the validity, construction, discharge, or enforcement of the contract it enters into and forms a part of it, measuring the obligations of one party and the rights acquired by the other. Connecticut Mut. Life Ins. Co. v. Cushman, 108 U. S. 51, 2 S. Ct. 236, 27 L. Ed. 648; Northern Pac. R. R. Co. v. Wall, 241 U. S. 87, 36 S. Ct. 493, 60 L. Ed. 905; Ede v. Knight, 93 Cal. 159, 28 P. 860. At the time the above contract was executed section 1917 of the Civil Code provided: "Unless there is an express contract in writing, fixing a different rate, interest is payable on all moneys at the rate of seven per centum per annum after they become due, on any instrument of writing, except a judgment. * * *" And, as held in the following cases, unless the parties to such a contract shall otherwise provide, interest on deferred payments is allowed only from the time the payments fall due. City of Los Angeles v. City Bank, 100 Cal. 22, 34 P. 510; Gero v. Richey, 38 Cal. App. 21, 175 P. 91.

An inconsistency was inferentially created by the above references in the contract to interest payments; but in view of the form used the elimination therefrom of a printed paragraph, to which the above-quoted portions clearly refer, taken in connection with the facts preceding its execution as disclosed by the record and found by the court, the construction which the court placed thereon was not unreasonable, and its conclusion should not be disturbed. Slama Tire Protector Co. v. Ritchie, 31 Cal. App. 555, 161 P. 25; Manley v. Pac. Mill & Timber Co., 79 Cal. App. 641, 250 P. 710. Moreover, in accordance with the views expressed in Gero v. Richey, supra, wherein the court considered the effect of a clause similar to the above, it was reasonable to assume therefrom, in the absence of an express provision for the payment of interest on deferred installments, that delinquent installments were contemplated, in which event it was the intention to provide for the payment of interest thereon from their due dates as a condition to the execution of a deed, and also that a failure for 60 days to make such payments with interest as above should work a forfeiture of the vendee's interest in the property.

All the equities of the case were in favor of the plaintiff, and the record discloses no ground for the reversal of the judgment.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

94 Cal. App. 355

PEOPLE v. ELROY. (Cr. 1505.)

District Court of Appeal, First District, Division 2, California. Oct. 18, 1928.

1. Witnesses 🔑45(2)—Nine years nine months old girl in third grade at school, testifying she was required to tell truth or be sent to reform school, held competent witness (Code Civ. Proc. § 1880, subd. 2).

In prosecution for violating Pen. Code, § 288, girl nine years and nine months of age, testifying that she attended school in third grade, that oath required her to tell the truth, and that girls who did not tell the truth would be sent to reform school, *held* qualified to testify, under Code Civ. Proc. § 1880, subd. 2.

2. Witnesses 🔑79(2)—Previous testimony by nine year nine months old girl could be considered in determining her qualifications as witness.

In determining qualification of girl nine years and nine months of age to testify as witness, fact that she had previously testified could be taken into account.

Appeal from Superior Court, City and County of San Francisco; K. S. Mahon, Judge.

Melvin Elroy was convicted of violating Penal Code, § 288, and he appeals. Affirmed.

Vincent W. Hallinan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

KOFORD, P. J. [1] This is an appeal from a judgment of conviction of violating Penal Code, § 288. The sole point upon appeal is that the court erred in permitting a girl nine years and nine months of age to testify against the defendant. Upon examination of this witness by the court she testified that she was nine years old, attended school in the high third grade; that she had testified previously at this trial; that the oath required her to tell the truth; and that girls who did not tell the truth would be sent to the reform school. The court thereupon announced his opinion that the witness was qualified, and the direct examination proceeded without objection nor attempt at cross-examination by the defense as to her qualification.

[2] The point is not well taken. This examination, as well as the witness' testimony as a whole, showed her to be qualified within the meaning of Code of Civil Procedure, § 1880, subd. 2; the fact that she had previously testified could also be taken into account; and, finally, the record fails to show any abuse of discretion on the part of the court in permitting her to testify. People v. Craig, 111 Cal. 460, 469, 44 P. 186; People v. Baldwin, 117 Cal. 244, 250, 49 P. 186; People v. Delaney, 52 Cal. App. 765, 199 P. 896; People v. Reyes, 194 Cal. 650, 229 P. 947.

It is ordered that the judgment be and it is hereby affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

94 Cal. App. 449

WOLF v. DREW. (Civ. 6568.)

District Court of Appeal, First District, Division 2, California. Oct. 24, 1928.

1. Appeal and error 🔑612(1)—Reviewing court held limited to consideration of judgment roll, where certificate of trial judge was not attached to transcript (Code Civ. Proc. § 953a).

Reviewing court *held* limited to consideration of judgment roll, where transcript, though containing certificate of clerk, failed to bear certificate of trial judge, on appeal taken under Code Civ. Proc. § 953a.

2. Dismissal and nonsuit 🔑43(5)—Newspaper accounts of departure of plaintiff's former attorney held not to support motion for leave to produce additional evidence after dismissal (Code Civ. Proc. § 583, and section 956a, as added by St. 1927, p. 583).

Newspaper accounts of departure of plaintiff's former attorney from San Francisco *held* mere hearsay and not admissible to prove truth of assertion made, and therefore they did not support motion for leave to produce additional evidence, under Code Civ. Proc. § 956a, as added by St. 1927, p. 583, after dismissal of action, for failure to prosecute under Code Civ. Proc. § 583.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by R. A. Wolf against Helen P. Drew. From a judgment of dismissal, plaintiff appeals and applies for leave to produce additional evidence. Judgment affirmed, and motion to produce additional evidence denied.

Samuel J. Jones, of San Francisco, for appellant.

John William Ham, of San Francisco, for respondent.

DOOLING, Justice pro tem. This is an appeal from a judgment dismissing the action under section 583, Code of Civil Procedure, for failure to bring the same to trial within two years after answer filed. The appeal is taken under section 953a, Code of Civil Procedure, and the transcript contains, in addition to the judgment roll, what purports to be a copy of an affidavit and certain oral testimony introduced in the court below in opposition to the motion to dismiss. Counsel have stipulated for diminution of the record by the addition thereto of a copy of an affidavit introduced by respondent in support of the motion.

[1] The transcript contains the certificate of the clerk, but no certificate of the trial judge. In this state of the record this court is limited to a consideration of the judgment roll. "Neither the certificate of the clerk nor the stipulation of the attorneys * * * can take the place of the judge's certificate so as to constitute the transcript a sufficient record under section 953a." People v. California Protective Corporation, 76 Cal. App. 354, 365, 244 P. 1089, 1093; Pouchan v. Godeau, 21 Cal. App. 365, 131 P. 879; Jeffords v. Young, 197 Cal. 224, 239 P. 1054.

[2] Counsel for appellant have applied to this court for leave to produce additional evidence under section 956a, Code of Civil Procedure, as added by St. 1927, p. 583. This evidence consists of two newspaper accounts of the departure of appellant's former attorney from San Francisco. Apart from any other consideration, it is clear that these newspaper accounts are hearsay and not admissible to prove the truth of what they assert.

The motion to produce additional evidence is accordingly denied, and, no error appearing from the judgment roll, the judgment appealed from is affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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94 Cal. App. 378

PEOPLE v. KIRK. (Cr. 1481.)★

District Court of Appeal, First District, Division 1, California. Oct. 19, 1928.

Rehearing Denied Nov. 17, 1928. Hearing Denied by Supreme Court Dec. 17, 1928.

1. Embezzlement 🔑47—Intent to embezzle is for jury.

The question of intent as to whether person charged with embezzlement intended to feloniously appropriate the money to his own use being incapable of direct proof, except where facts proved afford no reasonable ground as inference for intent, it is the peculiar province of the jury to find the intent from the facts and circumstances of the case and to say what particular intent follows from acts done.

2. Embezzlement 🔑11—Fact that no demand was made upon defendant convicted of embezzlement to return funds constitutes no ground for reversal.

Fact that no demand was ever made upon defendant convicted of embezzlement, for a return of funds embezzled, constitutes no ground for reversal.

3. Embezzlement 🔑4—Test of "embezzlement" is whether evidence shows fraudulent appropriation of money.

The test of crime of embezzlement is whether evidence shows clearly a fraudulent appropriation of money.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Embezzle—Embezzlement.]

4. Embezzlement 🔑44(1)—Evidence held to support conviction for embezzlement.

In prosecution for embezzlement, evidence *held* sufficient to show fraudulent appropriation of money, supporting conviction therefor.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Edward L. Kirk was convicted of embezzlement, and he appeals. Affirmed.

Joseph P. Lacey, William R. Geary, and G. W. Lupton, Jr., all of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

TYLER, P. J. Defendant was charged and convicted of the crime of embezzlement. He appeals from the judgment and order denying his motion for a new trial. The information charges him with having on or about the 4th day of June, 1927, embezzled the sum of $400, the personal property of one Bessie N. Buschke. Defendant is an attorney at law. He represented the owners of certain real property in Alameda county who were nonresidents of the state. One Glen H. Moseley, a licensed real estate broker, had supervision of the property for the collection of rents and other purposes. He acted under the direction of defendant, Kirk. The property consisted of a residence situated at Broadmoor boulevard, San Leandro. Moseley advertised the same for sale, and as a result thereof certain offers were received by him from prospective purchasers. The first offer was for the sum of $5,000 cash. Moseley, believing that defendant had been given authority as the agent and attorney for the owners to make the sale, communicated with him concerning this offer. Defendant submitted the offer to the owners for their approval, but they were dissatisfied with the same and so advised defendant. Subsequently, on April 13, 1927, Bessie N. Buschke made an offer of $5,750. This offer was conditioned on a down payment of $500, balance at the rate of $45 per month to be applied to principal and interest. Mrs. Buschke was guardian of the estate of her husband, and her offer was subject to the further condition that the court approve of the transaction. Upon receiving the offer Moseley took a deposit from Mrs. Buschke in the sum of $100, subject to the owner's approval, and submitted the offer to defendant,

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★Rehearing denied. Hearing denied by Supreme Court.

Kirk. Kirk informed Mrs. Buschke that if she wanted the property that her offer and terms would be acceptable. Defendant volunteered to attend to the application before the probate court for permission to use the guardianship funds for the purchase without charge to Mrs. Buschke. Prior to the hearing of this application and on May 27th of the same year Mrs. Buschke sent her bank book to defendant Kirk, together with an order on the bank authorizing it to pay Kirk the sum of $400 from the guardianship account. Defendant withdrew this sum from the said account on June 4, 1927, and deposited the same to his personal account and subsequently checked out the funds for his own personal benefit. On the same day Mrs. Buschke signed a deed of trust and a note in conformity with the terms of sale. Prior thereto, and on May 1, 1927, Mrs. Buschke had entered into possession of the premises with the understanding that the deposit of $100 which she had made with Moseley was to be considered as rent in the event that the court failed to approve the transaction. Upon the hearing of the application defendant secured an order of the court that the sum of $424.48 be invested in the enterprise. Subsequent to July 1, 1927, Mrs. Buschke made three monthly payments of $45 to defendant and received his receipt for the same. At various times during the months of June and July, 1927, defendant paid Moseley the amount of his commission in procuring the purchaser. It appeared in evidence that at the time Mrs. Buschke made her offer for the property defendant telegraphed the owners concerning the same and recommended acceptance. He received a telegram in reply advising him not to accept the offer upon the tentative terms, the owners stating that they wanted cash. As heretofore stated, defendant thereafter received the payment from Mrs. Buschke on May 27, 1927, but he failed to inform his clients of this fact, but placed the money in his own personal bank account and subsequently checked out the amount for his own personal use and benefit. At the time Mrs. Buschke made the payment to defendant, and at various other times, she demanded a deed from him, but was put off from time to time, with the assurance that the matter would be taken care of. The owners of the property heard nothing further from defendant concerning the transaction. Upon a visit to this state they discovered the condition of affairs. They employed an attorney, who interviewed defendant to ascertain from him upon what authority he had made the sale. Defendant claimed he was authorized to do so by the owners, but subsequently admitted that he had no such authority. On September 13, 1927, over three months after defendant had received the deposit, Mrs. Buschke was served with written notice from the owners to surrender the property. On the following day she swore to a complaint charging defendant with embezzlement and subsequently quitted possession of the premises.

[1] Defendant contends that this evidence does not establish the fact he ever had the intent to feloniously appropriate the money in question to his own use. The question of intent being incapable of direct proof, a jury is permitted to determine this question from the facts and circumstances of the case, and except in a case where the facts proved afford no reasonable ground for an inference as to intent, it is the peculiar province of the jury to find the intent and to say what particular intent follows from the acts done. People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389; 8 Cal. Jur. p. 278. The prosecution attempted to prove similar offenses committed by defendant for the purpose of showing a guilty intent, but this evidence was rejected by the trial court. Aside from any question concerning this ruling, we are of the opinion that the facts and circumstances in evidence were amply sufficient to satisfy the minds of the jurors beyond a reasonable doubt of the truth of the charge. No attempt was made by defendant to explain his acts, the defense having rested upon the conclusion of the case made out by the prosecution. Nor does the fact as claimed that no demand was ever made upon defendant for a return of the funds constitute ground for reversal.

[2-4] The guilt or innocence of defendant does not depend upon the question whether or not any demand was made upon him for the money involved. The real question is: Does the evidence establish the crime charged? The test of the crime of embezzlement is whether the evidence shows clearly a fraudulent appropriation by the defendant of the money; and proof of a demand is not required when the evidence otherwise shows the fact of such fraudulent appropriation. It is only in the absence of such other sufficient proof of a fraudulent appropriation that a demand may be necessary to fix the fact of the fraudulent appropriation; but the test of the crime is not thereby altered, but always is: Does the whole evidence establish the crime charged? People v. Blair, 19 Cal. App. 688, 127 P. 657. A careful reading of this entire record convinces us that it does. It shows that while defendant had authority to receive bids for the property, he had no authority to make the sale in question. On the contrary, he had received positive instructions from the owners not to do so. Notwithstanding these instructions, he accepted the funds belonging to Mrs. Buschke, placed them in his personal bank account and subsequently misappropriated the same to his own use. The judgment and order should be affirmed. It is so ordered.

We concur: CAMPBELL, Justice pro tem.; KNIGHT, J.

94 Cal. App. 356

CARBONDALE MACH. CO. v. EYRAUD.
(Civ. 3569.)

District Court of Appeal, Third District, California. Oct. 18, 1928.

1. Appeal and error 🔑957(1)—Judgment 🔑139—Motion to vacate default judgment is addressed to trial court's discretion, which is not interfered with unless clear abuse is shown (Code Civ. Proc. § 473).

Granting or denying of motion to set aside default judgment on ground of mistake, inadvertence, surprise, and neglect, under Code Civ. Proc. § 473, is largely a matter of discretion with the trial court, and trial court's order will not be disturbed unless abuse of discretion clearly appears.

2. Judgment 🔑143(12)—Inadvertent failure of attorney to file answer, due to rush of business and associate's absence, justified court's vacation of default judgment (Code Civ. Proc. § 473).

Affidavit of defendant's counsel showing that law firm had large number of contested cases, that one of members of firm was out of state, and that affiant had failed to serve answer through inadvertence in rush of business, *held* to show excusable neglect under Code Civ. Proc. § 473, justifying trial court in opening default judgment.

3. Judgment 🔑167—Court properly refused to impose terms on opening default judgment, where plaintiff failed to show he was prejudiced (Code Civ. Proc. § 473).

Where on defendant's motion to set aside default judgment under Code Civ. Proc. § 473, plaintiff failed to show that it would suffer any prejudice from having case heard on the merits, court did not abuse its discretion, but acted properly, in refusing to impose terms upon defendant.

4. Appeal and error 🔑957(1)—Judgment 🔑138(1)—Power to set aside default judgments should be liberally exercised, and reviewing court will not interfere unless opening of judgment results in injustice (Code Civ. Proc. § 473).

Power of trial court to vacate default judgments for inadvertence, surprise, mistake, or excusable neglect under Code Civ. Proc. § 473, to permit disposition of cases on their merits should be freely and liberally exercised, where plaintiff will not be prejudiced and court's orders will not be reversed unless setting aside of judgment is calculated to defeat rather than to promote justice.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by the Carbondale Machine Company against A. J. Eyraud. From an order setting aside and vacating a default judgment, plaintiff appeals. Affirmed.

McGovney & Klein, of Los Angeles, for appellant.

Newby & Palmer, of Los Angeles (Nathan Newby, Jr., of Los Angeles, of counsel), for respondent.

PRESTON, Justice pro tem. This is an appeal by plaintiff from an order setting aside and vacating a default judgment.

On May 14, 1926, the plaintiff, the Carbondale Machine Company, a corporation, commenced this action in the superior court of the county of Los Angeles against defendant, for damages for breach of a certain contract, signed by defendant, wherein plaintiff agreed to erect for defendant an automatic refrigerating plant. On the same date the summons was issued and personally served upon the defendant, A. J. Eyraud, in the county of Los Angeles. No appearance was made by defendant within the time allowed by law, and on June 9, 1926, the default of the defendant was entered, and thereafter, on June 23, 1926, the court ordered judgment entered against the defendant and in favor of the plaintiff for the sum of $1,609.30, damages and costs, and on the same day said judgment was entered.

On July 17, 1926, defendant made application to the trial court to have the default set aside and the judgment vacated upon the ground "that said judgment was entered through mistake, inadvertence, surprise, and neglect of defendant's counsel."

In support of this motion the defendant presented his own affidavit and the affidavit of his counsel setting forth the facts upon which he relied. No counter affidavits were filed, or counter showing made by plaintiff, and the court granted defendant's motion and vacated the default and set aside the judgment, and permitted defendant to file his answer. The court did not impose any terms upon the defendant.

From this order the plaintiff prosecutes this appeal.

[1] The granting or denying of a motion of this character is so largely a matter of discretion with the trial court that, unless it is clearly made to appear that there has been an abuse of this discretion, this court will decline to set aside the trial court's order. Nicoll v. Weldon, 130 Cal. 666, 63 P. 63; Staley v. O'Day, 22 Cal. App. 149, 133 P. 620; Jones v. Southern Pacific Co., 71 Cal. App. 773, 236 P. 336, and cases there cited.

[2] There is no showing whatever of any abuse of discretion on the part of the trial court. The court was satisfied from the undisputed evidence presented to it that the neglect of the defendant was excusable, and we see no reason for questioning its conclusion in that respect. The defendant filed a sufficient affidavit of merits with his application for relief.

The affidavit of defendant contains these facts:

"* * * That he was served with a summons in the above-entitled cause on the 24th day of May, 1926, and upon said day that he took the copy of the summons and complaint that had been served upon him to Wm. Fleet Palmer, of the firm of Newby & Palmer, and employed him to defend said action, * * * and he was further advised by said attorney that he would take care of the said matter and would appear in the said cause and would present the defendant's defense in said action, and affiant, fully relying upon the statement of the said Wm. Fleet Palmer, and resting in confidence that the said Mr. Palmer would take such steps as were necessary to defend him in said action, and affiant believed that such steps had been taken by said attorney, until the 12th day of July, 1926, at which time affiant was informed that a judgment had been entered against him by default in said case. That affiant, immediately upon hearing that a judgment had been entered against him by default in said case, called up said attorney by telephone and asked him about the matter, and then for the first time learned that the said Wm. Fleet Palmer had failed to file an appearance for him in said cause. * * *"

The affidavit of defendant's counsel, Wm. Fleet Palmer, is also in part as follows:

"That on the 24th day of May, 1926, the defendant in the above entitled cause brought to him a copy of the complaint and summons in said cause that had been served upon defendant on that day * * * and the defendant then and there directed affiant to look after the matter for him and to enter an appearance and make his defense. Affiant further says that the firm of Newby & Palmer had at that time a large number of cases that were being sharply contested, and there was a great volume of business in the office of said firm; that on the 22d day of April, 1926, Nathan Newby, Esq., of said firm, left the state of California on a business and pleasure trip, and has ever since said day been absent from said city. That there devolved upon affiant at said time the duty of managing and caring for all of the business of said firm; that at the time the employment by said defendant in said cause was accepted, affiant fully intended to file an appearance in said cause and present the defense of the defendant thereto; that in the rush and confusion of attempting to carry on the business of said firm in the absence of Mr. Newby, affiant totally, by inadvertence and oversight, failed to prepare and serve and file the answer * * * and affiant avers that the said cause of action totally escaped his attention and remembrance until affiant was called upon the telephone by defendant on July 12, 1926, when defendant informed affiant that a judgment had been entered by default. * * *"

The facts presented by these affidavits, as we have stated, were undisputed, and we think constituted excusable neglect under section 473 of the Code of Civil Procedure, and fully warranted the court in granting the motion.

[3] Appellant contends that the court abused its discretion in relieving defendant from his default, without imposing terms upon him. There is no merit in this contention. There was no showing made to the court that would warrant it in imposing any terms upon the defendant; neither did plaintiff make any showing whatever that it would suffer any prejudice by the default being set aside and the judgment vacated, and the case heard upon its merits. Therefore, in the absence of such a showing, it would have been improper for the trial court to have imposed any terms upon the defendant. It is to be assumed, if nothing to the contrary is shown, that plaintiff will be able at any time to establish its cause of action. If, for any reason, it will be unable to do so, that fact should be made to appear. Nicoll v. Weldon, supra.

[4] It has often been stated by the appellate courts of this state that the power of the trial court should be freely and liberally exercised, under section 473 of the Code of Civil Procedure, to mold and direct its proceedings so as to dispose of cases upon their substantial merits, and its orders will not be reversed unless its power has been exercised in a manner which is calculated to defeat, rather than advance, the ends of justice. Buell v. Emerich, 85 Cal. 116, 24 P. 644; Harbaugh v. Land & Water Co., 109 Cal. 70, 41 P. 792; Nicoll v. Weldon, supra.

In Berri v. Rogero, 168 Cal. 740, 145 P. 97, the court used the following language, which is particularly appropriate in the case at bar:

"The law does not favor snap judgments. The policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. Where a party in default makes seasonable application to be relieved therefrom, and files an affidavit of merits alleging a good defense, and the plaintiff files no counter affidavit and makes no showing that he has suffered any prejudice or that injustice will result from the trial of the case upon its merits, very slight evidence will be required to justify a court in setting aside the default."

If the appellant had exercised as much industry in trying to bring about a trial of this case on the merits as it has in trying to prevent a trial on the merits, the action would no doubt have long since been finally determined.

We see no reason to continue this discussion. We think the appeal is wholly without merit.

The order is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

94 Cal. App. 405

KOVACEVICH v. FISCHER MOTOR BODY CO. et al. (Civ. 6364.)★

District Court of Appeal, First District, Division 1, California. Oct. 20, 1928.

Rehearing Denied Nov. 19, 1928. Hearing Denied by Supreme Court Dec. 17, 1928.

1. Mandamus 🔑187(9)—True facts not appearing from record, intendments and presumptions not contradicted by it must be indulged in favor of judgment.

The true facts not appearing from record on appeal from judgment denying a petition for writ of mandate, every intendment and presumption not contradicted by or inconsistent with the record must be indulged in favor of the judgment.

2. Mandamus 🔑187(9)—It is presumed, record not showing reason for denying writ of mandate to compel corporation to issue financial statement, that there was legal one (Civ. Code, § 302a).

Notwithstanding that no reasons appear from record for entry of order denying a petition for writ of mandate to compel corporation to issue financial statement, as provided by Civ. Code, § 302a, it must be presumed that there was a legal one.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Application by Chris Kovacevich for writ of mandate against the Fischer Motor Body Company, formerly the Fischer-Gaffney Body Company, and others, to compel respondents to issue a financial statement. From a judgment denying the petition, plaintiff appeals. Affirmed.

Josephine L. Kovacevich, for appellant.

Peter tum Suden and Richard tum Suden, both of San Francisco, for respondents.

CASHIN, J. An appeal from a judgment denying a petition for a writ of mandate.

Appellant, who was a stockholder in respondent corporation, sought by the proceeding to compel the issuance of a financial statement, as provided by section 302a of the Civil Code. A demurrer with an answer to the petition was filed by the respondent corporation. The answer denied certain of the material allegations of the petition. The demurrer was sustained, with leave to amend, and subsequently an amended petition was filed, to which respondent corporation on October 20, 1927, again demurred, filing therewith its motion to strike out portions of the amended petition. Thereafter, on November 4, 1927, the court made and entered the following order or judgment, from which the plaintiff appealed: "In this action, good cause appearing to the court, it is ordered that the petition for writ of mandate be and the same is hereby denied." The appeal was taken on the judgment roll without a bill of exceptions or the transcript provided by section 953a of the Code of Civil Procedure other than the clerk's transcript of the papers constituting the judgment roll. The certificate attached thereto enumerates the matters included therein, and the record fails to show what proceedings were had or that no evidence was adduced before the court at the time the judgment was rendered.

Appellant claims in his brief that the case was never set for trial, that there was no trial of any issue of fact, and that the entry of the judgment appealed from followed a hearing upon the demurrer to the amended petition.

[1, 2] Whatever may have been the true facts the same do not appear from the record before us; and although, as contended by appellant, the answer was before the court only in the event the petition stood the test of demurrer (Metropolitan Life Ins. Co. v. Rolph, 184 Cal. 557, 194 P. 1005), yet, so far as shown, the demurrer might have been withdrawn or waived and the case have proceeded to trial upon the answer filed. Every intendment and presumption not contradicted by or inconsistent with the record on appeal must be indulged in favor of the judgment (Throop v. Weaver, 180 Cal. 335, 181 P. 55); and notwithstanding that no reason appears for the entry of the order denying the petition, it must be presumed that there was a legal one, in the absence of anything to show the contrary (Woods v. Diepenbrock, 141 Cal. 55, 74 P. 546; Jackson School District v. Culbert, 134 Cal. 508, 66 P. 741; Brown v. Vidal, 1 Cal. Unrep. Cas. 15; Myers v. Canepa, 37 Cal. App. 556, 174 P. 903, 906).

For the foregoing reasons the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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94 Cal. App. 470

PEOPLE v. ROGERS. (Cr. 1496.)

District Court of Appeal, First District, Division 2, California. Oct. 25, 1928.

1. Criminal law 🔑1202(4)—Clerk and court erred in reading and submitting to jury confessed prior convictions of defendant (St. 1923, p. 696, § 2; Pen. Code, §§ 1025, 1093, subd. 1, 1158).

In trial under St. 1923, p. 696, § 2, for carrying of concealed weapons by one previously convicted of felonies, the clerk's reading to jury of prior conviction, which defendant admitted, instead of one he denied, in violation of Pen. Code, §§ 1025, 1093, subd. 1, and court's submission to jury of confessed prior convictions, contrary to sections 1025, 1158, amounted to error.

★Rehearing denied. Hearing denied by Supreme Court.

2. Witnesses 🔑337(6)—Cross-examination of defendant as to convictions of burglary and carrying concealed weapons held permissible as impeachment (St. 1923, p. 696, § 2; Code Civ. Proc. § 2051; Pen. Code, §§ 1025, 1093).

In trial under St. 1923, p. 696, § 2, for carrying of concealed weapons by one previously convicted of felonies, cross-examination of defendant as to confessed prior convictions of second degree burglary and carrying concealed weapons was permissible as impeachment, under Code Civ. Proc. § 2051, notwithstanding provisions of Pen. Code, §§ 1025, 1093.

3. Criminal law 🔑1202(7)—Clerk's reference to confessed prior convictions in reading information, and court's submission thereof to jury, held not reversible error, where evidence thereof was properly received to impeach defendant (St. 1923, p. 696, § 2; Pen. Code, §§ 1025, 1093, subd. 1, 1158; Const. art. 6, § 4½; Code Civ. Proc. § 2051).

Clerk's reference to admitted prior convictions in reading to jury information under St. 1923, c. 339, § 2, for carrying of concealed weapons by one previously convicted of felonies, in violation of Pen. Code, §§ 1025, 1093, subd. 1, and instructions submitting such convictions to jury in violation of sections 1025, 1158, *held* not reversible error, in view of Const. art. 6, § 4½, where evidence of such convictions was properly received as impeachment, under Code Civ. Proc. § 2051, on cross-examination of defendant.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Roy Rogers was convicted of violating the statute making a felony of carrying concealed weapons by one previously convicted of a felony, and he appeals. Affirmed.

Harry S. Whitthorne, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and W. Augustine, Deputy Atty. Gen., for the People.

KOFORD, P. J. This is an appeal from a judgment of conviction of violating section 2 of chapter 339 of the Statutes of 1923, making a felony of carrying concealed weapons by one previously convicted of a felony. The information under which the defendant was tried charged three prior convictions of felony: The first, July 4, 1918; the second, burglary at San Francisco, January 26, 1922; and the third, carrying concealed weapon in Humboldt county, March 20, 1924. Upon arraignment, the defendant denied the first prior alleged, but admitted the second and third.

[1] Notwithstanding these pleas, the clerk, in reading the information to the jury, read the second prior, which the defendant had admitted, instead of reading the first prior, which the defendant had denied. In submitting the case to the jury, the court submitted forms of verdicts upon the second and third priors. The reading of the information by the clerk in the manner stated was a violation of Penal Code, § 1025, and of subdivision 1, § 1093, Penal Code. In submitting to the jury as an issue the confessed prior convictions alleged second and third in the information, the court violated sections 1158 and 1025 of the Penal Code. That the foregoing proceedings at the trial amounted to error admits of no doubt, but whether such error requires a reversal of the judgment depends upon whether the record shows that a miscarriage of justice has occurred.

[2] The defendant also urges as ground of appeal the cross-examination of the defendant, who was a witness in his own behalf.

"Q. Have you ever been convicted of a felony? A. I have.

"Q. What one? A. Here in San Francisco.

"Q. What one? A. Second degree burglary.

"Q. What else?

"Mr. Whitthorne: I will have to object to it as incompetent, irrelevant, and immaterial.

"The Court: Overruled.

"Mr. Skillin: What else? A. Concealed weapon.

"Q. What? A. Humboldt county, 1924.

"Q. For carrying concealed weapons? A. Yes."

These two convictions are the same as the second and third priors alleged in the information. This cross-examination was permissible as impeachment, under Code of Civil Procedure, § 2051. It was held in People v. Arnold, 116 Cal. 682, 687, 48 P. 803, that such cross-examination was permissible, notwithstanding the provisions of Penal Code, § 1093, and the language used in that decision is broad enough to include the provisions of Penal Code, § 1025, which provides that prior convictions confessed by the defendant shall not be alluded to on the trial. It is there said that the object of the section was to give the defendant the benefit of withholding from the jury the knowledge of such prior convictions in all instances other than where by the conduct of his own case the production of such facts is rendered essential to a proper presentation of the case of the People. See, also, 8 Cal. Jur. p. 647; People v. Booth, 72 Cal. App. 160, 166, 236 P. 987; People v. Crowley, 100 Cal. 478, 482, 483, 35 P. 84; People v. Oubridge, 38 Cal. App. 68, 175 P. 276.

[3] Eliminating those references at the trial to the priors which were made in violation of the provisions of the Penal Code, there would still remain for the consideration of the jury proof properly received of the same prior convictions. It would not be reasonable to believe that, if the references to prior convictions made by the clerk in reading the information and by the trial judge in giving his instructions had been eliminated, the jury's verdict would have been different, where evidence of the same priors remained before

them, given from the mouth of the defendant himself.

Our examination of the record convinces us that the guilt of the defendant was clearly proven, and that a new trial should not be ordered, because of the errors committed at the trial, in view of the provisions of section 4½ of article 6 of the state Constitution.

It is therefore ordered that the judgment of conviction be and the same is hereby affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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94 Cal. App. 473

KIERULFF & RAVENSCROFT v. KOPING. (Civ. 3589.)

District Court of Appeal, Third District, California. Oct. 25, 1928.

1. Evidence 🔑458—Parol evidence is admissible to show circumstances surrounding execution of guaranty, where intent as to limitation thereof is not clear from writing.

Written guaranty is limited or continuing according to purpose and intent appearing from the instrument, and, when the writing is ambiguous, parol testimony is admissible to show surrounding circumstances.

2. Guaranty 🔑38(1)—Entire written guaranty must be read together in determining whether continuing guaranty was intended.

Entire written guaranty must be read together to determine whether intent was to give a limited or a continuing guaranty.

3. Appeal and error 🔑1050(3)—Admission of oral testimony as to purpose for which guarantee was given, though rendered unnecessary by express statement of instrument, held not prejudicial.

Admission of oral testimony to prove that guaranty was given to establish line of credit, though unnecessary in view of statement to that effect in written guaranty itself, was not prejudicial, in action upon the guaranty.

4. Guaranty 🔑38(1)—Guaranty limiting amount of guarantor's liability, but containing no limitation as to time, will generally be construed as continuing.

Where guaranty contains limitation as to the amount for which the guarantor will be bound, but contains no limitation as to time, guaranty will be generally construed as continuing and operative without limit until revoked, except as to the amount of the liability, which refers to the guarantor's liability and not to the amount of dealing between the principal and the guarantee.

5. Guaranty 🔑38(1)—Guarantor's liability, though limited, will be regarded as continuing, where purpose of contract is to give standing credit to principal debtor.

Liability under guaranty will be considered as continuing, where by the terms of the contract the object is to give standing credit to the principal debtor, though amount of guarantor's liability is limited.

6. Guaranty 🔑27—Guaranty should be construed to effectuate purpose for which writing is executed.

Instrument of guaranty should be construed like any other instrument to effectuate the purpose for which the writing is executed.

7. Husband and wife 🔑87(2)—Married woman's guaranty of her husband's account to amount of $500, for purpose of establishing husband's credit, held continuing guaranty under which guarantor was liable regardless of extent of purchases of principal.

Written guaranty by married woman, "for the purpose of establishing my husband's credit," and providing, "I hereby guaranty Mr. K.'s account to the amount of $500," *held* continuing guaranty, under which guarantor was liable to extent of maximum sum named regardless of extent of dealings between guarantee and principal, especially where the first purchase of merchandise was for an amount much below the maximum sum.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Kierulff & Ravenscroft against Tresa E. Koping. Judgment for plaintiff, and defendant appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant.
Jacobs & Jacobs, of Stockton, for respondent.

PLUMMER, J. The action is founded upon a written guaranty in the words and figures following, to wit:

"Stockton, Calif., May 5, 1926.

"Kierulff & Ravenscroft, Dear Sirs, Following is a list of property owned by me described for the purpose of establishing my husbands credit with you who is the owner of the radio store known as the Stockton Radio Shoppe; 1 apartment house, value $31,000 at 437 E. Fremont St., Stockton (¼ interest); 1 22-acre ranch value $6500, six miles E. of Stockton on The Linden Road (½ interest); 1 4-room bungalow at 150 Ramona St., Stockton, value $2700 (sole owner).

"Following is a list of the mortgages:

Apt house	$12000
Ranch	2500
House	1400

"I hereby guarantee Mr. Koping's account to the amount of $500 Five hundred dollars.

"[Signed] Tresa E. Koping."

The transcript shows that at and prior to the execution of this guaranty, V. G. Koping, the husband of the defendant, was conducting a radio shop or store in the city of Stockton, and that he desired to place in the store certain radio equipment or merchandise kept and sold by the plaintiff. It appears that this merchandise could only be handled by regularly licensed dealers, or at least was only sold to and through regularly licensed dealers. It further appears from the transcript that the plaintiffs, before selling such merchandise to the said V. G. Koping, desired some guaranty as to his credit, not being satisfied with V. G. Koping's credit rating as it theretofore existed. In pursuance of the understanding had between the plaintiffs, V. G. Koping and the defendant, relative to the sale and purchase of such radio equipment, the defendant signed the foregoing written guaranty, which guaranty was forwarded to the plaintiffs by the said V. G. Koping. Thereafter, and during the course of the business conducted by the said V. G. Koping, he ordered and received from the plaintiffs several hundred dollars worth of radio merchandise, leaving, on October 7, 1926, a balance due the plaintiffs of the sum of $600. During the course of the business conducted by the said V. G. Koping and his dealings with the plaintiff, it appears that he paid on account of merchandise purchased from them the sum of $542.

[1] The action herein is founded upon the theory that the writing executed and delivered by the defendant to the plaintiffs is a continuing guaranty.

Some minor objections are urged by the defendant as a reason for ordering a reversal of judgment, but these objections all appear to be answered by the provisions of our Civil Code. In the first place it is urged that the record shows no acceptance of the guaranty executed and delivered by the defendant. Section 2795, Civil Code, changes the rule announced in many cases, and provides that an absolute guaranty is binding upon the guarantor without notice of acceptance. Some question is also raised as to whether notice was given to the defendant of the default of V. G. Koping in payment of the merchandise ordered from the plaintiffs. This objection, again, is obviated by section 2807, Civil Code, which reads: "A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice." These Code provisions are a complete answer to the decisions of courts of other states having no such legislative enactments. As we read the record, there is really but one question in this case, and that is, does the writing executed by the defendant and delivered to the plaintiffs, as herein stated, constitute a continuing guaranty? If so, then and in that case the defendant is liable even though V. G. Koping purchased goods of more than twice the value of the amount specified as the extent of the defendant's liability, and also paid to the plaintiffs, during the course of his business dealings with them, a sum of money in excess of that set forth in the guaranty limiting the amount for which the defendant agreed to stand chargeable. The cases having to do with guaranties set forth many examples and discuss the limitations contained therein whether as to time or as to amount, or as to a particular transaction, and hold the written guaranty as limited or continuing according to the purpose and intent appearing from an inspection of the writing itself, or when the writing is ambiguous, then resort is had to the surrounding circumstances under which the writing was executed, and testimony showing the same is admissible.

In the case of Lean v. Geagan, 20 Cal. App. 260, 128 P. 792, we find this statement:

> "A guaranty limiting the amount for which the guarantor will be bound, but without limitation as to time, and without circumstances to evince a contrary intention, will, in general, be construed to be a continuing guaranty and operative till revoked. The guarantor will be held liable to the extent of his guaranty, though the principal debtor may have during the existence of the guaranty contracted debts equal to or greater than the sum named therein."

In this case the guaranty read in part:

> "In consideration of such sale and credit extended I hereby guarantee the payment of any and all indebtedness which may hereafter become due * * * provided the amount due or to become due shall at no time exceed the sum of $1,000.00."

The trial court at first held this to be a continuing guaranty; subsequently, granted a motion for a new trial, and upon appeal, the order granting a new trial was reversed. The controlling principle in that case appears to be the purpose for which the guaranty was granted, to wit, the establishment of a credit on the part of the person about to make purchase of merchandise. It appears, also, that the merchandise purchased in that case was not merchandise included in one order, but merchandise purchased upon successive orders. The holding of that case is further to the effect that, there being no limitation of time, and no limitation as to the guaranty of any specific order, it ran in favor of the person to whom the guaranty was executed, to the extent of the sum of $1,000, the limitation mentioned having reference only to the amount of the guarantor's liability, and not to the extent of the dealings between the purchaser and the one giving credit.

In the case of Nason & Co. v. Kennedy, 40 Cal. App. 159, 180 P. 349, circumstances were presented from which the court held that the writing executed and delivered as a guaranty was not a continuing one. The writing involved in the Nason Case is worded as follows:

> "I do hereby guarantee the account of L. C. Kennedy up to the sum of $750.00, for what goods in your line he may purchase from you, and it is understood that if he does not pay his bills under the terms of purchase that I will pay them or see that they are paid."

The court, in its opinion in that case, observes that the guaranty was silent as to what particular account or bill it referred to, and, therefore, that under such uncertainty, resort should be had to the circumstances surrounding the execution of the instrument in order to determine the intention of the parties, and that the circumstances as disclosed by the evidence showed that the defendant's son was desirous of engaging in the mercantile business and had placed an initial order for a stock of goods with the Los Angeles agent of the plaintiff, whose place of business was in the city of San Francisco. Upon receiving this order, the plaintiff wrote to the agent, stating, in substance, that it could not make shipment of the goods unless payment thereof was guaranteed, and inclosed with its letter the form of guaranty, with the request that the agent have the mother of Kennedy sign the same, etc. And it appears from this, and from further statements in the opinion in that case, that there were sufficient facts disclosed to justify the trial court in finding that the intent and purpose of the guaranty was to cover the particular transaction, to wit, the initial order of a stock of merchandise, and was not a guaranty covering other or further transactions. The writing in the Nason Case contains nothing which indicates a purpose to establish the credit of the intending purchaser. It would appear that a stock of goods was being ordered, and the mother of the purchaser simply guaranteed the payment of the specific stock of goods ordered.

[2, 3] In the case at bar the whole instrument must be read together, the first sentence as well as the last clause. In the first sentence the intention of the guarantor is expressed in direct language, to wit: "For the purpose of establishing my husband's credit with you," etc. The record in this case indicates a like purpose, and while we think the instrument itself discloses sufficiently the purpose, and that oral testimony was unnecessary, the admission of oral testimony indicating a like purpose cannot be held prejudicial.

[4, 5] In the annotation to the case of Scovill Mfg. Co. v. Cassidy, Ann. Cas. 1918E, p. 611, appears a long list of cases, so many as to prohibit their being set forth herein, supporting the following statement:

> "Where by the terms of the guaranty it is evident that the object is to give a standing credit to the principal to be used from time to time either indefinitely or for a certain period it is generally deemed a continuing guaranty."

And, further:

> "Whether a contract of guaranty is a continuing undertaking is a question of intention which must be gathered from the instrument itself, or from the course of dealings between the parties or from both. If it appears that a future course of dealing for an indefinite time, or a succession of credits to be given, was contemplated by the parties, the contract will be construed to be a continuing guaranty."

It is further held that the mere fact that the person for whose benefit and credit the guaranty is executed in the course of his dealings has bought and paid for more goods than the amount specified in such instrument does not discharge a continuing guaranty. On the other hand, as stated in 28 California Jurisprudence, 959:

> "Where a guaranty contains no express limitation as to either time or amount, and there is nothing in the instrument itself from which it can be inferred that it was a guarantor's intention to leave it open as to both, the guaranty will generally be understood as referring to a single transaction," etc.

In the instant case there is a limitation as to the amount, and therefore, subject to the rule stated in the same volume on page 960:

> "Where the guaranty contains a limitation as to the amount for which the guarantor will be bound, but contains no limitation as to time, and there is nothing in the circumstances surrounding the execution of the contract to evince a contrary intention, it will in general be construed to be a continuing guaranty and operative without limit, except as to the amount of the liability, until revoked. The limitation mentioned in such a guaranty has reference to the amount of a guarantor's liability, and not to the amount of dealing between the principal and the guarantee," etc.

Likewise, as appears on page 961 of the same volume:

> "Although the amount is limited, the liability under the guaranty will be regarded as continuing when, by the terms of the contract, it is evident that the object is to give a standing credit to the principal debtor, to be used from time to time either indefinitely or until a certain period," etc.

This latter statement coincides precisely with the circumstances presented in the instant case, to wit, the giving of a standing credit.

[6, 7] While the subject of construction of guaranties has received considerable attention, it is now held that an instrument of guaranty is to be construed like any other instrument, neither to limit nor to extend the terms of the instrument under or beyond the intention of the parties, but to effectuate the purposes for which the writing is executed. See note to Scovill Mfg. Co. v. Cassidy, Ann. Cas. 1918E, 609. That the writing in the case at bar was intended to be a continuing guaranty is further shown by the size of the merchandise order of V. G. Koping, at the time of the execution of the instrument. That order shows a purchase of merchandise in the value of only $85.70, and it is not reasonable to hold that the guaranty in the sum of $500 was executed simply to cover that specific order, or any other particular specific order, and if such is not the case, then it necessarily follows that the purpose of the instrument was to establish the credit of V. G. Koping, and charge the defendant with liability for his dealings with the plaintiffs, to the extent, at least, of the sum of $500.

While the objection has been raised, we find nothing in the record which indicates a purpose or intent to vary the terms of the written instrument, though the record does contain testimony disclosing the intent of the guarantor, just as set forth in the writing signed by her.

The judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

In re CATE. (Civ. 4702.)★

District Court of Appeal, Second District, Division 2, California. Oct. 26, 1928.

Hearing Granted by Supreme Court Nov. 22, 1928.

On petition for rehearing.

For former opinion, see 270 P. 968.

Alfred E. Cate, of Los Angeles, for petitioner.

Hewitt, McCormick & Crump, of Los Angeles (Guy Richards Crump, of Los Angeles, of counsel), for respondent Los Angeles Bar Ass'n.

WORKS, P. J. Respondent bar association takes the ground, in addition to other points presented in support of its petition for a rehearing of this proceeding, that confusion would result from the establishment in California of the rule that courts have inherent power to admit, discipline, and disbar attorneys at law and to readmit disbarred attorneys, a rule already firmly fixed in most other jurisdictions. This confusion is feared because the inherent power naturally rests in several courts, it being unnecessary to decide where the line is to be drawn which will segregate the courts which do not enjoy it from those which justly may wield it. The fear is more imaginary than real. In the first place, the power in each court is confined to its own bar. No court may, through its exercise, except under the supreme judicial control below to be mentioned, impose a bar on any other court, nor may it interfere with the bar of any other. Secondly, we have not found that any confusion has resulted from the existence of the rule in any other jurisdiction in which it has maintained a footing, nor has respondent bar association pointed us to a state of confusion under the rule anywhere. Again, if it be granted for the sake of argument that confusion will result from the adoption of the rule, the havoc wrought by it will be negligible when compared with the damage to be done to the administration of justice by a concession of sole and exclusive power over such matters in the Legislature. Nor will the confusion to follow the adoption of the rule, still admitting the possibility of it for the sake of argument, in any degree approach the inharmony to result from a concession of a part of the power to the Legislature; the remainder resting in the courts.

Finally, if confusion should result from the adoption of the rule, we know of no reason why the Supreme Court, in the exercise of its plenary control over the law of judicial decision within the state and treating the power as one resting in the judiciary generally and not in particular courts, could not determine what courts should and what courts should not exercise it, thus holding the rule in abeyance for the time being, under a sound judicial public policy, in the excluded courts. The Supreme Court, beyond a doubt, to our minds, could determine that itself alone should exercise the power. That court, we think, could declare, if, indeed, the specific declaration were necessary, that its exercise of the power should be binding upon the tribunals of the state which are inferior to it. The court could thus, through admissions or readmissions ordered by it in the exercise of its inherent power, if the exercise were ever necessary, add to the number of members of the bar entitled to practice in all the courts of the state. Such is the effect of the opinion rendered in Hoopes v. Bradshaw, 231 Pa. 485, 80 A. 1098.

Rehearing denied.

We concur: CRAIG, J.; THOMPSON, J.

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94 Cal. App. 370

WESTERN BRICK CO. v. SMITH et al.
(Civ. 3573.)

District Court of Appeal, Third District, California. Oct. 18, 1928.

1. Appeal and error 🔑1011(1)—Correct version of transaction between owner and contractor in action to foreclose mechanics' liens held for trial court, and finding under conflicting evidence cannot be disturbed on appeal (Code Civ. Proc. § 2055).

In action to foreclose mechanics' liens, correct version of transaction between owner and contractor, whereby realty was conveyed by owner to contractor, with understanding that contractor should complete building and sell property, retaining amount of contract out of profits and giving balance to owner, was for trial court, and finding in accordance with version testified to by contractor under Code Civ. Proc. § 2055, based on conflicting evidence, cannot be disturbed on appeal.

2. Appeal and error 🔑1011(1)—Finding that lien claimant did not know of contractor's cancellation of building contract, based on conflicting evidence, held correct on appeal.

In action to foreclose mechanics' liens, finding by trial court that none of laborers or materialmen knew of cancellation of building con-

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★Supplemented 273 P. 617.

tract between owner and contractor, based on conflicting evidence, must be accepted as correct on appeal.

3. Mechanics' liens 🔑315—Surety under bond for owner and materialmen held not released by owner's conveyance to contractor and contractor's trust deed to owner (Code Civ. Proc. § 1183; Civ. Code, § 2836).

Under Code Civ. Proc. § 1183, providing that surety on contractor's bond shall not be released by change in building contract between owner and contractor, transfer of premises by owner to contractor and execution of trust deed by contractor, whereby building was to be sold after completion and proceeds divided between owner and contractor, did not under Civ. Code, § 2836, release surety on bond running in favor of owner and laborers and materialmen.

4. Mechanics' liens 🔑315—Recorded transfer to contractor, and trust deed to secure payment, held not notice to lien claimants.

Where transfer by owner to contractor and trust deed by contractor to owner was intended to secure contractor in payment of contract price, and provision for canceling building contract was not brought to notice of lien claimants, recording of transfer and execution of trust deed was not notice to lien claimants, who were not required, after notice of contract, to daily examine files of county recorder's office, to ascertain if terms of contract had been changed or modified.

5. Mechanics' liens 🔑315—Cancellation clause, attached to building contract after building was partly completed, held "modification" not releasing surety (Code Civ. Proc. § 1183).

Code Civ. Proc. § 1183, providing that no modification of building contract shall work release of surety, *held* to cover cancellation clause attached to building contract after building had been partly completed, especially where knowledge of cancellation was not brought to materialmen or laborers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Modify.]

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Consolidated cases by the Western Brick Company against F. L. Smith and others. Judgment for plaintiff, and defendant Eagle Indemnity Company appeals. Affirmed.

J. Karl Lobdell and H. L. Watt, both of Los Angeles, for appellant.

G. C. De Garmo, H. B. Cornell, Glen Behymer, Irl D. Brett, Alfred J. Smallberg, R. L. Horton, and Andreani & Haines, all of Los Angeles, for respondent.

PLUMMER, J. This is an appeal by the defendant Eagle Indemnity Company, a corporation, from a judgment rendered in seven cases, consolidated and tried as one, for the foreclosure of certain mechanics' liens.

On or about the 27th day of May, 1924, one I. G. Simons, the owner of certain real property in the city and county of Los Angeles, entered into a building contract with one Robert W. Clark for the erection of a five-story apartment and store building. The cost of said building named in the contract was $82,869, payable as follows: A first trust deed in the sum of $45,000; a second trust deed in the sum of $27,500; final payment in cash of $10,369 upon completion of the building. At the time of the execution of the contract, the contractor, as principal, and the Eagle Indemnity Company as surety, entered into an undertaking in the sum of $73,000, the surety bond containing the usual covenants providing that it should inure to the benefit of both the owner, laborers and materialmen; the contractor and surety undertaking to complete the building, and agreeing to pay for all labor and materials. The contractor proceeded with the construction of the building as provided for in the building contract, and completed the building on or about the 5th day of November, 1924, on which last-named date notice of completion was filed in the office of the county recorder of Los Angeles county.

During the course of the construction of said building the owner informed the contractor that he would not be able to pay the $10,369 called for in the contract upon the completion of the structure. Thereupon, and on or about the 13th day of August, 1924, Simons, as owner of the premises, executed a deed of conveyance to the contractor, Robert W. Clark. This deed was recorded in the office of the county recorder of Los Angeles county. At the same time Clark executed and delivered to Simons a promissory note in the sum of $17,500, and as security for the payment thereof executed and delivered to Simons a trust deed covering the property that had been conveyed to him by the deed just referred to as executed and delivered by Simons. Thereupon the following words were written upon the building contract just referred to:

> "In consideration of $10.00 and other good and valuable considerations paid to said owner by said contractor, receipt of which is hereby acknowledged, it is mutually understood and agreed that this agreement is cancelled, terminated and discharged. [Signed] Robert W. Clark, Contractor. I. G. Simons."

In relation to the transaction just referred to, the trial court found as follows:

> "That on or about the 13th day of August, 1924, the said Isaac G. Simons transferred and conveyed said real property above described to the said Robert W. Clark under the agreement and understanding between said parties that the said Robert W. Clark should complete said building, but after the completion thereof, said property should be sold. That out of the proceeds of said sale Robert W. Clark should first receive and be paid the full amount of his contract, and that any balance thereof then remain-

ing should be given and paid to the said Isaac G. Simons."

The cancellation of the contract, as shown by the above writing. was also found by the court, but in relation thereto the court found as follows:

> "That none of the plaintiffs above named had any knowledge or information concerning the transfer or conveyance of said property to said Robert W. Clark or the termination of said building contract prior to the completion of said building, as aforesaid, but at all times prior to the completion of said building, said plaintiffs thought and believed that the said Robert W. Clark was constructing said building as contractor, under and pursuant to the terms of said building contract described in paragraph III hereof."

The record shows that the property was sold on or about the 26th day of June, 1925, under the second trust deed hereinbefore referred to, which deed was prior in right to the mechanics' liens owned by the respective plaintiffs, and judgment therefor was entered against the surety company for the amount of the liens and foreclosure upon the property denied.

[1] The appellant strongly urges that the evidence is insufficient to sustain the finding of the court, which we have quoted herein, to the effect that there was an understanding between Clark and Simons relative to the completion of the building that the building should be sold and out of the proceeds the contractor was to receive his contract price, and the owner whatever balance should remain. The contractor, Robert W. Clark, called as a witness under the terms of section 2055, Code of Civil Procedure, testified upon direct examination as follows:

> "I started work upon the construction of the building, and about the time the roof was on Simons informed me that it would be impossible for him to pay me the money that would be due under the contract. * * * We simply agreed that inasmuch as he, Simons, did not have the money to pay me on the contract, that this agreement was made in order to see if it would be possible it might work out. These transfers were made to secure me as to my contract price. Over and above the contract price, he was to get any proceeds of the sale."

Upon cross-examination by counsel for the appellant herein, this witness modified his testimony to some extent and testified as follows:

> "I gave Simons the third trust deed for $17,500, an agreement to that effect, or a statement to the effect that I would finish the things as successfully as possible and sell it; that I was to receive my full contract price. Then he was to receive what balance there might be up to the $17,500, and that I was to receive all the balance if there was any."

Upon redirect examination, referring to a deposition theretofore given by the witness, the witness testified:

> "I testified that there was a separate agreement to the effect that, if the building were disposed of for a sufficient amount to give me my full payment of the contract, Simons was to get all over and above that money. I gave Simons a third trust deed for $17,500, on the premises, which was the amount we agreed as being the value of the lot, and incidentally a separate agreement to the effect that if the building were disposed of for a sufficient amount to give me my full payment of the contract, Simons was to get all over and above that money."

Again, the record shows that, upon examination by counsel for appellant, the witness give a different version of the transaction and testified that Simons was to get only $17,500, and he, the witness, was to get his contract price and also all over and above the $17,500. Our attention has not been called to the testimony of any other witness relative to this transaction, and as the trial court had the benefit of the witness Clark appearing before him, and being able to judge of the manner in which he testified, just what was the correct version was and is distinctly a matter for the trial court, and if the trial court believed the version given by the witness under his direct examination conducted under the provisions of section 2055, Code of Civil Procedure, the finding of the trial court is sufficient to support it, and cannot be disturbed on appeal.

[2] Again, the finding of the court that none of the laborers or materialmen knew of the so-called cancellation clause indorsed upon the contract is challenged by the appellant. Here, again, the testimony is in conflict. The witness Clark testified that he notified the laborers and materialmen; his testimony in this particular is contradicted by a number of witnesses. The court resolved this conflict in favor of the lien claimants, and, being based upon conflicting evidence, must be accepted as correct.

[3] The main reliance of appellant is based upon section 2836, Civil Code, which reads in part as follows: "A surety cannot be held beyond the express terms of his contract"—and quotes to some extent from the cases of Alexander v. Bosworth, 26 Cal. App. 589, 147 P. 607; County of San Luis Obispo v. Ryal, 175 Cal. 34, 165 P. 1; Turner v. Fidelity & Trust Co. of Maryland, 187 Cal. 76, 200 P. 959; Roberts v. Security Trust & Savings Bank, 196 Cal. 557, 238 P. 673; and also some other cases in which it is held that a surety is not bound by a contract that he has not made or authorized. All of these cases we have examined, and find that they state the law just as insisted upon by appellant, but are not governing in this case by reason of the Code provisions relating to building contracts and the conditions and stipulations contained in the bond executed by the Eagle Indemnity Company. Section 1183, Code of Civil Procedure, contains, among others, the following provision:

"No change or alteration of the work or modification of any such contract between the owner and his contractor shall release or exonerate any surety or sureties upon any bond given under this section."

The bond executed by the appellant runs not only in favor of the owner of the premises, but runs in favor of any one who should perform labor upon the building being constructed, or furnish materials for the construction of the building mentioned in the contract. The words of the bond are as follows:

"That this bond shall inure to the benefit of any and all persons who perform labor upon, or furnish materials to be used in the work described in said contract so as to give such persons a right of action upon this bond, upon any suit brought to foreclose the liens provided for by the laws of the state of California, or in a separate suit upon this bond."

There is no question in this case but that everything mentioned in the mechanics' liens went into the building described in the contract. That the transaction had between Clark and Simons did not release the Eagle Indemnity Company, see the well-considered opinion in the case of Hubbard v. Jurian, 35 Cal. App. 757, 170 P. 1093. We quote from that opinion as follows:

"It is the rule generally that a surety has a right to stand upon the terms of his contract of suretyship, and that he will be exonerated to the extent that he has been prejudiced by any violation of the covenants of the contract, but we are forced to the conclusion that this general rule cannot be made to apply to the contract of suretyship in suit here. And this is so, we think, because of the fact that the bond in question was executed pursuant and in obedience to the requirements of a statute which, although it permits such a bond to contain conditions for the performance of the contract, nevertheless also expressly provides that 'no * * * modification of any * * * contract between the owner and his contractors shall release or exonerate any surety * * * upon any bond given under this section.' Code Civ. Proc. § 1183."

The same question was before the Supreme Court in the case of Hub Hardware Co. v. Ætna Accident & Liability Co., 178 Cal. 264, 173 P. 81, where it was held that the provisions of section 1183, Code of Civil Procedure, enter into every surety bond given to insure the performance of a building contract. The language of the court there used, is as follows:

"The bond itself specifies that the principal and surety 'are held and firmly bound unto any and all persons, companies or corporations, who perform labor on, or furnish materials to be used in the said work of improvement aforementioned, in the sum of $17,500.' Statutes upholding liability inuring to the benefit of those with whom the person bound has no contractual relation have been repeatedly sustained. If the surety makes the contract with the law before him, the law enters into and becomes a part of the agreement"—citing Jones v. Great Southern Fireproof Hotel Co. (C. C. A.) 86 F. 370; Hollenbeck-Bush Planing Mill Co. v. Amweg, 177 Cal. 159, 170 P. 148.

In the case at bar, just as in the Hub Hardware Co., supra, Case, the surety bound itself to pay for any materials furnished to be used, and used in the described work. In other words, the surety contracted to pay for the materials that went into the work, and not whether Simons or Clark claimed to be the owner of the structure when it was completed.

[4, 5] It is further insisted that the recording of the transfer from Simons to Clark, and the execution of the trust deed by Clark in favor of Simons, was notice to the lien claimants. We do not well see how this would in any wise release the surety for the payment of the materials that went into the described building. While not expressly so found by the trial court, the transaction was, in effect, one designed simply to secure the contractor in the payment of the contract price, and, as the finding that the so-called cancellation clause written on the contract was not brought home to the lien claimants, we do not find any tenable theory upon which the surety should be relieved from the terms and provisions of the bond executed by it.

The argument of appellant that the cancellation clause attached to the contract after the building had been partly completed is not covered by the provision of section 1183, Code of Civil Procedure, which provides that no modification of a building contract shall work a release of the surety, while certainly ingenious, does not impress us as being outside of what was intended by the Legislature. While the word "modification" in its ordinary use would relate only to a limitation or reduction in degree, it would be unreasonable to hold that the Legislature intended that after a contract had been partly completed, and laborers had performed work and materialmen had furnished materials, that a cancellation clause attached to the contract and signed by the contractor and owner would relieve the surety and leave the laborers and materialmen remediless, and especially so in a case where knowledge of such cancellation has not been brought home either to the materialmen or to the laborers. Under such circumstances we think the clause quoted from section 1183, Code of Civil Procedure, applies.

Whether the transaction disclosed by the record in this case would work a release of the surety bond as to the beneficial interest of the owner in the property is not necessary for us to decide, as that question is not directly before us. The fact is, however, that the building was erected according to the conditions of the contract, and all the circumstances connected with the case indicate that the arrangement entered into between the contractor and the owner was simply for the purpose of further securing the contractor in obtaining the contract price agreed upon, and that the beneficial ownership of the property never did pass from the owner to the contractor. Again, we think the law does not require a laborer or materialman, after having notice of a contract, to daily examine the files of the county recorder's office to ascertain if the terms of the contract have been changed, modified or canceled before proceeding with his labor or delivery of materials. This requirement is the effect of appellant's argument.

The minor points urged for reversal by the appellant have been examined, but do not demand extended consideration herein.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

94 Cal. App. 402

Ex parte BLACK. (Cr. 1736.) ★

District Court of Appeal, Second District, Division 2, California. Oct. 19, 1928.

Rehearing Denied Nov. 17, 1928.

1. Infants 🔑16—Charge of delinquency is not a criminal charge.

Charge of delinquency is not a criminal charge, it being neither a misdemeanor nor a felony, and hence the ordinary provisions of the Penal Code relating to such matters, such as section 1387, do not apply.

2. Infants 🔑16—Infant's discharge under first petition did not require discharge under second petition for moral delinquency, showing sexual familiarity with man named in first petition and other man (Juvenile Court Act, § 6).

Discharge of infant under petition to commit her to detention home for moral delinquency, because court failed to make proper findings, *held* not to entitle her to discharge under second petition for moral delinquency because of sexual familiarity with men, under Juvenile Court Act (St. 1915, p. 1229) § 6, where in specifying such delinquency it named other occasions than those in first petition with the same man, as well as with another man.

Application by Anna Black for a writ of habeas corpus to be directed to the Superintendent of the Ventura County Detention Home. Writ denied.

Jarrett Beckett, of Ventura, for petitioner.

Burton Rogers, Dist. Atty., of Ventura, for respondent.

CRAIG, J. The petitioner, Anna Black, is detained in the Ventura county detention home. She seeks to be released upon habeas corpus. It appears that on August 1, 1928, a verified petition was filed by the probation officer of Ventura county in the superior court, averring said Anna Black to be a person under the age of 21 years, and that she was then leading a dissolute and immoral life, and praying that she be adjudged a ward of the juvenile court; that on the 2d day of August, 1928, that court made an order committing her to the Ventura School for Girls. She was placed in that institution and remained therein until October 5, 1928. On the 3d day of October she filed a verified application in the superior court for a writ of habeas corpus. The writ was issued and made returnable October 5th, at which time she was ordered released and discharged. This order was made because it appeared that the proceedings up to that time had been defective, in that no proper findings had been made by the court before ordering the minor committed and depriving her parents of her custody.

Immediately thereafter, and on October 5, 1928, the district attorney of Ventura county filed another petition to have Anna Black adjudged a ward of the juvenile court. She was thereupon committed to the detention home, where she still remains. In the oral argument before this court, as well as in petitioner's briefs, the principal reliance is placed upon section 1387 of the Penal Code.

[1] The charge of delinquency is not a criminal charge. In re Brodie, 33 Cal. App. 751, 166 P. 605; In re Tahbel, 46 Cal. App. 755, 189 P. 804. Viewed as a matter within the scope of the act under which the proceeding here in question is prosecuted, it is neither a misdemeanor nor a felony. The effect of a discharge of one complained against under the juvenile court act is provided for in the act itself. This indicates an intention upon the part of the Legislature that the ordinary provisions of the Penal Code relating to such matters, among which is the section cited by counsel for petitioner, should not govern.

[2] However, it is provided in section 6 of said act that "if said person shall be discharged by the juvenile court * * * such order of discharge [or dismissal] shall constitute a bar to any further proceedings in any court against said person upon said charge." St. 1915, p. 1229. The mere reading of this language is sufficient to establish the proposition that, if the second petition filed herein were substantially the same as the first, the petitioner would be entitled to her discharge, but this is not the case. An examination of the second petition shows that the principal complaint concerning this minor is that she has been guilty of sexual familiarity with certain men. However, the second petition names other occasions than those named in the first, with the same man, as well as with another man. It is appar-

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★Rehearing denied.

ent that these additional acts are of themselves sufficient to give the juvenile court jurisdiction to declare petitioner a delinquent, as being in danger of leading a lewd and immoral life. Of course, the principal purpose of the juvenile court act is to safeguard the morality and character of persons of tender years. Its provisions are for their benefit, and we do not think a fair construction of them warrants the conclusion that it was intended that one in need of its aid should be deprived thereof because of a discharge by the juvenile court, where, after such discharge, other acts of delinquency than those presented to and considered by the court previous to the discharge are subsequently brought to its attention through a proper proceeding.

The petition for writ of habeas corpus is denied, and the petitioner is remanded.

We concur: WORKS, P. J.; KEETCH, Justice pro tem.

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94 Cal. App. 397

PEOPLE v. GORMAN et al. (Cr. 1691.)

District Court of Appeal, Second District, Division 1, California. Oct. 19, 1928.

1. Embezzlement 🔑44(6)—Conviction for embezzlement held sustained by testimony that corporate officer appropriated to own use proceeds of checks fraudulently issued for false credits entered by officer.

In prosecution for embezzlement, evidence that officer of corporation in charge of accounts carried account of one dealer under fictitious name, and issued checks for goods not delivered to corporation, but falsely credited by officer to fictitious person's account, and that officer used money derived from payment of checks, ostensibly cashed by fictitious payee, for his own use, established the corpus delicti, and was sufficient to sustain conviction.

2. Embezzlement 🔑35—Allegation that corporate officer embezzled money held not variance from proof showing embezzlement of check under evidence.

Where evidence in prosecution for embezzlement showed that corporate officer fraudulently appropriated to own use certain money belonging to corporation and within custody of officer, there was no variance between allegations that embezzlement charged was of so much money, and proof that offense, if committed, consisted in embezzlement of check.

3. Criminal law 🔑1186(4)—Admission, in prosecution for five offenses of embezzlement, of evidence concerning other embezzlements, not charged nor proved, was not error, where no bad faith nor prejudice was shown (Const. art. 6, § 4½).

In prosecution of defendant for five separate offenses of embezzlement, introduction of evidence tending to prove commission by defendant of two other embezzlements, neither of which was charged in information against defendant, and as to which proof failed, was not error, where defendant was convicted of two embezzlements and acquitted of three, and there was no suggestion of bad faith in prosecuting officer, and no showing of prejudice to defendant, in view of Const. art. 6, § 4½.

4. Criminal law 🔑1162—Errors of judgment, not too serious in probable effect, if committed in criminal prosecution, should be overlooked.

If, in good faith, errors of judgment be committed in criminal prosecution, which are not too serious in their probable effect, they should be overlooked or condoned.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Edmund B. Gorman and Abraham Kirsch were convicted of embezzlement, and Abraham Kirsch appeals. Affirmed.

Joseph W. Ryan and Samuel Horowitz, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Asa Keyes, Dist. Atty., and Tracy C. Becker, Deputy Dist. Atty., both of Los Angeles, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction on each of two counts of embezzlement, and from an order denying his motion for a new trial.

[1] The first point presented by appellant is to the effect that the evidence was insufficient to support the verdict. While an examination of the transcript discloses the fact that the evidence was not as clear as might have been desired, nevertheless sufficient is therein contained from which the jury was warranted in deducing therefrom the following conclusions, to wit: Defendant was the vice president and assistant secretary of the Amalgamated Metals Corporation, which, among other things, was engaged in the business of buying junk or scrap metal. Among the persons from whom junk was purchased were two brothers named Koplowitz. Some trouble with the police department having arisen concerning the method of purchasing junk from individuals other than licensed dealers, the account of the Koplowitz brothers, who were peddlers of junk, was changed on the books of the Amalgated Metals Corporation, so that said account was carried under the fictitious name of C. Bronson, and thereafter, as payments became due for junk delivered to the Amalgamated Metals Corporation by the Koplowitz brothers, checks were drawn in favor of C. Bronson. As vice president of the corporation, defendant exercised his authority to control the manner in which such account should be handled. He also gave directions to various employees of the corporation with reference

to making out credit slips which represented the weight of junk received from "C. Bronson" and the price to be paid therefor. Although not without conflict, the evidence showed that by the order of defendant, on each of the occasions charged in the information, the C. Bronson account was credited in specified amounts, which represented the delivery to the corporation of junk which in fact was never received by the corporation. Thereafter checks were issued by the corporation in favor of C. Bronson in payment of the several amounts credited to such account, which checks were ostensibly cashed by the payee thereof. According to the admission of defendant, the money derived from the payment of such checks was eventually received by him and appropriated to his own use. In such assumed circumstances, it is clear that the corpus delicti was established, and that the evidence was sufficient to support the verdict.

[2] Appellant also urges that a variance existed as between the allegations contained in the information and the "proof," in that the embezzlement as charged in the information was as of so much money; whereas the evidence showed that, if guilty at all, the offense consisted in the embezzlement of a check. But, as hereinbefore stated, the evidence was sufficient to justify the conclusion that by means and methods designed and adopted by defendant certain specified moneys belonging to the corporation, which in fact were within the custody and control of defendant, or had been intrusted to him by the corporation, were fraudulently appropriated by defendant to his own use and benefit, from which it results that the contention of defendant in this regard cannot be sustained.

[3] Appellant also complains that prejudicial error was committed by the trial court, in that on the trial of the action, over the objection of defendant, the prosecution was allowed to introduce evidence which it was claimed tended to prove the commission by defendant of two other certain embezzlements, neither of which was charged in the information against defendant, and as to which, as conceded by the deputy district attorney in charge of the prosecution, the proof failed. In the case of People v. Frank, 28 Cal. 507, it is held, generally, but with some explanation, that, on a prosecution of the defendant on a charge of uttering a forged indorsement on a draft, evidence of other forgeries claimed to have been committed by the defendant were admissible against him, notwithstanding the fact that, as to such other alleged forgeries, the defendant had theretofore stood trial and been acquitted of the commission of such offenses.

In connection with such claim of prejudicial error arising from the admission of evidence relating to other similar offenses alleged to have been committed by defendant, the record herein discloses the fact that by the terms of the information on which defendant was prosecuted he was charged with the commission of ten separate offenses, of which five were for embezzlement and the remaining five were for grand larceny, based upon the identical facts which constituted the foundation for the several charges of embezzlement, and that, after evidence had been introduced relating to such charges of embezzlement and grand larceny, the charges as to grand larceny were dismissed, leaving intact the charges as to five separate embezzlements by defendant, and as to each of which evidence was introduced by the prosecution. It further appears that defendant was acquitted as to three of such embezzlement charges, and convicted on two of them. Having failed to secure the conviction of defendant on either of such three charges of embezzlement, it is clear that, so far as affects the two charges of embezzlement on which defendant was convicted, each of the three unsustained charges stands on the same footing as each of the other alleged embezzlements as to which the proof failed, and as to the introduction of evidence relating thereto the appellant now complains. The extension of the principle for which appellant contends would inevitably lead to the result that in every case in which two or more embezzlements were charged, and wherein the proof failed as to any one or more of them, if defendant were convicted as to any of the others, he would be entitled to a new trial as to such offenses of which he was convicted, because, forsooth, the prosecution had prejudiced the defense by injecting into the case a *suspicion* that the defendant was guilty of some other offense, when as a matter of fact, as to such crime, he was altogether innocent. As a result of such a rule, in the service of public interest and financial economy, no prosecution would ever be had wherein a defendant was charged with the commission of more than one offense, because, ordinarily, no prosecuting officer would feel justified in taking the chances of a mistrial, which necessarily would be involved where two or more offenses were charged in the same information or indictment.

[4] However, on the one hand, it is apparent that if, on the trial of a criminal action, a prosecuting attorney be permitted to promiscuously and indiscriminately present for the consideration of the jury various and sundry scraps of evidence which utterly fail to make out even a prima facia case as to an offense similar in its nature to that for the commission of which the defendant is on trial, but which merely have the effect of casting a suspicion upon him, the defendant necessarily will be placed at a considerable disadvantage, if not seriously prejudiced, as to his defense. On the other hand, it should be remembered that the law is not an exact science; that facts are at least difficult, if not impossible, of demonstration; and that lawyers and judges often differ one from the other in their inter-

pretation of the law, just as members of the jury may likewise differ in their conclusions on the ultimate facts. If, for example, in a proper case, a prosecuting attorney should attempt the presentation of facts which in his judgment were sufficient to establish the prior commission by the defendant of an offense similar to that of which the defendant may stand charged, but with such conclusion as to the law the trial judge be not in accord, or that at a critical point in the proposed chain of evidence, by reason of some unforeseen happening, an indispensable witness either should fail to appear at the trial or to give the anticipated testimony, should it necessarily and inevitably follow that a mistrial should result?

It is manifest that human frailty and the ideal administration of justice are often in conflict and that perfection cannot be attained. All that reasonably may be expected is an approximation. The modern tendency is that if, in good faith, errors of judgment be committed—if they be not too serious in their probable effect—they should be overlooked or condoned. No rule may be formulated which in all cases will be an infallible guide to justice. The determination of a question such as is here presented must depend largely upon the surrounding circumstances. In the instant case no suggestion is made regarding bad faith in the prosecuting officer, and the situation as presented was undoubtedly attributable to an error in judgment. Concretely, as disclosed by the reporter's transcript of the evidence, each of the two questioned transactions was entirely regular, and not properly subject to adverse criticism from either an ethical or a legal standpoint. In fact, so far as the jury was concerned, it is readily conceivable that the questioned evidence but redounded to the credit of the business sagacity of defendant, and that the failure of the prosecution to "make good" on its claim of the commission by defendant of other similar offenses operated as a boomerang, so that in the eyes of the jury the defendant became an innocent, persecuted individual, rather than some person standing trial on a charge properly preferred against him in good faith. In any event, the only disadvantage which may have accrued to defendant was at the outset, arising from a possible suspicion in the minds of the members of the jury of fraudulent or criminal dealing, engendered by what might be termed the unfounded claim made by the prosecuting attorney regarding the previous similar offense or offenses committed by defendant. But with the combined declarations of the attorneys for defendant and the prosecuting attorney, and finally with the official declaration by the judge of the trial court, in substance that the evidence was wholly insufficient to establish the commission by defendant of any other previous offense, the ultimate prejudicial effect of the incident was negligible, so far as concerned honorable traits of character in defendant. So viewed, and especially in consideration of the provisions of section 4½ of article 6 of the Constitution, the point is not available as a reason for a reversal of the judgment.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

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94 Cal. App. 433

LOS ANGELES AUTO TRACTOR CO. v. SUPERIOR COURT WITHIN AND FOR LOS ANGELES COUNTY et al. (Civ. 5646.)

District Court of Appeal, Second District, Division 1, California. Oct. 23, 1928.

1. Judgment 🔑301—Chancery court has power to supervise execution of its orders, and may modify them, affecting details of performance, where decree is subject to confirmation of further order.

Chancery court has power to supervise the execution of its orders, and may modify them in matters affecting details of performance, where decree, though final in nature, requires a further order of the court for the execution of the original decree.

2. Judgment 🔑203—It is not presumed court will dispose of case piecemeal, by successive final judgments.

In absence of clear showing, it will not be presumed that court will attempt to dispose of a case piecemeal, by successive final judgments, since only one final judgment is contemplated in each case.

3. Mandamus 🔑52—Quieting title 🔑52—Where court quieted plaintiff's title, allowing defendant 30 days to pay purchase money and receive deed, subsequent orders extending period for payment held within court's discretion, not warranting interference by mandamus.

Where court entered decree quieting plaintiff's title to property, with provision that defendant should have 30 days after entry of decree to pay price to plaintiff, in which case plaintiff would be required to make conveyance, court had jurisdiction to extend time, and successive orders allowing defendant additional period in which to make the payment, continued for period of about one year, did not constitute abuse of discretion, justifying appellate court's interference by mandamus, especially where in certain cases stipulations were made for extensions.

4. Mandamus 🔑28—Court's discretion will not be controlled by mandate, except in case of palpable abuse.

Where trial court is vested with discretion in exercise of its judicial power, exercise of such discretion will not be controlled by mandate, except in case of palpable abuse.

Application by the Los Angeles Auto Tractor Company for mandamus, to be directed to the Superior Court within and for Los Angeles County and Victor R. McLucas, Judge. Writ denied.

Bart F. Wade, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, Claude H. McFadden, Deputy Co. Counsel, and Loewenthal, Lissner, Roth & Gunther, all of Los Angeles, for respondents.

CONREY, P. J. An alternative writ of mandate was issued herein, pursuant to an amended and supplementary petition filed on the 8th day of January, 1928, whereby the petitioner sought to compel the respondent court, in an action pending therein, to enter a final decree quieting petitioner's title to certain described real property. Prior to that time the action had been tried before respondent judge, McLucas. Findings of fact and conclusions of law had been filed, and in accordance therewith, on the 18th day of November, 1926, a so-called interlocutory decree had been entered. By that decree it was adjudged that the plaintiff's title to said property be quieted against the claims of defendant Gladiator Manufacturing Company, unless within 30 days after entry of the interlocutory judgment the company paid to a "trustee," appointed and named in the decree, and for the plaintiff, the sum of $15,500 and interest, and certain sums expended by plaintiff for taxes, all found to be due by virtue of a contract for the sale of said real property by the plaintiff to the company's assignors. It was provided that, upon payment by the company to the trustee, within said period of 30 days, of said sums of money, plaintiff should execute a deed conveying said real property to said defendant company, and at the same time should deliver a certificate of title made by the Title Insurance & Trust Company, showing clear title in the plaintiff, subject only to certain conditions, restrictions, and tax liens. If, within 10 days after the deposit of said moneys with the trustee, plaintiff did not comply with said requirements as to deed and certificate of title, then by the terms of the decree the trustee was authorized and empowered to make the conveyance on behalf of the plaintiff, and on behalf of the plaintiff comply with said other duties of the plaintiff. The closing paragraphs of the decree were as follows:

> "It is further ordered, adjudged and decreed that if said Gladiator Manufacturing Company shall not, within thirty days after the entry of this interlocutory decree, pay to said trustee the said sums hereinbefore provided to be paid by it, then and in that event, the title to the plaintiff in and to the aforesaid real property shall be quieted against all claims of the defendants and each of them and said plaintiff shall have and recover possession of the same.
>
> "It is further ordered, adjudged and decreed that the Title Insurance & Trust Company be, and it is hereby, appointed as trustee of said court with full power and authority to do each and all of the acts hereinbefore provided to be done by said trustee and such other acts as from time to time may be required by said court to be done by said trustee in carrying out and enforcing the provisions of the decrees of the court in the above entitled action.
>
> "It is further ordered, adjudged and decreed that on or before the expiration of sixty days from the entry of this interlocutory judgment, a final judgment shall be made by said court finally determining all the rights of the parties herein."

Defendant company did not deposit with the trustee the required sums of money within said period of 30 days from and after November 18, 1926, although it made financial arrangements under which it claimed that it would have paid except for a controversy which arose concerning the demands made by the plaintiff. On the 4th day of January, 1927, pursuant to notice, the plaintiff moved for final judgment as provided in the interlocutory decree. Thereupon the court directed plaintiff to deposit with the trustee, within one week, the required deed and certificate of title. The plaintiff complied with this order, but the funds were not deposited with trustee. Again, upon notice, the plaintiff, on February 7, 1927, moved the court to enter its decree quieting plaintiff's title. Thereupon, upon representations made by said defendant that the moneys necessary to comply with the interlocutory decree would be obtained within two weeks, the court made an order extending until February 21, 1927, the time allowed to defendant corporation for payment of the required money.

On February 21, 1927, counsel for the respective parties again appeared before the court, and the matter was continued until February 28, 1927. Thereupon, on February 28th, upon representations made by defendant corporation, the court made the following order:

> "Motion for judgment continued to March 14, 1927, to give defendant opportunity to close escrow, and with understanding this will be final continuance and that if defendant does not close escrow by that time, court will amend findings."

Further continuances were made as follows: On March 14, 1927, to March 17, 1927; March 17, 1927, to March 28, 1927. On March 28, 1927, said motion of February 7, 1927, was ordered off calendar. Thereafter the matter of said motion was restored to the calendar, and on April 4, 1927, the court denied said motion for entry of decree quieting title.

On April 15, 1927, on motion of defendant corporation, and on the ground that the Title Insurance & Trust Company refused to act as trustee in accordance with the terms of the interlocutory decree, an order was entered amending the interlocutory decree by appointing F. J. Zettler as commissioner to carry out the terms of the decree, by receiving and applying the moneys to be paid by defendant corporation and by executing deed, etc., if plaintiff failed so to do. This amendment followed the form of the original interlocutory decree in its remedial provisions, but in such terms as to extend until May 15, 1927, the time within which the required payment should be made.

On the 21st day of April, 1927, plaintiff again moved for final judgment, and the motion was denied. On May 13, 1927, pursuant to stipulation duly filed, the court ordered that:

> "The time for the defendant, Gladiator Manufacturing Company, to comply with the terms of the interlocutory decree in the above entitled action, be, and the same hereby is, hereby extended up to and including May 25, 1927."

Similar stipulations and orders extended the time to July 7, 1927. On the 14th day of November, 1927, the plaintiff again moved for final judgment. Thereupon, on "stipulation of said defendant made in open court that upon condition that the court continue the motion for two weeks no further continuance would be requested by said defendant," the court continued the motion to November 28, 1927. It was further ordered that, unless the money was paid by defendant by ten o'clock a. m. of November 28, 1927, "the court will grant the said motion of plaintiff and order judgment in favor of said plaintiff."

On November 28, 1927, said motion came on for hearing and at the same time there was presented a petition wherein it was shown that defendant corporation had assigned its interest in the subject-matter of the action to one Everett B. Sawyer. By said petition Commissioner Zettler set forth that said assignee, Sawyer, had tendered a sum of money to him, and petitioner asked the court for instructions. Thereupon the matter was transferred to another department for further hearing before Hon. Hartley Shaw, a judge of said superior court, by whom plaintiff's motion was denied and the commissioner was instructed to accept tender of the money by Sawyer. It was further ordered that commissioner's deed be executed to Sawyer, if upon 10 days' notice of payment of the money the plaintiff should fail to execute such deed. Said period of 10 days expired on December 9, 1927, but the court prior to that time extended the time within which deed was to be executed by plaintiff until the 9th day of January, 1928.

Respondents contend that the decree as entered by the court was interlocutory, and not final, and that therefore it was subject to amendment by the trial court in the exercise of its discretion. In Thompson v. White, 63 Cal. 505, the court referred to the Code definition of a judgment, as distinguished from an order, and discussed in relation thereto the matter of interlocutory decrees in equity. It was held that there was no intention to abolish the power of a court of equity to pronounce what in equity practice was called an interlocutory decree. The subject was further discussed on a later appeal of the same case (Thompson v. White, 76 Cal. 381, 18 P. 399), and the court directed attention to the fact that under the old equity practice an interlocutory decree may be modified on final hearing, as the law and the evidence shall require. Looking to the terms of the decree as entered in the case at bar, we see in it a complete determination of the facts and of the rights of the parties. This being so, we are inclined to regard it as a final decree.

It should be noted, however, that in a recent decision of the Supreme Court upon a very similar case, it was held by Mr. Justice Sloss (Justices Shaw and Richards concurring) that the judgment therein considered was an interlocutory judgment or decree. We refer to Krotzer v. Clark, 178 Cal. 736, 174 P. 657. That was an action to quiet title, wherein it appeared that the plaintiff owned the land, and had entered into a contract for sale thereof to defendant, and afterward brought an action to set aside the contract. The court entered a so-called interlocutory judgment requiring that the plaintiff tender to defendant a deed and certificate of title, and providing that if the defendant should for 20 days thereafter fail to make the payments provided for in the contract, the plaintiff should be entitled to have his title quieted. Tender was made and refused, whereupon the court entered its final decree quieting title. There were two appeals, one from the interlocutory judgment, and the other from an order denying defendant's motion for a new trial. Referring to the former, the Supreme Court said:

> "There is, in the record, a notice of appeal from the interlocutory judgment, but it is not effectual for any purpose. The Code authorizes appeals from interlocutory judgments in certain cases only. Code Civ. Proc. § 963. This is not one of such cases, and the court is, therefore, without jurisdiction of the attempted appeal. Ill. Trust & Sav. Bank v. Alvord, 99 Cal. 407 [33 P. 1132]; Grey v. Brennan, 147 Cal. 355 [81 P. 1014]; Title Ins. & Trust Co. v. Cal. Development Co., 159 Cal. 484 [114 P. 838.] The defendant did not appeal from the final judgment."

Conversely, in Sugarman, etc., Co. v. Miller & Lux, Inc. (Cal. Sup.) 269 P. 1113, the appeal was from the final, and not from the interlocutory, judgment, and was considered as an appeal properly taken.

It is possible, however, for a decree in equity to be a final determination of the rights of the parties and of the specific relief to be granted, and yet the decree might contain a reservation of a right of supervision by the court over the administration of the remedy. This appears to have been attempted by the court in the decree now under consideration. The decree, after providing a period of 30 days within which defendant company should pay the stated sums of money, and further providing for conveyance to be made on behalf of the plaintiff if the plaintiff itself did not comply with the requirements as to deed and certificate of title, ordered that on or before the expiration of 60 days from the entry of this interlocutory judgment, a final judgment shall be made by the court "finally determining all the rights of the parties herein." From the language thus used, it seems clear that the court did not intend that the "interlocutory" judgment should of itself operate to complete the record of the action, but that the court intended that the ultimate remedy, as between two stated alternative conditions, should depend upon the actions of the respective parties in relation to the execution of the decree, and that in accordance with those subsequent transactions a final judgment should be granted. The terms of the final judgment, therefore, would depend upon proof of the facts of such subsequent transactions.

[1, 2] "There are some decrees which though final in their nature, dismissing the bill or granting relief, nevertheless require some further order or decree for the execution of the original decree or for complete adjustment of all matters incidental to the litigation. These may be termed supplemental decrees." Whitehouse, Equity Practice, § 402. "A decree made without any reservation of further directions constitutes a final decree, and, after it has been pronounced, the cause is at an end, and no further hearing can be had. When further directions are reserved by a decree or order, it becomes necessary to set the cause down for hearing for such further directions." Fletcher's Equity Pleading and Practice, § 740.

The power of a chancery court to supervise the execution of its orders, and even to modify them in ways affecting only the details of their performance, has long been recognized. "There are some cases of decrees which, although they are final in their nature, require the confirmation of a further order of the court, before they can be acted upon. In cases of decrees of foreclosure, the court will, upon application, enlarge the time for payment of the money, even though the final order has been enrolled." Daniell's Chancery Practice (6th Am. Ed.) pp. 991–993. We find nothing in our statutes or decisions which can be said to have been intended to limit the power of the superior court in a suit in equity to grant relief properly adjusted to the equitable rights of the parties as determined by the court, and to control the parties in all matters connected with their required obedience to the orders embodied in the decree. It is true that, as stated in Doudell v. Shoo, 159 Cal. 448, 454, 114 P. 579, our system of procedure contemplates that there shall be but one final judgment in a cause, and that in the absence of a clear showing it is not to be presumed that the court would attempt to dispose of a case piecemeal by successive final judgments, each covering a part of the matters in controversy.

[3] In the case at bar the court did not attempt to leave undetermined either the rights of the parties or the remedies to which they are entitled. The reservation made by the court and the orders which it made from time to time enlarging the limits of time within which payment might be made by defendant company, were, as we think, within the scope of the court's authority to supervise the execution of its orders, so that the remedies provided for might be directed in their operation, with due regard to the rights of the parties as determined and declared by the court in its decree. The stipulations made from time to time, signed by counsel for the respective parties, to which we have referred, indicate that negotiations were pending and that the several granted extensions of time were, in some instances, allowed by actual consent.

[4] In view of all these facts we think that the record does not show that the court has exceeded its jurisdiction or abused its discretion in the orders thus far made. Where a trial court is vested with discretion in the exercise of its judicial power, the exercise of such discretion will not be controlled by mandate except in case of palpable abuse. Realty, etc., Co. v. Superior Court, 165 Cal. 543, 132 P. 1048.

The alternative writ is discharged, and the petition for peremptory writ is denied.

We concur: HOUSER, J.; YORK, J.

94 Cal. App. 407

RIVERSIDE PORTLAND CEMENT CO. v. ANCHOR LAUNDRY CO. et al.
(Civ. 3584.)

District Court of Appeal, Third District, California. Oct. 20, 1928.

1. **Limitation of actions 🔑167(1)—Lien on corporation stock sold after limitations had run against notes secured was not extinguished, where action on notes had been commenced within time (Civ. Code, § 2911).**

Where payee of notes, after expiration of time for bringing action on notes had expired, caused shares of stock in corporation given as security to be sold, but prior thereto and within time instituted action on the notes, the lien of the pledge was kept alive by commencement of the prior action on the notes, so as not to make applicable Civ. Code, § 2911, providing that lien is extinguished by lapse of time within which action can be brought on principal obligation.

2. **Subrogation 🔑17—Payee of notes secured by stock paying another's notes secured by same stock became subrogated to benefits of lien extinguished (Civ. Code, §§ 2876, 2903, 2904).**

Where payee of notes secured by shares of stock in corporation paid prior notes made to another secured by the same stock under Civ. Code, §§ 2876, 2903, 2904, he became subrogated to all the benefits of the lien thus extinguished.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the Riverside Portland Cement Company against the Anchor Laundry Company, M. E. Schaffer, and others. Judgment for plaintiff, and last-named defendant appeals. Affirmed.

G. C. O'Connell, of Los Angeles, for appellant.

G. C. De Garmo, H. B. Cornell, and O'Melveny, Millikin & Tuller, all of Los Angeles, for respondent.

FINCH, P. J. July 25, 1919, the appellant executed the contract set out in full in Riverside Portland Cement Co. v. Anchor Laundry Co., 75 Cal. App. 286, 288, 242 P. 879, by the terms of which he assigned 200 shares of the capital stock of the Anchor Laundry Company (then held by the Hellman Commercial Trust & Savings Bank in pledge to secure the payment of his two promissory notes in the total sum of $18,400) as security for the payment of a series of notes of $5,000 each executed by him and payable to the plaintiff. The first of these notes became due and payable May 6, 1918, the second June 5, 1918, and the others at later dates. The plaintiff paid the Hellman bank the amount due on the appellant's aforesaid notes and received delivery of the 200 shares of stock. May 5, 1922, the plaintiff brought an action to recover from appellant and others the amount of all the promissory notes, but did not seek in that action to foreclose its lien on the capital stock. June 29, 1922, the plaintiff caused the 200 shares of stock to be duly sold to satisfy the whole of the appellant's indebtedness to it, including the amount paid by it to the Hellman bank on account of the appellant's aforesaid two notes. Thereafter the plaintiff made demand upon the Anchor Laundry Company for the transfer of the 200 shares of stock on the books of that company. The demand was refused, and thereupon this action was commenced to compel such transfer. Judgment was entered in favor of the plaintiff, and this appeal is from the judgment.

[1] Appellant contends that at the time the stock was sold the statute of limitations had run against the first and the second notes of the series, and that the lien of the pledge was thereby extinguished as to them, citing section 2911 of the Civil Code, which reads:

> "A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation."

[2] By bringing the action upon the notes, as stated, however, the plaintiff kept its lien alive. Commercial Savings Bank v. Hornberger, 140 Cal. 16, 21, 73 P. 625.

Appellant further contends that the stock was not pledged to the plaintiff as security for the amount it paid to the Hellman bank on his notes. Upon payment of the amount of such notes the plaintiff became subrogated to all the benefits of the bank's lien on the stock. Civ. Code, §§ 2903, 2904, and 2876.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

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94 Cal. App. 410

SWITZLER et al. v. ROBERT A. KLEIN & CO. (Civ. 3581.)

District Court of Appeal, Third District, California. Oct. 20, 1928.

1. **Vendor and purchaser 🔑15, 109, 334(1)—Reservation of strip for city on map recorded after sale of lot, worked partial failure of consideration and entitled purchasers to rescind and recover payments.**

City's exercise of rights to install public sewer and use as alley a 10-foot strip, reserved for it on map recorded after execution of contract for sale of lot including such strip, deprived purchasers of all beneficial interest in strip, except light and air coming over it, and worked failure of consideration to such extent, so as to entitle them to rescission and recovery of payments, whether such reservation conveyed the res itself or merely gave city an easement therein.

2. Vendor and purchaser 🔑37(2)—Purchasers of lot were not bound to search record for vendor's subsequent reservation of strip for city.

Purchasers, to whom vendor presented map showing lot with 46-foot frontage, agreed to be conveyed free and clear of easements or conditions other than certain building restrictions, were not bound to investigate record to ascertain whether vendor made any change which would work fraud on their rights or limit extent or value of property sold, as by entering reservation of 10-foot strip off lot for city on map as recorded after execution of contract.

3. Vendor and purchaser 🔑114, 336—Purchasers employing attorney to settle immediately on learning of vendor's fraud did not waive right to rescind and recover payments by not suing immediately.

Purchasers, employing attorney to investigate and negotiate for settlement immediately on learning that they did not own lot to extent stated in agreement by reason of vendor's entry of reservation of 10-foot strip for city on map recorded after execution of contract, did not waive right to rescind and recover payments by not suing immediately on discovery of alleged fraud, as effort to secure settlement without litigation should be looked on favorably.

4. Vendor and purchaser 🔑43(1)—Keeping up payments for short time, pending negotiations for settlement, held not ratification barring rescission for fraud.

Keeping up monthly payments on purchase price of lot for short period of time, pending negotiations for settlement after discovery of alleged fraud in reservation of strip for city on map recorded after execution of contract, *held* not such ratification as to bar rescission; such payments being merely facts to be considered by trial court in determining whether purchasers ratified transaction, notwithstanding change in map.

5. Vendor and purchaser 🔑117, 339—Purchasers conveying lot to vendor after discovering latter's fraud, held to have offered to place him in statu quo, as required to rescind and recover payments.

Purchasers executing and delivering to vendor a deed to lot purchased, and demanding refund of all payments after failure of negotiations for settlement instituted by attorney employed by them immediately after discovering vendor's reservation of strip for city on map recorded after execution of contract, *held* entitled to rescission and recovery of payments as against contention that they did not offer to place vendor in statu quo.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Action by Robert Benson Switzler and another against Robert A. Klein & Co., a corporation. Judgment for plaintiffs, and defendant appeals. Affirmed.

Henry Hayes, of Los Angeles, for appellant.

Allen & Lyon, of Fullerton, for respondents.

PLUMMER, J. Action for rescission and recovery of partial payment. Plaintiffs had judgment, and the defendant appeals.

On the 27th day of March, 1923, the plaintiffs and defendant entered into an agreement in writing by which the plaintiffs agreed to purchase and the defendant agreed to sell and convey a certain lot in the city of Fullerton, in the county of Orange, known as lot 40 in tract 460, said lot having, as specified in the contract, a frontage of 46 feet on Roosevelt avenue, the purchase price of the lot being fixed at the sum of $1,850, upon which the plaintiffs had made payments aggregating $785. The suit is founded upon the action of the defendant company in making a reservation 10 feet in width in favor of the city of Fullerton along the entire south side of said lot 40, which left in the undisputed control and possession of the plaintiffs a lot only 36 feet in width facing Roosevelt avenue. The contract or agreement of purchase referred to was entered into between the plaintiffs and the defendant prior to the recording of the map of the addition to the city of Fullerton. The complaint alleges, and the court so found, that after entering into the contract of sale and purchase, the defendant, without the knowledge or consent of the plaintiffs, or of either of them, caused the proposed plat of the addition to the city of Fullerton, in which said lot 40 is situate, to be so changed as to reserve to the city of Fullerton, for such uses and purposes as the city might desire, a strip of land along the entire south line of said lot 40, 10 feet in width. The map or plat, as it existed at the time the plaintiffs entered into the agreement of purchase referred to, and which was exhibited to the plaintiffs, did not show or have upon its face any markings indicating a reservation to the city of Fullerton. The map just referred to was filed as a tentative map on April 17, 1923. It appears that the authorities of the city of Fullerton refused to accept the same or permit record thereof until a reservation 10 feet in width had been made in favor of the city of Fullerton, along the south side of lot 40, and certain other lots in line therewith, but not involved in this action. Thereupon, the defendant entered, or had entered, upon said map a reservation in favor of the city of Fullerton, as just described, and said map was, on the 8th day of May, 1923, approved and recorded. Thereafter, and some time during the early part of 1924, the city of Fullerton entered upon said 10-foot reservation and proceeded to construct a sewer along the entire course of said reserved part of lot 40. This sewer apparently was finished on or about the 4th day of February, 1924.

The contract or agreement of purchase provided that upon the election of the defendant a deed might be executed for said lot, delivered to the plaintiffs, and the plaintiffs execute a mortgage or trust deed securing the unpaid portion of the purchase price of said lot. The record shows that during the month of July, 1924, a deed was executed conveying to the plaintiffs lot 40 in block No. 460 of said tract, without specifically mentioning the number of feet frontage of said lot on Roosevelt avenue. The agreement of purchase called for a lot 46 feet on said avenue, free and clear of incumbrances, save and except as to the conditions specified in the agreement, which conditions are not involved in this action. The deed referred to the map on record, but neither the agreement of purchase nor any of the indorsements thereof, nor anything in the deed called attention to the fact that the reservation made upon the official plat or map had been made thereon, nor is there anything in the agreement, nor does there appear anything in the record, to indicate that the plaintiffs were to receive a lot having less than 46 feet frontage on Roosevelt avenue, free and clear of all conditions and reservations, save and except as specified in the agreement of purchase. The reservation of 10 feet along the south side of said lot 40 was made without the knowledge or consent of the plaintiffs, and was made after the plat or map had been exhibited to the plaintiffs, after the agreement of purchase had been entered into by them with the defendant, and after the reservation was made, no information thereof appears to have been conveyed by the defendant to the plaintiffs.

The only contention that the plaintiffs had knowledge thereof is the argument put forth upon the theory that the filing of the plat or map with the reservation thereon made as stated, after the execution of the agreement of purchase and sale, amounted to constructive notice. The record shows that the plaintiff Robert B. Switzler visited the lot a number of times after entering into the agreement of purchase, and in his visits obtained knowledge that the city of Fullerton was constructing the sewer, as heretofore mentioned. His testimony is to the effect that he made discovery of the installation of the sewer in September, 1924. This date, however, is undoubtedly incorrect because the sewer was completed early in February, 1924. The testimony, however, is undisputed that early in September, 1924, the plaintiffs were informed by a man who was fumigating orange trees that they, the plaintiffs, had only one row of orange trees instead of two. This was early in September, 1924. Thereupon the plaintiffs consulted an attorney by the name of C. R. Allen, who made an investigation of the records, and it was then that the plaintiffs became aware of the entry of the reservation in favor of the city of Fullerton, as hereinbefore stated. This was some weeks after the execution of the deed of conveyance from the defendant to the plaintiffs, and the execution and delivery by the plaintiffs to the defendant of a trust deed to secure the remainder of the unpaid purchase price of said lot. Immediately upon making the discovery that the deed describing the lot did not convey to them, free and clear, the 46-foot frontage on Roosevelt avenue, as specified in the contract or agreement of purchase, the plaintiffs retained C. R. Allen as their attorney for the purpose of securing a settlement with the defendant. Negotiations were carried on between Mr. Allen, as attorney for the plaintiffs, and Mr. Robert A. Klein, representing the defendant, for some period of time, but not being able to reach an agreement, and the defendant apparently refusing to do anything, the plaintiffs, on or about May 6, 1925, executed and delivered to the defendant a deed to the lot in question, and demanded a refund of all of the payments theretofore made by the plaintiffs to the defendant. The deed was accepted and retained, but the defendant refused to refund the payments. Hence this action.

The court found that the agreement called for 46 feet frontage on Roosevelt avenue; that the reservation was made without the knowledge or consent of the plaintiffs, and was made in fraud of the right of the plaintiffs; that at the time of the execution and delivery of the deed by the defendant to the plaintiffs of the lot in question, on or about the 3d day of July, 1924, the plaintiffs had no knowledge of the reservation made in favor of the city of Fullerton, and relied upon the statements of the defendant and the contract of purchase, hereinbefore referred to, that they were receiving, under the deed, a lot having 46 feet frontage on Roosevelt avenue, unburdened by any reservations, or, rather, that the plaintiffs were receiving a conveyance to the lot according to the contract of purchase. That the failure to convey a lot containing 46 feet frontage on Roosevelt avenue, according to the agreement of purchase, constituted a failure of consideration, and, further, that the defendant was guilty of fraud in changing the plat or map covering said lot, without the knowledge or consent of the plaintiffs. The court found further that the plaintiffs had not waived their right to rescind the contract, and had done nothing which constituted a waiver of their right to rescind, and had not, by their acts, done anything which could be considered as a ratification of the change made, with respect to said lot, by the defendant. We have not followed the language of the findings, but have stated their substance and effect.

[1] On the part of the appellant it is first contended that the reservation made by the defendant in relation to lot 40 gave to the city of Fullerton only an easement therein, and that the res itself was not conveyed to the city. This contention, however, is immaterial. The record shows that the city of Ful-

lerton had taken possession of the reserved strip for the installation of a public sewer; that it had the right of ingress and egress on and over said reserved strip, and, in addition to installing a public sewer, might use the same for a public alley. The exercise of such rights under the easement, if easement was created, took away from the plaintiffs all beneficial interest or ownership therein as a place of residence or as a tract of land upon which they could erect any building or structure. If it be admitted that there was conveyed to the plaintiffs a title to the strip of land in question, the circumstances show that the only beneficial interest they obtained therein would be in the way of light and air coming over the same. Under any circumstances, it is evident that a failure of consideration would immediately be worked in so far as the reserved strip of land is concerned, and for residential purposes a serious lessening of the value of the remaining portion of the lot. An inspection of the agreement of purchase referred to shows a tract of land subdivided into lots for residential purposes. The agreement of purchase contains a number of conditions and specifications limiting the location of the residences to be constructed upon the lots and upon lot 40, the value of the structures to be erected, the distance from Roosevelt avenue, etc.

Appellant calls our attention to a number of authorities where relief by way of cancellation has been denied, and insists that this case is governed thereby. These authorities and their application we will consider.

[2] In 12 California Jurisprudence, 800, § 61, it is said:

> "Relief cannot be granted on the ground of fraud where it appears that the party seeking it, when the duty was encumbent upon him to investigate, has, through his own negligence, failed to ascertain matters of public record. The rule in such cases is that one is presumed to know whatever he might, with reasonable diligence, have discovered, and when the facts upon which the alleged fraud rests are matters of public record, open to inspection, ignorance of the fraud will not excuse him. Where, however, there is no duty imposed to examine the records, and where, under the circumstances, a prudent person would not be put upon inquiry, the mere fact that such means of knowledge are open and not availed of does not bar relief when actual discovery is made. The circumstances must be such that the inquiry becomes a duty, and the failure to make it, a negligent omission."

The same statement of the law is found in the case of Tarke v. Bingham, 123 Cal. 163, 55 P. 759. In that case an action was brought to reform a mortgage, and, as reformed, for foreclosure. An error was made in the recorder's office by which it appeared that the action on the promissory note involved was barred. The court held that nothing had occurred which would put the plaintiff upon notice, and that the plaintiff was not negligent in not making an examination of the records. In the case at bar the plaintiffs were presented, for inspection, a proposed plat or map of the addition of the city of Fullerton, in which lot 40 was described as having a frontage of 46 feet on Roosevelt avenue. This lot was unburdened by any easements or conditions, save and except certain building restrictions specifically and particularly set forth in the agreement of purchase. Having had presented to them a map or plat showing 46 feet frontage of said lot, having an agreement in their possession calling for a lot having 46 feet frontage, free and clear, no duty was cast upon the plaintiffs to investigate the record and ascertain whether the defendant had been guilty of making any change which would work a fraud upon their rights or limit either the extent or value of the property which they were to obtain as shown by the map and as covenanted in the agreement of purchase already executed, signed, and delivered to them by the defendant.

[3] It is further insisted by the appellant that the plaintiffs have waived any right to rescind by reason of not having begun this action immediately upon the discovery of the fraud alleged. The record shows, however, that immediately upon knowledge being brought to the plaintiffs that they did not own the property to the extent set forth in their agreement, the plaintiffs employed an attorney to investigate the matter and to take up with the defendant the proposition of settlement or adjustment. The record fails to disclose just what attempts were made to avoid litigation, but it does show that the plaintiffs did not sleep upon their rights, but immediately began to take steps to secure some adjustment. The record shows that no considerable time elapsed while these negotiations were being carried on, and instead of being construed as a waiver of any rights to rescind, we think the effort to secure settlement without litigation should be looked upon favorably.

In the case of Lady Washington Consolidated Co. v. Wood, 113 Cal. 482, 45 P. 809, relied upon by the appellant as supporting the theory of waiver, the opinion shows that the minutes of the plaintiff corporation disclosed everything relied upon as a basis for its action. All the acts relating to the execution of the release, which it desired to have set aside, appeared upon the record books of the company. The defense was made that the action was barred by the statute of limitations. The court there said that it is not sufficient for the plaintiff to allege that he was ignorant of the facts at the time of their occurrence, and had not been informed of them within three years, etc.; that the plaintiff would be presumed to have knowledge of the facts which he ought to have known; that the plaintiff, in order to excuse himself, must show that the fraud, or acts of fraud, were committed under such circumstances that he would not be presumed to have knowledge of them; and further, if it appears that the plaintiff had notice or information of circumstances which would put him on inquiry, which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts. In that case, however, the books of the company contained facts sufficient to put a reasonable man upon inquiry, and differed from the case at bar in that the plat exhibited to the plaintiffs and the agreement delivered to them were calculated to prevent inquiry, as they fully set forth just what the plaintiffs understood they were purchasing.

In Hecht v. Slaney, 72 Cal. 363, 14 P. 88, the validity of a recorded homestead was involved. There is no disputing the fact that a recorded homestead, under the codes, is constructive notice to all the world, and is readily distinguishable from the facts surrounding the case at bar.

In the case of Oppenheimer v. Clunie, 142 Cal. 313, 75 P. 899, cited as authority that the action to rescind must be begun promptly, the record shows that instead of beginning the action promptly after the discovery of the alleged fraud (the fraud being in relation to a lease of a certain theater), the plaintiff waited until after the profitable season had gone by and did nothing until the arrival of what is called the dull season by theater operators. Under such circumstances the court held the plaintiff was not entitled to equitable relief.

In the case of Harrington v. Paterson, 124 Cal. 542, 57 P. 476, there was a long wait on the part of the defendant in complaining of the fraud relied upon, and, in fact, nothing was done by him until after suit to enforce the obligation had been begun.

In the case of Ruhl v. Mott, 120 Cal. 668, 53 P. 304, the record discloses that the plaintiff had knowledge of the alleged fraud for a long period of time, and had so dealt with the lands and premises involved as to waive his right to equitable relief.

In Cross v. Mayo, 167 Cal. 594, 140 P. 283, the court, having before it the question of whether the circumstances showed action within a reasonable time, held as follows:

> "Whether the party entitled to rescind has acted promptly is a question to be decided by the trial court upon the facts of the particular case,"

—and further stated that the evidence in that case was of such a nature as to support a conclusion that the defendant, with full knowledge of the facts, was not ready to end the contract, and that continuing to treat the same for his own purpose, as valid and binding, he failed to make known any desire to terminate the contract for such a length of time and under such circumstances as to preclude the exercise by him of the right of rescission. The trial court, in the instant case, had the right to determine, upon the facts presented, whether the plaintiff had brought his action for rescission within a reasonable time. We find nothing in the case which indicates that after the discovery of the fraud the plaintiffs were willing to treat the conveyances made to them as valid and binding, or that indicates that the plaintiffs were willing to ratify the transaction as conveying to them the property for and as the property contracted for. The fact that they employed an attorney to represent them in the matter, who immediately opened negotiations with the defendant, shows an entirely contrary state of facts from those set forth in the case of Cross v. Mayo, supra, and also in the other cases relied upon by the appellant.

[4, 5] Again, citing 9 California Jurisprudence, 1198, it is insisted that the plaintiffs, in making monthly payment upon the purchase price of the premises, after the discovery of the fraud and pending the period of attempted settlement, ratified the contract. While the payment of the purchase price has in many cases been held to indicate a ratification, it cannot be held that keeping up monthly payments for a short period of time during the pendency of negotiations seeking a settlement, is such a ratification as to bar rescission. Such payments, under the circumstances, constituted merely facts or acts to be considered by the trial court in determining whether the plaintiffs had or had not ratified the transaction, notwithstanding the alleged change in the map referred to, and which prevented them from receiving the property as contracted for. We do not find anything tenable in the contention by the appellant that the plaintiffs did not offer to place the defendant in statu quo. The record shows that what was done with regard to the trust deed was at the request of the defendant, and the plaintiffs, by their conveyance to the defendant, offered to restore to the defendant everything of value which they had obtained, and demanded a refund of the moneys paid to them on account of the purchase price of the premises and certain other items which do not appear to be objected to if the plaintiffs were held entitled to the property.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

94 Cal. App. 486

SICHTERMAN v. R. M. HOLLINGSHEAD CO. (Civ. 6310.)★

District Court of Appeal, First District, Division 2, California. Oct. 26, 1928.

Rehearing Denied Nov. 23, 1928. Hearing Denied by Supreme Court Dec. 24, 1928.

1. Negligence ⊂⊃93(1)—Automobile driver's negligence was not imputable to injured fellow employé riding with him when collision occurred, neither having authority over other.

Where employé, injured while riding in employer's truck alongside of fellow employé driving it, stood on same plane as driver, not being obliged to take orders or directions from him, the driver's negligence was not imputable to him, though injured party was a member of corporation owning truck and driver did not have license; the relation of master and servant or of principal and agent not existing.

2. Automobiles ⊂⊃227(1)—Doctrine of last clear chance held not applicable, where driver of truck colliding with car had no reason to believe car struck in unavoidable danger.

Where evidence did not disclose any fact which showed to driver of truck with which Ford car collided that Ford was in a position of danger from which it could not extricate itself, doctrine of last clear chance was not applicable in action by occupant of Ford car to recover for injuries.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Richard Sichterman against R. M. Hollingshead Company. Judgment for plaintiff, and defendant appeals. Reversed.

Edwin H. Williams, of San Leandro, for appellant.

Ford, Johnson & Bourquin, of San Francisco, for respondent.

STURTEVANT, J. Plaintiff commenced an action against the defendant to recover damages for injuries sustained in an automobile collision. The jury returned a verdict in favor of the plaintiff, and from a judgment entered thereon the defendant has appealed.

In his complaint the plaintiff charged negligence in general terms following the pleading of the plaintiff in Stein v. United Railroads, 159 Cal. 368, 113 P. 663. In its answer the defendant denied any negligence on its part and pleaded contributory negligence on the part of the plaintiff. In its opening brief the defendant contended that it was not negligent and quoted from the record to sustain the contention. It also contended that the plaintiff was negligent and quoted from the record to sustain that contention. Furthermore, as stated above, it made the contention that prejudicial error was committed by the trial court in giving an instruction on the doctrine of the last clear chance. When the plaintiff filed his brief he quoted no part of the record refuting the contentions made by the defendant, but merely addressed himself briefly to citing some authorities on the question of imputed negligence and some on the subject of the doctrine of the last clear chance. He says:

> "The evidence was quite conflicting upon the question of the negligence of defendant and contributory negligence of plaintiff. Counsel for defendant admits that the evidence was conflicting upon these questions (App. Br., line 4)."

The reference is incorrect. However, on page 4 and not line 4, we find the following:

> "The evidence in the case conflicted sharply as to the facts of the accident complained of, but it was uncontradicted in other matters of substantial importance."

Whatever the writer meant by the language just quoted, it is perfectly clear, to one who picks up the defendant's brief and examines its 122 pages and the appendix of 51 additional pages, that the defendant is not to be understood as admitting that the evidence is conflicting on the issue of the defendant's negligence, nor that it is conflicting on the issue of the plaintiff's negligence. On these all-important matters the plaintiff gives us no help. Considering the rights of the litigants we have been at great pains to study the record, which is very long and which is not printed in whole or in part by the plaintiff.

[1] 1. It will greatly simplify this decision if we first discuss the question of imputed negligence. The facts pertinent to that issue are these: The plaintiff was riding on the right-hand side of the front seat of a Ford touring car. J. P. Knight was at the wheel, and there is no claim that the plaintiff had physical hold or control of any part of the car. J. F. Mahoney was formerly the owner of a business conducted under the name of Mahoney Floor Polishing Company. The plaintiff was an employé. Later Mahoney extended the lines of his business. To do so the Peerless Safety Device Company was incorporated. He owned a part of the stock, W. H. Cherry owned a part, and the plaintiff owned a part. There were no other stockholders. Mahoney acted as manager or superintendent. Sichterman took orders from Mahoney and continued as an employé. When there was work for more persons, extra help was hired. The employés, whether stockholders or otherwise, were each paid by the hour. The company owned the Ford touring car. J. P. Knight was an employé. When the car was to be driven it was Knight's duty to drive it, and when a certain job was reached he stepped from the wheel and worked with the rest of the employés. As Mr. Mahoney testified:

> "We all worked together. I got down on my hands and knees the same as the rest. We all worked together."

★For opinion on rehearing, see 271 P. 1111. Hearing denied by Supreme Court.

As to the power to boss or superintend, there was evidence that Knight and Sichterman stood on an even plane; neither had authority to direct the other. There was no conflict in the evidence on the question of the relative authority of these two servants. Under these circumstances the trial court did not err in giving instructions to the effect that the driver's negligence was not to be imputed to the plaintiff. Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 742, 164 P. 385. The court quotes with approval from Nonn v. Chicago City Ry. Co., 232 Ill. 378, 83 N. E. 924, 122 Am. St. Rep. 114, where it is said:

> "There can be no such thing as imputable negligence, except in those cases where such a relation exists as that of master and servant or of principal and agent."

As there was no such relation existing between this plaintiff and Knight, the negligence of the latter may not be imputed to the former. The trial court did not err in giving instructions to that effect.

2. The defendant calls to our attention the fact that Knight did not hold a chauffeur's license and that the plaintiff was riding with him and that the omission of Knight and of the Peerless Safety Device Company to procure such license constituted negligence which is to be imputed to the plaintiff, and that such negligence constituted contributory negligence on the part of the plaintiff. The authority cited on the first point discussed by us is against this contention of the defendant. So is Irwin v. Golden State Auto Tour Corp., 178 Cal. 10, 14, 171 P. 1059. These two cases are addressed to the negligence, if any, of Knight. As to the negligence of the Peerless Safety Device Company, the rule is the same. 29 Cyc. 545, 546. The defendant cites and relies on the doctrine stated in 2 Thompson on Corporations (2d Ed.) 269, § 1268. It is not in point. This is not an action by the corporation or one of its stockholders against an officer of the corporation. The trial court did not err in the instructions which it gave or those which it refused on this issue.

3. Shorn of all features claimed to have arisen by reason of negligence imputed to the plaintiff, the court fully instructed the jury on the subject of contributory negligence. By its verdict the jury has made the implied finding that the plaintiff was not guilty of contributory negligence. We are not at liberty to disturb the verdict in view of the evidence which was introduced at the trial.

4. The defendant claims it was not negligent and it quotes the record to sustain its contention. As hereinabove set forth, the plaintiff has given us no help in his brief. At the trial the parties used a diagram on which the witnesses drew lines, etc., with colored crayons. That diagram has been brought up. From the record it appears that before either party had reached Fifth street each vehicle was on its side of the street, and if each vehicle had continued forward on straight lines there would have been a space of 25 feet between them. The witness Knight testified that as he turned on Townsend street to go northwesterly on Fifth street, the defendant's car was a short distance back of the northeasterly line of Fifth street. He marked both points. He testified further that he then proceeded at about 5 to 8 miles per hour. Measuring the distance between where his car was at that time and the point of the impact, and making the same measurement between where the defendant's car was and the point of the impact, the distances are approximately the same. The witness Hancock, who was driving the Mack truck, testified that when he saw the Ford car start to pass in front of his truck, the truck was at the curb line or 15 feet out into Fifth street. "At that time I had a clear view of the Ford; an unobstructed view. The driver of the Ford gave me absolutely no signal—absolutely no signal of his intention to turn. He did not put his left hand out. I did not hear any horn at all. It was going at a very high rate of speed. I would estimate it to be about 25 miles an hour. When I saw the Ford commencing to make that turn I blew my whistle and swung to the right and put on my emergency brake and my foot brake and pulled over." The plaintiff in argument claimed that the defendant was negligent because it did not stop. The answer is that the evidence shows the driver tried to stop and the evidence does not show that he negligently did or omitted any act in that attempt. As we have shown by the testimony of the witness Knight, the truck was not going any faster than the Ford car was going, which was estimated by the same witness at 5 to 8 miles. The witnesses for the defendant gave similar testimony regarding the speed of the truck. Moreover, they testified that the Ford car ran into the truck and that the occupants of the Ford car were thrown forward and out. Plaintiff produced a photograph of the Ford car which shows the right-hand fender to be bent and torn up until it is nearly as high as the top of the radiator. If, as contended by the plaintiff, the big Mack truck ran into the Ford from behind, striking it on the right-hand side, that fender would have been bent down and not up. If, as testified to by the witnesses for the defendant, the Ford ran into the Mack truck from behind, striking it on the left-hand side, the result might have been to press the fender upwards as shown in the photograph and to throw the occupants forward. The record contains little, if anything, that can be claimed to be in conflict with what we have quoted and which tends in the least to show negligence on the part of the defendant.

[2] 5. The court instructed the jury on the doctrine of the last clear chance. The defendant claims this was error. The plaintiff asserts that the witness Hancock stated that

when his truck was at the northeasterly line of Fifth street it was traveling 17 to 18 miles an hour. Traveling at 17 or 18 miles an hour, the witness testified that he could stop the truck in 20 feet. At the northeasterly line of Fifth street there was no occasion for stopping. After crossing the northeasterly line of Fifth street the truck proceeded 50 feet or thereabouts. The plaintiff argues that these facts justified the instruction on the last clear chance. But several factors were wanting to support the argument. When the truck was at the northeasterly line of Fifth street, the evidence does not disclose any fact which showed to the driver of the truck that the Ford car was in a position of danger from which it could not extricate itself. Under the facts contained in the record, the defendant had as much right to claim that the Ford car should have stopped. We think the trial court erred in giving an instruction on the doctrine of the last clear chance, and that under the facts of this case the error was prejudicial.

The judgment is reversed.

We concur: BUCK, Presiding Justice pro tem.; NOURSE, J.

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94 Cal. App. 441

NYLUND v. MADSEN. (Civ. 3516.)

District Court of Appeal, Third District, California. Oct. 23, 1928.

1. Appeal and error 🔑1048(3)—That court permitted leading questions does not require reversal, where form of questions did not prejudice appellant.

That trial court permitted asking of leading questions does not require reversal, where transcript does not disclose that appellant was prejudiced by the form of the questions asked.

2. Executors and administrators 🔑221(5)—Plaintiff's statement, during deceased's lifetime, that deceased had paid her $2 a day, held not to prevent recovery against estate of reasonable value of services rendered as nurse on deceased's last illness.

In action against estate for services as nurse during last illness of deceased, previous statement of plaintiff, during lifetime of deceased, that deceased had paid her $2 a day, did not prevent recovery for reasonable services rendered.

3. Work and labor 🔑30(2)—Value of services rendered is for jury in actions based on quantum meruit.

In actions based on quantum meruit for value of services, the question as to the value of the services rendered is for the jury, and jury may fix value from their common knowledge of the value of similar services.

4. Executors and administrators 🔑449—Failure of plaintiff, suing estate for services rendered deceased, to introduce testimony as to their reasonable value, held not to prevent recovery based on trial court's opinion as to value.

In action against estate for services rendered deceased as nurse during his last illness, in which evidence disclosed nature and extent of services rendered, recovery *held* not precluded by failure of plaintiff to introduce testimony as to reasonable value of services, since trial court sitting as jury could form his own opinion as to value from the testimony concerning the services rendered.

5. Evidence 🔑570—Testimony of experts is not conclusive on trier of fact.

Testimony of experts is not conclusive and does not bind jury or trial court sitting without a jury.

6. Work and labor 🔑28(4)—Trial court sitting as jury in action for services rendered may determine their reasonable value within limits of common knowledge, without aid of expert testimony.

In action on quantum meruit for services rendered, trial court sitting as jury may fix value of services without aid of expert testimony, where value of services is within common knowledge.

7. Work and labor 🔑4(2)—Promise to pay reasonable value of services of character usually charged for, rendered promisor with his consent, is implied.

Performance for another of useful services of character usually charged for, with other's consent, raises implied promise of the person served to pay the reasonable value of the services.

8. Executors and administrators 🔑221(5)—Promise of deceased to pay reasonable value of services rendered by nurse during his last illness was implied under evidence showing their extraordinary character.

In action against estate to recover reasonable value of services rendered deceased as nurse during his last illness, in which evidence showed that deceased was suffering from loathsome disease, and that services rendered by plaintiff were of extraordinary character, promise of deceased to pay their reasonable value was implied.

Appeal from Superior Court, Humboldt County; T. H. Selvage, Judge.

Action by Sadie E. Nylund against Henry F. Madsen, executor of the last will and testament of Carl Miller, deceased. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

W. F. Clyborne and Frank McGowan, both of Eureka, for appellant.

J. T. Fraser, of Eureka, for respondent.

PLUMMER, J. The plaintiff had judgment against the defendant as the executor of the last will and testament of Carl Miller, deceased, for the sum of $600. From this judgment the defendant appeals.

The complaint in the action sets forth that for a considerable period prior to the death of Carl Miller the plaintiff attended him as a nurse and performed services, at his instance and request, and upon his promise to pay therefor, of the reasonable value of $1,000; that the plaintiff has not been paid for said services. The death of Carl Miller is then set forth, the admission of his last will and testament to probate, and the appointment of the defendant as executor are alleged and judgment demanded in the sum of $1,000. The filing of the claim against the estate of said deceased is alleged, and its rejection by the executor also pleaded. The answer of the defendant put in question the fact of the services, the promise to pay therefor, and also the value thereof.

[1, 2] Upon this appeal, while other objections are alleged, the only real ground upon which it is insisted that a reversal of the judgment should be ordered is in the fact that no witness testified that the services performed by the plaintiff were of the reasonable value of $600, or any other sum. Complaint is made that the trial court permitted the asking of leading questions, but an examination of the transcript does not disclose that any prejudice was suffered by the defendant by reason of the form of the questions permitted to be asked by the trial court. Attention is also called to the fact that a certain witness testified that the plaintiff told her at one time that the deceased paid her $2 a day for taking care of him while he was sick, and that this should have been considered a bar to any recovery by the plaintiff. An examination of the transcript fails to support the contention made by the appellant in relation to this testimony.

The question and answer upon which the objection is based are as follows:

> "Q. While you were there at the Nylund residence during that week just before Mr. Miller went down to San Francisco did you hear Mrs. Nylund say anything about being paid? A. Well, she told me at one time that he had paid her $2.00 a day."

This may all be true, but it does not show that the plaintiff was paid for her services during the last illness of the deceased; all it does show, if anything, is that at one time the deceased considered the plaintiff's services worth at least $2 per day, or at least that he had at one time paid that much for plaintiff's services.

[3, 4] While the answer of the defendant denies the services, the record shows that there was practically no denial thereof upon the trial, and the only testimony introduced was in relation to the extent of the same. The testimony of Dr. Gross alone is sufficient to show the extent of the services. He testified that the services consisted in dressing one of the hands of the deceased for several months; that the deceased was suffering from several running sores; that there was mucous coming from all of them; that he had a sore hand and sore throat, and that eruptions were breaking out over his body; that he also had a sore foot; that the plaintiff treated one of the hands of the deceased twice a day; the hand was suffering from cancer and had to be dressed at least twice a day; that the plaintiff took care of him pretty nearly all the time; that she did this for a period of five or six months; that the plaintiff had to rub liniment on one of the patient's legs; had to put applications on his neck several times a day; that the infections which broke out had to be dressed several times a day; that in addition to the sore on his hand, one of his arms had a sore that required dressing; that the plaintiff would dress the sore hand and then bring him to the witness' office for him to dress; that when the patient coughed the plaintiff had to assist him in removing the saliva and mucous from his mouth; that the services performed by the plaintiff were extraordinary; that the services included more than that of a nurse; it included that of an attendant and housekeeper; that the plaintiff attended to business for the decedent, nursed him, and treated his very loathsome disease with which he was afflicted. Other witnesses testified as to the services, but the simple outline taken from the attending physician's testimony is amply sufficient to show the extent of the services. We may here state that the different witnesses, who testified in relation to the services, described in detail the offensive condition of the patient or of the ailments with which he was afflicted, and the record contains sufficient to show that the testimony introduced fully advised the court as to the extent of the services performed, and their character. We may further state the record shows that the plaintiff took care of the deceased for the period of time mentioned and until, as stated by the attending physician, the burden of taking care of the deceased caused her to break down, and then two nurses had to be employed to look after the deceased. No question is made by appellant that the amount allowed by the trial court was or is excessive. As we have stated, the only point urged for reversal in this particular is that no witness went on the stand and stated his opinion as to the value of the services. It is urged upon the authority of Cowdery v. McChesney, 124 Cal. 363, 57 P. 221; Crusoe v. Clark, 127 Cal. 341, 59 P. 700; Laiblin v. San Joaquin Agricultural Corp., 60 Cal. App. 516, 213 P. 529, that such testimony is necessary. The cited cases, however, do not so hold. The rule stated in all of them is substantially the same as the following quotation from Laiblin v. San Joaquin Agricultural Corp., supra:

> "The action being upon a quantum meruit, it was proper, of course, to allow evidence as to the reasonable value of the labor performed and it was competent to prove what was the reasonable value of such labor by the opinions of experts fully qualified to give such testimony."

It is not held in any of the cases relied upon by appellant that such testimony is absolutely necessary. In actions based on quantum meruit for the value of services, the value of the services rendered is for the jury. In this case, for the trial court, and while opinion evidence is admissible, where the facts constituting the service and all the circumstances relating thereto are placed before the trial court, the court or the jury, as the case may be, has before it sufficient upon which to determine the fact of value. The rule is thus stated in 40 Cyc. 2855:

> "In an action for services rendered the questions whether they were rendered, and if so, what is their value, are for the jury; and in the absence of evidence of the value of such services, or where the evidence leaves uncertain the amount plaintiff is entitled to recover, the jury may estimate their value from their own judgment and knowledge on the subject."

This does not mean that the jury is entitled to fix the value, irrespective of testimony, nor upon their knowledge of the services performed, but their common knowledge of the value of services which have been described under all the circumstances and conditions disclosed by the testimony. In the case of Hossler v. Trump, 62 Ohio St. 139, 56 N. E. 656, this identical question was before the Supreme Court of the state of Ohio. It was there held (we are quoting from the syllabus):

> "When, upon the trial of the general issue in an action upon a quantum meruit for services of a domestic character, the plaintiff offers evidence showing the facts from which the promise to pay may properly be inferred, and also showing the nature and extent of the services rendered, the case should be submitted to the jury, although no witness expresses an opinion as to the value of the services."

The services involved in that action were for nursing, bathing, and caring for Mr. Trump, washing his clothing and bedding, mending, etc., setting forth the period of time, and the claimed value thereof, at $3 per day. The trial court in that action instructed the jury that as no evidence was offered tending to show the value of the services, that is, no witness had stated to the jury his opinion of their value, their verdict should be for the defendant. In the circuit court the judgment of the common pleas court was reversed, and upon appeal to the Supreme Court the judgment of the circuit court was affirmed. In the course of the opinion in that case the Ohio Supreme Court said:

> "The jury in such a case may reject the opinions of witnesses, if they deem them unreasonable, because the facts touching the character and extent of the services which the plaintiff is required to prove, and which, in the case before us, were proved, are themselves the subject of consideration by the jurors with a view to the exercise of their own knowledge and the formation of their own opinions as to their value."

The court then goes on to cite the case of Head v. Hargrave, 105 U. S. 45, 26 L. Ed. 1028, where the Supreme Court, speaking through Justice Field, holds that a trial court may disregard the testimony of witnesses who give their opinions as to the value of attorney's fees, and act upon its own knowledge and information of such matters. Again, in the case of Craig v. Durrett, 1 J. J. Marsh. (Ky.) 365, 19 Am. Dec. 103, in an action for the value of services the same rule is promulgated. It is there said (quoting from the syllabus):

> "The jury may from their knowledge of the business of society and the value of the labor, in assumpsit for work and labor, find a verdict for the price of the work done notwithstanding there is no evidence of the worth of labor at the time and place the work was performed."

See, also, Wetzel v. Kellar, 12 Ind. App. 75, 39 N. E. 895.

[5] That the testimony of experts is not conclusive, and that a jury is not bound by opinion testimony, which, of course, applies to the trial court when sitting without a jury, see 3 Cal. Jur. p. 714, § 111; also, Ehlers v. Wannack Bros., 118 Cal. 310, 50 P. 433, in an action involving work performed by an architect. Opinion evidence was first introduced. The defendant sought to show the extent and character of the work, for the purpose of laying the foundation for fixing the value of the same. This testimony was excluded by the trial court, and for this reason the judgment was reversed. While it is now held in practically all jurisdictions that opinion evidence is admissible as to value, where the witness has knowledge of the same, it is likewise held in practically all of the jurisdictions that such opinion evidence may be disregarded.

In Estate of Iser, 52 Cal. App. 405, 198 P. 1014, this court had occasion, speaking through Mr. Justice Hart, to collate a large number of authorities bearing upon this question. On page 408 of the opinion in that case (198 P. 1015), this court said:

> "The position of these appellants is, apparently, that before a court can find the value of professional services it must have before it the testimony of experts to the effect that certain services are of certain value. But this is not the law. The testimony of experts is, of course, admissible to prove the value of attorneys' services" (citing a number of authorities).

And, further:

> "But the opinions of experts in such cases are not binding upon the jury, who may apply to the

testimony 'their own experience and knowledge of such services'" (citing a number of authorities).

Again:

> "If the jury may form a judgment as to the value of services in opposition to the opinions of experts, it necessarily follows that the testimony of experts is not essential" (citing further authorities).

Again, the rule is further elaborated in 27 California Jurisprudence, p. 230, § 39, where it is said:

> "In an action upon a quantum meruit it is proper to allow evidence as to the reasonable value of the labor performed. The character and amount of work done by the plaintiff may be proved for the purpose of showing the value of the services, and so it is competent, as bearing upon the value of legal services, to prove the nature of the litigation and the amount involved."

[6] It is also further said in the same section from which we are quoting that opinion testimony of experts, qualified, may be introduced. In other words, the cases all distinguish between the kind of testimony that may be introduced and what testimony it is absolutely necessary to introduce in order to support a judgment. The authorities which we have cited make this distinction and show clearly that when all the facts and circumstances are placed either before the court when sitting with a jury, or when the case is being tried before the court without a jury, the court or the jury, as the case may be, may fix the value without the aid of expert testimony. The rule, of course, is limited to matters which are within common knowledge. As said, in substance, in one of the cases, there is no reason for assuming that a trial court has no knowledge of the facts and circumstances of which all other persons have common knowledge. In other words, if a jury possesses sufficient common knowledge to find a verdict as to value for work and labor, where the extended character of the work fully appears in the testimony, there is no reason for concluding that a trial court does not possess the same knowledge.

[7, 8] As to the promise to pay, it is sufficient to state that the testimony in this case shows that the services were performed under such conditions as the law would imply a promise. Just as stated in the case of Young v. Bruere, 78 Cal. App. 127, 248 P. 301:

> "Where one performs for another, with the other's knowledge, a useful service of a character usually charged for, and the latter expresses no dissent, or avails himself of the service, a promise to pay the reasonable value of the services is implied."

We do not need to add to the authorities cited in this case.

The judgment in this case, however, is irregular and should be amended by adding thereto: "Payable out of the Estate of Carl Miller, deceased, in due course of administration." And it is hereby ordered that the above words be added to the judgment in this case, and as so amended the judgment is affirmed, respondent to recover costs.

We concur: FINCH, P. J.; HART, J.

94 Cal. App. 343

PACIFIC GAS & ELECTRIC CO. v. UNIVERSAL ELECTRIC & GAS CO.
(Civ. 6251.)

District Court of Appeal, First District, Division 1, California. Oct. 17, 1928.

1. Assignments 🔑68—Purchaser of electrical energy, accepting deliveries from seller's assignee without objection, except as to rate, waived objections to assignment.

Where contract for sale by power company of electrical energy for fixed rates provided that it should bind successors in interests of both parties, contained no stipulation against assignment, and there was nothing under it to show that skill or other quality peculiar to power company or nature of service was a material inducement to contract, it appearing that purchaser, with knowledge of facts and without objection, except as to rate charged, accepted deliveries from assignee of seller and made monthly payments on account, such circumstances *held* to sufficiently indicate waiver of objections to the assignment.

2. Electricity 🔑11—Copies of contract to furnish electric energy and of proposed lease and assignment, filed with Public Utilities Commission, became part of assignee's rate schedule (Public Utilities Act, §§ 14(b), 17, subd. 4(b); Civ. Code, § 3532).

Where copy of contract to furnish electrical energy was filed in accordance with Public Utilities Act (St. 1915, p. 115), §§ 14(b), 17, subd. 4(b), and a copy of proposed lease of seller and assignment was also filed and its execution authorized, under Civ. Code, § 3532, requiring no idle acts, *held*, that the contract became part of assignee's filed schedule of rates, making it unnecessary to file originals, so as to allow assignee to sue purchaser for difference between contract price fixed before Public Securities Commission acquired control of rates, and as fixed after commission acquired control under Public Utilities Act.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Pacific Gas & Electric Company against the Universal Electric & Gas Company. Judgment for plaintiff, and defendant appeals. Affirmed.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

William Kehoe, of San Francisco, for appellant.

Thomas H. Breeze and Leo H. Susman, both of San Francisco, for respondent.

CASHIN, J. An appeal from a judgment entered against the defendant in an action on a contract for the sale of electrical energy.

The contract, which was entered into between Sierra & San Francisco Power Company (hereinafter referred to as the power company) and the defendant on July 9, 1915, provided for the sale by the power company and the purchase by the defendant for a period of eight years of all the electrical energy required by the latter in the regular course of its business in excess of that generated by its own plant. The rates agreed to be paid were fixed in accordance with a sliding scale based upon the amount of energy used, and it was further provided that the contract should bind the successors in interest of both parties. The complaint alleged that between the months of January, 1920, and April, 1922, inclusive, energy was furnished, for which under the contract defendant agreed to pay the sum of $812,613.97, and of which $774,598.36 had been paid. The prayer was for the difference of $38,015.61, and for which, with interest, the judgment was entered. The contract also provided that for the energy delivered during any month payment should be made within 30 days thereafter, and, in case the defendant should dispute any bill rendered within the period fixed for payment, then it should pay the amount which it admitted to be due, and forewith offer to submit to arbitration in the manner provided the question respecting the balance unpaid.

When the contract was entered into the Railroad Commission of the state of California had no jurisdiction over the rates, charges, and contracts of the parties, for the reason that they were not operating within a municipality which had surrendered its power of control in such matters. After the amendment of section 23 of article 12 of the Constitution in 1914, the present Public Utilities Act was adopted (Stats. 1915, p. 115), and took effect on August 8, 1915. By this legislation the commission acquired jurisdiction over the parties respecting their contracts and rates (section 14(b) of the act, and in compliance with an order of the commission the power company on October 6, 1915, filed a list of deviations from its regularly filed electric rates then in force. Reference therein was made to the above contract, but whether the list set forth the rate agreed to be paid thereunder cannot now be ascertained, as the list has been lost from the files of the commission. Subsequently the commission requested that a copy of the contract be filed, and this was done on February 15, 1916.

Thereafter on March 26, 1919, the power company and Pacific Gas & Electric Company, plaintiff and respondent here, filed with the commission their joint application for an order authorizing the power company to execute a lease of all its generating and distributing plants and properties to the plaintiff, this being followed by a supplemental application referring to the proposed lease, the terms of which were contained in an exhibit attached, and by which, in addition to leasing its properties and business, the lessor assigned to the lessee for the term of the lease or until their earlier expiration all of the lessor's existing contracts for the sale of electrical energy. Thereafter a notice of hearing was given by the commission, stating the nature of the application, and on January 17, 1920, its order, referring to the form of the lease filed with the application and authorizing its execution, was made. Pursuant to the authorization the lease, containing substantially the provisions, terms, and conditions shown in the exhibit, was executed, but a copy of the executed instrument was not filed with the commission. As stated, the lease by its terms assigned all existing contracts for the sale of electrical energy, and these the lessee assumed and agreed to perform, subject, however, to such changes and modifications as should from time to time be lawfully made by agreement between the lessee, as successor in interest of the lessor, and the other party or parties thereto, or otherwise in conformity with law. At all times since August 9, 1915, plaintiff has been engaged in selling and distributing electrical energy in San Francisco, and during that period has had on file with the commission schedules of its rates and charges which were in full force and effect. None of those schedules, however, prescribed the same rates as those specified in the above contract, but, as stated, a copy of the contract has at all times since February 15, 1916, been on file with the commission.

It is admitted that during the period alleged in the complaint the amount of energy as claimed by the plaintiff was delivered to the defendant, and that statements therefor were rendered monthly; the rates charged being those provided by the contract. Some months before the making of the lease and assignments mentioned the original parties to the contract agreed that the rates fixed therein should be lowered, this agreement being evidenced by certain letters which passed between them. Subsequently the power company, under date of July 31, 1918, gave notice of the termination of this agreement, and thereafter until the month of December, 1919, bills were rendered monthly at the rates provided by the contract, but the defendant continued to make payment thereon at the reduced rate. On January 17, 1921, an action was commenced by the power company against the defendant to recover the difference, and a judgment therefor was entered, which was subsequently affirmed on appeal. Sierra & San Francisco Power Co. v. Universal Electric & Gas Co., 197 Cal. 376, 241 P. 76. It was held in that case that, the letters mentioned not having been filed with the commission, the purported modification of the original agreement never became effective, and that the power company had the right to revert to the original rate without the sanction of the commission.

After the plaintiff commenced delivery under the contract the defendant continued to make monthly payments based upon the reduced rate, and, so far as shown, no offer was made by it to submit the question regarding the unpaid balances to arbitration.

[1] Appellant claims that the contract was not assignable, and, further, that neither the original contract nor the lease purporting to assign the same having been filed with the commission, as parts of plaintiff's schedule of rates, no recovery can be had in the action. The contract, so far as shown, contained no stipulation against assignment, nor any provision which expressly or impliedly forbade performance by another. Furthermore, there was nothing to show that the skill or other quality peculiar to the power company, or the nature of the service, was a material inducement to the contract. Similar contracts have been held to be assignable (La Rue v. Groezinger, 84 Cal. 281, 24 P. 42, 18 Am. St. Rep. 179; Leader Co. v. Little Rock, etc., Co., 120 Ark. 221, 179 S. W. 358); and it appears that appellant, with knowledge of the facts and without objection, except as to the rate charged, accepted deliveries from the plaintiff and made monthly payments on account. Such circumstances sufficiently indicate a waiver of objections to the assignment. Staples v. Somerville, 176 Mass. 237, 57 N. E. 380; Kinser v. McMurray, 190 Iowa, 1329, 181 N. W. 691, 694; Brewster v. Hornellsville, 35 App. Div. 161, 54 N. Y. S. 904; Wyatt Lumber Co. v. Colley Hardwood Mfg. Co. (C. C. A.) 3 F.(2d) 1023.

It is provided by subdivision (b) of section 14 of the Public Utilities Act that:

> "Under such rules and regulations as the commission may prescribe, every public utility other than a common carrier shall file with the commission within such time and in such form as the commission may designate, and shall print and keep open to public inspection schedules showing all rates," etc., "together with all rules, * * * contracts," etc., "which in any manner affect or relate to rates, tolls, rentals, classifications, or service."

And subdivision 4b of section 17 of the act provides:

> "Except as in this section otherwise provided, no public utility shall charge, demand, collect or receive a greater or less or different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates, tolls, rentals and charges applicable to such product or commodity or service as specified in its schedules on file and in effect at the time. * * *"

[2] As stated, a copy of the contract was filed at the request of the commission, and a copy of the proposed lease and assignment was also filed and its execution authorized. The act does not require the filing of original contracts relating to rates unless the commission shall so direct, and, the form in which such document shall be filed being left to its discretion, copies will suffice if the commission makes no further requirement. The law requires no idle acts (Civ Code, § 3532), and when by authority of the commission the power company assigned its interest in the contract to the plaintiff, copies of both the assignment and contract being then on file, the contract, as the effect of the transaction, became a part of plaintiff's filed schedule of rates, and it was unnecessary to file the original instruments, unless required by the commission, which is not contended to have been the case.

We find no merit in the appeal, and the judgment is accordingly affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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94 Cal. App. 424

JOHNSON v. KVALE. (Civ. 3518.)

District Court of Appeal, Third District, California. Oct. 22, 1928.

1. Pleading ⚷345(1)—Judgment on pleadings held erroneous, where defendant's answer alleged facts sufficient to overcome plaintiff's prima facie evidence.

Judgment on pleading in action to recover selling price of lambs and interest thereon in favor of plaintiff *held* erroneous, where defendant's answer alleged facts sufficient to overcome prima facie evidence that public weighmaster's certificate, upon which action was based, was correct.

2. Weights and measures ⚷8—Public weighmaster's certificate, relied on for correct weight of lambs sold, may be attacked for fraud or mistake (St. 1915, p. 1288, § 6, as amended by St. 1919, p. 724, § 3).

Public weighmaster's certificate of weight of lambs may be attacked on ground of fraud or mistake, in action to recover selling price of lambs based on certificate, St. 1915, p. 1288, § 6, as amended by St. 1919, p. 724, § 3, providing for reweighing of commodity, when doubt or difference arises, and that when product is sold subject to public weighmaster's certificate, weight should be true net weight of product, not showing intention that method provided was to be exclusive remedy for correcting error.

3. Appeal and error 🔑1171(2)—Judgment on pleadings for $666.60, defendant's answer admitting liability of $594.10, will not be affirmed on ground that difference was trifle which law disregards.

Judgment on the pleadings for plaintiff in action to recover for selling price of lambs based on public weighmaster's certificate of weight, where defendant's answer alleged discrepancy in true weight, and weight as stated in certificate which would make correct selling price $594.10 instead of $666.60, will not be affirmed on ground that difference was trifle which law would disregard.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by Glen Johnson against N. J. Kvale. Judgment for plaintiff, and defendant appeals. Reversed.

Lilburn Gibson, of Ukiah, for appellant.
W. D. L. Held, of Ukiah, for respondent.

FINCH, P. J. The plaintiff was given judgment on the pleadings for the sum of $666.60 and interest thereon, the amount demanded in the complaint, and the defendant has appealed. The answer admits an indebtedness of $594.10, but denies any greater indebtedness. Respondent's brief correctly states the following facts:

> "On June 16, 1927, plaintiff sold defendant several lots of sheep, among them 123 lambs at the agreed price of ten cents per pound. The 123 lambs were weighed by a public weighmaster, and under his seal he issued a certificate showing these lambs to weigh 6305 lbs. Thereupon the parties settled on that basis; the defendant took delivery of the sheep and gave plaintiff his check for $666.60 in payment of the several lots of sheep he then received from plaintiff, including the 123 lambs. Defendant shipped a portion of said sheep and mingled the remainder with others he had elsewhere purchased. Some time thereafter, defendant claims to have discovered that said 123 lambs did not weigh 6305 lbs. as the public weighmaster's certificate showed but that they weighed only 5580 lbs. Defendant thereupon stopped payment on the check he had delivered to plaintiff. This action was then instituted."

[1] The answer, among other averments, alleges that the 123 lambs weighed in the aggregate only 5,580 pounds, but that, "by reason of the fact that one of the peas on the scales had been moved without the knowledge of this defendant, or of the public weighmaster in charge thereof, * * * all 123 lambs appeared to weigh 6,305 pounds instead of their actual weight of 5,580 pounds; that said public weighmaster thereupon delivered his certificate to these parties, which certificate showed said lambs to have weighed 6,305 pounds, and, acting solely upon said weights as described by said certificate, said defendant drew his check in favor of said plaintiff in the sum of $666.60 instead of the correct sum of $594.10; * * * that said check was immediately delivered to the plaintiff; that the making, executing and delivery of said check in the sum of $666.60 by defendant was done and performed by defendant through inadvertence and by mistake and through entire ignorance of the fact that the said lambs weighed 5,580 pounds only and * * * solely by reason of his said mistaken belief, * * * and had he known that said lambs weighed only 5,580 pounds, he would have drawn his check in favor of plaintiff in the sum of $594.10 only."

The allegations of the answer show that the check was given under a mistake of fact. Respondent contends that the weighmaster's certificate is prima facie evidence of the facts stated therein. This may be conceded, but this prima facie evidence is overcome by the facts alleged in the answer. It may be that the defendant will experience difficulty at the trial in proving the alleged facts, but that has nothing to do with the sufficiency of the answer as a pleading. It cannot be said as a matter of law that, because of the impossibility of again weighing the lambs, their weight may not be susceptible of proof by other evidence. If the shipment of a part of the lambs and the mingling of some of them with others have made it impossible to determine their true weight with reasonable accuracy, the defendant must pay in accordance with the weighmaster's certificate, however innocent his acts, but, if such proof is available, no reason appears for penalizing him by requiring him to pay the plaintiff a greater sum than that to which he is entitled. Even if the defendant had paid the plaintiff in cash the full amount of the check, under the allegations of the answer he would be entitled to recover the alleged excess. 20 Cal. Jur. 972; 21 R. C. L. 164.

[2] Section 6 of the Act of 1915, providing for rules and regulations governing the performance of the duties of public weighmasters (Stats. 1915, p. 1288), as amended in 1919 (Stats. 1919, p. 724), provides for the reweighing of any commodity "when doubt or differences arise as to the correctness of the net or gross weight" thereof as shown by the certificate of a public weighmaster. Section 7 of the act, as amended in 1919, provides: "When any product is sold subject to public weighmaster weights, such weight shall be the true net weight of the product."

There is nothing in the act, however, to indicate that it was the intention to make the certificate of a public weighmaster conclusive evidence of the weight of a commodity, and it has been held that the Legislature has not the power to make such certificate conclusive. 28 R. C. L. 7. Neither does it appear that it was the intention to make the method provided by section 6 the exclusive remedy for correcting an error in weight, when the party seeking a correction had no reason to doubt the correctness of the certificate in time to avail himself of such method. In such a case, it is more reasonable to hold that, like other instruments, the certificate may be attacked on the ground of fraud or mistake.

[3] Respondent further contends that the amount of the excess, $72.50, is so small that the judgment should be affirmed on the ground that "the law disregards trifles." It requires no argument to show that the doctrine is not applicable to the facts of this case.

The judgment is reversed.

We concur: PLUMMER, J.; HART, J.

94 Cal. App. 431

HARTSOCK et al. v. MERRITT. (Civ. 6462.)

District Court of Appeal, First District, Division 2, California. Oct. 23, 1928.

As Modified Nov. 22, 1928.

1. Mandamus 🔑63—Mandamus lies to compel public official to perform his specific duty, where he refuses to act or where refusal is clear abuse of discretion.

Where the law imposes upon a public official specific duties and he either whimsically or arbitrarily refuses to perform them, or where his refusal to perform is based upon an erroneous conclusion of his legal duties, or where the right of an individual is so fixed that the refusal of the official to act is a clear abuse of discretion, mandamus is the proper remedy to compel him to do his duty.

2. Mandamus 🔑74(1)—Mandamus lies to compel city clerk to certify sufficiency of recall petition, where refusal was clear abuse of discretion.

Where city clerk wrongfully and arbitrarily refused to certify as sufficient a petition for recall of a city commissioner, and in doing so clearly abused his discretion, mandamus is the proper remedy to compel him to certify.

Application by A. R. Hartsock and others for mandamus against Frank C. Merritt to compel respondent, as Clerk of the City of Oakland, to certify as sufficient a recall petition of a City Commissioner. Writ granted.

Frederick Dubovsky, of Oakland, for petitioners.

Preston Higgins, City Atty., C. Stanley Wood, Asst. City Atty., Alfin N. Nelson, Chief Deputy City Atty., and John W. Collier, Deputy City Atty., all of Oakland, for respondent.

NOURSE, J. The petitioner moved for a peremptory writ of mandate to require the respondent, the city clerk of the city of Oakland, to certify as sufficient a petition filed with him asking for an election to vote upon the recall of C. C. Young, one of the commissioners of said city, and purporting to have been signed by the required number of qualified voters of said city. The respondent filed a demurrer and answer to the petition. The demurrer was overruled, and the legal questions involved in the proceedings were disposed of at that time (Hartsock v Merritt [Cal. App.] 269 P. 757), but the allegations of the answer raised issues of fact upon which findings were necessary to be had before the proceeding could be finally determined. Those issues of fact were referred to Hon. J. T. B. Warne, a judge of the superior court, for trial and determination, and following the trial, pursuant to said reference, written findings thereon have been made and filed herein. The petitioner now moves that these findings of fact be adopted by this court, that a peremptory writ issue, and that the exhibits consisting of individual certificates of electors asking for the recall election be withdrawn.

The said referee, after a painstaking and impartial trial of all the issues referred to him, running from September 17 to October 1 of this year, has found that a large number of individual certificates were wrongfully and arbitrarily rejected by the respondent; that such certificates conform to all the requirements of the provisions of the charter of the city of Oakland; and that there were filed with the respondent 8,769 valid and sufficient individual certificates, a number in excess of that required by the charter for the purpose of calling the election.

The referee was further directed to transmit to this court all the evidence offered upon the issue pleaded, that respondent's rejection of any of the said certificates was wrongful, arbitrary, or fraudulent. This evidence has been transmitted with the referee's report, and in addition thereto he has found that the action of the respondent was not fraudulent, but that his rejection of 1,400 individual certificates was wrongful and arbitrary. The purpose of bringing the evidence upon this issue before us was to enable this court to determine whether the case presented was one warranting the exercise of the extraordinary writ of mandamus to control the action of a public official in whom discretionary powers are vested.

[1] The general rule is that mandamus does not lie to compel a public official to exercise his discretion in any particular manner, but where the law imposes upon him specific duties and he either whimsically or arbitrarily refuses to perform those duties, or where his refusal to perform is based upon an erroneous conclusion of his legal duties, or where the right of the individual is so fixed that the refusal of the official to act is a clear abuse of discretion, mandamus is the proper remedy. In re Holmes, 187 Cal. 640,

647, 203 P. 398; Dufton v. Daniels, 190 Cal. 577, 580, 213 P. 949; Bleuel v. City of Oakland (Cal. App.) 262 P. 477.

[2] Such is the case presented here. Upon the written findings on file herein, and upon the evidence transmitted therewith from which we find that the action of the respondent was wrongful and arbitrary and a clear abuse of discretion, and upon the matters heretofore decided on demurrer, we conclude that a peremptory writ of mandate should issue as prayed for in the petition herein filed.

The motion of the petitioner is therefore granted, and the writ will issue as prayed.

We concur: WARNE, Presiding Justice pro tem.; STURTEVANT, J.

Modification of Opinion.

PER CURIAM. It appearing that in the judgment heretofore entered herein the court inadvertently failed to include therein costs to the petitioner, and it appearing upon agreement of the parties that the respondent is a public officer of the city of Oakland, a municipal corporation, and that as such he defended the petition herein in good faith, and that the cost should, therefore, be awarded against said municipal corporation. It is therefore ordered that the judgment heretofore entered herein be and the same is hereby amended, by adding thereto the following: The petitioners are to recover their costs herein from the city of Oakland, a municipal corporation.

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94 Cal. App. 427

DAVIS v. WANSLEBEN et al. (Civ. 6108.)★

District Court of Appeal, First District, Division 1, California. Oct. 23, 1928.

Rehearing Denied Nov. 22, 1928. Hearing Denied by Supreme Court Dec. 20, 1928.

1. Associations ⇐20(5)—Seller to recover for goods sold because promoter acted for association, and latter was estopped from denying liability, had burden of proof.

Seller, to recover for goods sold and delivered unincorporated association, on theory that act of promoter of public entertainments in making the purchase was approved by the association, and that latter was estopped from denying liability, had burden of proof.

2. Associations ⇐20(5)—Evidence held insufficient to support claim for goods sold against association because purchase was approved, and association was estopped from denying liability.

In action to recover for goods sold and delivered unincorporated association on theory that act of promoter of public entertainments in purchasing the goods was approved by the association, and that the association was estopped from denying liability, evidence *held* insufficient to support judgment against association.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by J. J. Davis against William G. Wansleben and others. Judgment against one of the defendants only, and plaintiff appeals. Affirmed.

James M. Thomas, of San Francisco, for appellant.

Fitzgerald & Johnson, of Gilroy, for respondents.

CASHIN, J. An action to recover for goods sold and delivered.

The complaint alleged that the goods were sold to Ogalalla Tribe, Improved Order of Redmen No. 142, an unincorporated association (which will be hereinafter referred to as the association), and other defendants, including one Jack Donnelly, who were alleged to have been doing business under the name of Redmen's Circus and Pow Wow. The trial court entered judgment against Donnelly alone, and it is claimed by the plaintiff, who has appealed therefrom, that judgment should also have been entered against the association.

In support of the contention it is urged that the findings of the court are unsupported, and that the decision is against law.

The testimony shows the defendant Donnelly to have been a promoter of public entertainments, which were usually given under the auspices of some social organization, the profits being divided between him and the organization. Defendants Wansleben, Fabri, Ralph and Harry Eustice were members of the association, and with them negotiations were commenced by Donnelly which led to the giving of an entertainment which was called a Redmen's Circus and Pow Wow. The affair was held at Gilroy, Cal., on consecutive evenings, and the goods for which plaintiff sought to recover were sold in connection therewith. The defendant Wansleben, in addition to being a member, was also the sachem or head officer of the association. On March 19, 1926, he, with defendant Fabri, both assuming to act for the association, signed a written agreement with Donnelly, which provided for the giving of the entertainment and for a division of the profits between him and the association. This was followed on April 14, 1926, by a letter, addressed to the plaintiff by Wansleben, who described himself as the sachem of the association, and which by its terms authorized Donnelly to order the goods for the association. It was testified that Donnelly talked to various members of the association at its meeting place on one or more occasions when meetings were being held, urging them to co-operate in the sale of tickets, and to render other services in connection with the affair, which several of them did. It also appears that the entertainment was held on vacant real property owned by the association; that a municipal license therefor was procured in its name, and that advertising matter, over the name

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★Rehearing denied. Hearing denied by Supreme Court.

of Wansleben as sachem, was inserted in local newspapers and sent to the members in the form of circulars, stating that the affair would be held under the auspices of the association for the purpose of raising funds for its new building, and urging them to purchase and sell tickets of admission. This testimony tended to show that the association was a party to the transaction; and it was testified in effect by Fabri that it approved the acts of the individual defendants.

As against the foregoing, it was testified by defendants Wansleben, Ralph and Harry Eustice that the whole transaction was arranged by Fabri and themselves with Donnelly, and that the association had no connection therewith; that Donnelly first approached Fabri on the subject, and it was suggested that the entertainment be given under the auspices of the association, which proposal they declined, giving as their reason that the by-laws of the association would not permit. It was then agreed that the affair would be conducted on their own responsibility, it being understood between all the parties that Donnelly should furnish the merchandise and other things needed, and be responsible for any losses; and that, if the result showed a profit, this should be divided with Donnelly, and the balance, after deducting the costs of a banquet for themselves, should be presented to the association for the benefit of its building fund. The Eustices also testified that the contract and letter mentioned were signed by Wansleben without their knowledge and consent, and, according to the latter, without authority of the association; his testimony in this respect being corroborated by the secretary of the association. It was also testified that the advertising mentioned was caused to be done by Donnelly; and it appears that all the funds derived from the enterprise (which finally resulted in a loss) were received and disbursed by the individual defendants through a bank account opened by them and not by the association. There was also evidence that neither the contract nor the letter was called to the attention of any officer or member of the association, with the exception of Wansleben and Fabri, until after the entertainment had closed. No evidence of authority to sign the contract or letter on behalf of the association was adduced, and it is not contended that the sachem of the organization had implied power to bind it by contract. Appellant claims, however, that the facts support no conclusion other than that the purchase of the goods was approved by the association: and, further, were such as to estop the latter from denying liability.

[1, 2] We are unable to agree with these contentions. The burden of proof rested upon the plaintiff; and, although the court might from the evidence have fairly found against the association, nevertheless the testimony of these witnesses—which the court believed, and which was not inherently improbable—tended to support the findings, and we cannot say that the conclusions reached were unreasonable. Furthermore, no benefit from the transaction was received by the association, nor was any act done or omitted which, in view of the testimony of its witnesses, would estop it from denying liability to the plaintiff.

Appellant, as stated by his counsel, is not seeking to recover a personal judgment against any of the individuals joined as defendants except Donnelly, but to enforce a claim against the association. After a reading of the whole record, including the evidence, we are satisfied that no sufficient ground has been shown for the reversal of the judgment in favor of the association, or a direction, as asked by appellant, that a judgment be entered against it.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

94 Cal. App. 493

LYDERS v. WILSEY et al. (Civ. 6083.)★

District Court of Appeal, First District, Division 2, California. Oct. 26, 1928.

Rehearing Denied Nov. 23, 1928. Hearing Denied by Supreme Court Dec. 24, 1928.

1. Appeal and error 🔑994(3)—Reviewing court will not reverse trial court's judgment upon question of fact depending upon credibility of witnesses.

Reviewing court will not set its judgment above that of trial court upon question of fact, where finding depends upon the truth of the testimony of the witnesses appearing before the trial court.

2. Fraud 🔑50—There is presumption against fraud, equal to presumption of innocence of accused.

There is a presumption against fraud which approximates in strength presumption of innocence of one accused in crime.

3. Evidence 🔑60—It was not presumed that county surveyor and one assisting him in his private practice were engaged in fraudulent scheme to defeat right of applicant to purchase state lands; "inference."

It was not presumed that county surveyor and person whom he employed to assist him in his private practice were engaged in fraudulent scheme to defeat right of applicant to purchase state swamp lands, where there was no evidence to support such deduction, "inference" being a deduction to be drawn from the facts proved, and not a conclusion based upon suspicion alone.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inference.]

4. Public lands 🔑61(6)—One assisting county surveyor in his private practice, who was not appointed as deputy, was not disqualified from purchasing state swamp lands (Pol. Code, §§ 3414, 4024).

In proceeding under Pol. Code, § 3414 et seq., to determine contest over purchase of state swamp lands, one assisting county survey-

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★Rehearing denied. Hearing denied by Supreme Court.

or in his private practice *held* not as matter of public policy disqualified from purchasing state swamp lands, where it was not shown that he had been appointed as deputy county surveyor under Pol. Code, § 4024.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Suit by Eric Lyders against Earl P. Wilsey and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Henshaw, Black & Lyders, of San Francisco, and J. J. Bullock, of Redwood City, for appellant.

J. W. Coleberd, of South San Francisco, and John D. Willard and Gilbert D. Ferrell, both of San Francisco, for respondent Wilsey.

Daniel A. Ryan, of San Francisco, for respondent Kneese.

NOURSE, J. This is a special proceeding arising out of a contest between two applicants for the purchase of swamp or overflowed lands of the state and referred to the superior court of San Mateo county for trial and decision by the surveyor general of the state under the provisions of sections 3414 et seq. of the Political Code.

The plaintiff, who is last in time in filing his application, charges in his complaint that he was delayed in receiving a survey from the county surveyor of San Mateo county, and charges, upon information and belief, that this delay was the result of a conspiracy on the part of the county surveyor and defendant Wilsey, who is the other applicant for the right to purchase the lands in controversy. For the purpose of raising this issue the complaint alleges that the defendant Kneese, who at all times was the county surveyor of San Mateo county, had employed Wilsey as a deputy county surveyor in his office, and that the county surveyor, having learned through the plaintiff that the lands in controversy were open to purchase from the state, conveyed this information to his codefendant, and that he and his codefendant then conspired to so delay action upon plaintiff's application for a survey as to permit the defendant Wilsey to procure a survey of the same lands and file his application with the state surveyor general for leave to purchase prior to the time when the plaintiff made similar application.

The material facts of the case are all undisputed and fully sustain the findings of the trial court adverse to the plaintiff. The uncontradicted evidence discloses that on March 20, 1924, the defendant Wilsey, assuming that under the law his application should be made directly to the state, wrote to the registrar of the state land office at Sacramento, Cal., for information leading to the purchase of the lands in controversy. This letter was delivered to the registrar of the federal land office in Sacramento, and by him forwarded to the federal land office in San Francisco, and by that office returned to the state surveyor general in Sacramento, in which office it was received on March 25, 1924. On March 22 of the same year the defendant Wilsey filed with the county surveyor of San Mateo county a written application for a survey of the land in question. On March 24 the surveyor with an assistant made a preliminary survey of the land and instructed his assistant to proceed with the work. On March 26 the plaintiff made an oral application to the county surveyor for a survey of the same land. He was notified that an application of this character should be in writing, and he filed with the county surveyor a written application for that purpose on March 28. Prior to this, however, the defendant Wilsey personally appeared in the office of the surveyor general at Sacramento to apply for leave to purchase the land and was informed by the surveyor general that such an application could not be accepted until accompanied by a survey certified by the county surveyor. Such a survey was delivered to Wilsey on April 17, 1924, and on the same day he filed with the surveyor general his application to purchase, accompanied by the certified survey of the county surveyor. In response to plaintiff's request the county surveyor delivered to him a survey of the land on April 23, 1924, and on May 5 plaintiff filed with the surveyor general his application to purchase the land, accompanied by the certified survey and his protest against the granting of the application of defendant Wilsey. The surveyor general then referred the whole matter to the superior court as herein stated.

The trial court found all these facts to be true, and also found that it was not true that the defendant Wilsey was a deputy county surveyor, either de jure or de facto, but that he had been employed by the county surveyor to assist him in his private practice. It was also found that it was not true that the defendants entered into any conspiracy to defraud the plaintiff, or that any false representations were made to the plaintiff regarding the survey, or that the application of the defendant Wilsey was made for the benefit of his codefendant Kneese, and that the latter has not at any time been interested in the application of Wilsey to purchase the land or any portion thereof, and has not at any time had any interest in the land sought to be purchased. Upon these findings the trial court drew the conclusions of law that the defendant Wilsey was entitled to purchase the land; that he made application to the county surveyor for a survey before the plaintiff applied to the county surveyor for the same purpose, and that he duly filed his application with the state surveyor general to purchase the land before plaintiff filed his application with the same official. Judgment followed in favor of the defendants, and from this the plaintiff has appealed on a typewritten transcript.

[1-3] On this appeal the appellant rests

upon two grounds, neither of which is based upon the claim that the evidence in the record does not support the findings of the trial court, but both of which are based solely upon the bare statement of the appellant that the facts as he conceives them to be, and the inferences which he draws, support his theory of the case. The first ground is that the two respondents conspired to defraud him out of his right to purchase the land and that we should find this to be true by disregarding all the sworn testimony upon which the trial court found the facts to be and by taking in lieu of that evidence the suspicions which the appellant entertains regarding the conduct of the respondents. Though it should be sufficient to say that this court will not set its judgment above that of the trial court upon the simple question of the facts in issue where the finding of fact depends upon the truth of the testimony of the witnesses appearing before the trial court, there is another answer to the argument of appellant and it is this: His only claim of a conspiracy rests in the suspicions and in the inferences which he insists must be drawn adverse to the positive evidence in the record. But an inference is a deduction to be drawn from the facts proved and not a conclusion based upon suspicion alone. To the point that because Wilsey was employed in and about the office of his corespondent we must presume that they conspired to defraud appellant, the answer is that the presumption is always against fraud. This presumption approximates in strength that of innocence of crime. Truett v. Onderdonk, 120 Cal. 581, 588, 53 P. 26; Everett v. Standard Acc. Ins. Co., 45 Cal. App. 332, 338, 187 P. 996.

[4] The second ground urged by the appellant is that the respondent Wilsey had been continuously acting as deputy county surveyor in the office of defendant Kneese and was, therefore, as a matter of public policy, disqualified from purchasing the land from the state. Here again the appellant does not contend that the evidence does not support the finding of the trial court adverse to him, and does not complain of any error in the admission of testimony or in the rulings of the court at any period of the trial. His contention is, like that on the first point raised, that he believes in his own theory and that we should act upon that belief. The evidence is plain and undisputed that the respondent Wilsey was never at any time alleged in the complaint appointed or designated as a deputy county surveyor; did not occupy that position either de jure or de facto; was never known or recognized as deputy by the county surveyor or by the county of San Mateo or by any of those dealing in an official capacity with the office of the county surveyor. The law regarding the appointment of deputies of county officers is found in section 4024, Political Code. It is plain and unmistakable and requires no interpretation. It provides that certain county officers may appoint such deputies as may be necessary, but that such appointment must be in writing and filed in the office of the county clerk and until such deputy shall have taken the oath of office "no one shall be or act as such deputy."

Though the briefs argue to some length as to whether the law in force at the time these transactions occurred required the original application to purchase land from the state to be filed with the county surveyor or with the state surveyor general, and whether the initiation of the right of the applicant comes from the filing of the application with the surveyor general or with the filing of a request with the county surveyor to make a survey, and whether such request should be oral or in writing, we do not deem it necessary to discuss any of these questions, because, as we have seen, the undisputed facts are, as found by the trial court, that the respondent Wilsey was prior in time in his filing in both offices.

Judgment affirmed.

We concur: BUCK, Presiding Justice pro tem.; STURTEVANT, J.

205 Cal. 309

SECURITY TRUST & SAVINGS BANK v. CARLSEN et al. (L. A. 8044.)

Supreme Court of California. Nov. 5, 1928.

In Bank.

Appeal from Superior Court, Los Angeles County; Wm. H. Dehy, Judge.

Dissenting opinion.

For majority opinion, see 271 P. 104.

Newlin & Ashburn, of Los Angeles (Clyde E. Holley, of Los Angeles, of counsel), for appellant.

Foster & Godward and Lester R. Godward, all of Los Angeles, for respondents.

Goodwin & Morgrage and W. I. Gilbert, all of Los Angeles, for defendant and respondent Petroleum Midway Co.

PER CURIAM. Rehearing denied.

PRESTON, J. In the case of Carlsen v. Security Trust & Savings Bank (Cal. Sup.) 271 P. 104, I dissented from the views of the majority of the court. I adhere to that position.

In substance my view is that the escrow agreement between the buyer and seller had been fully performed by the buyer, Carlsen, and that, inasmuch as he waived the condition respecting certificate of title to be furnished by the seller (a provision made for his own exclusive benefit), he thereby became entitled to delivery of the deed and other documents constituting the conveyance. If this position is sound, it necessarily follows that the escrow party was in law under the specific duty and obligation to make said delivery to said buyer. This obligation may not be cast upon the shoulders of another, not even the other party to the escrow. It is no concern of the other party. The conflict is between the purchaser and the escrow depositary.

Section 386 of the Code of Civil Procedure clearly does not apply to this situation. An escrow has been defined as follows:

> "A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depositary, it will take effect. While in the possession of the third person, and subject to condition, it is called an escrow." Section 1057, Civil Code.

When the purchaser fully performed upon his part, according to the terms of the document, the depositary became a trustee for him. This principle was well expressed in the recent case of Law v. Title Guarantee & Trust Co. (Cal. App.) 267 P. 565, 568, as follows:

> "It will be observed that it is only while the instrument is subject to the conditions imposed that the deposit will be deemed to be an escrow. When the conditions upon which the deposit of the instrument have been fully performed, the relationship of the interested parties automatically changes and the depositary is then deemed to hold the instrument as a trustee for the party entitled thereto."

The same principle is announced in Feisthamel v. Campbell, 55 Cal. App. 774, 205 P. 25; also in Shreeves v. Pearson, 194 Cal. 699, 230 P. 448. In 10 R. C. L. p. 640, it is said:

> "* * * Upon the happening of the event or the performance of the condition upon which manual delivery should be made by the depositary to the grantee, although not in fact physically delivered to him, a deed theretofore in escrow becomes ipso facto the deed of the grantee in whom the title vests, and that thenceforth the depositary or holder is regarded as the mere agent or trustee of the grantee."

See, also, Wilson v. Coffey (Cal. App.) 268 P. 408.

It requires no extended citation of authority to show that the seller lost control of the documents by the deposit of them in escrow. A redelivery could not be compelled except upon failure of the purchaser to pay the purchase price specified, which is not and could not be claimed. Cannon v. Handley, 72 Cal. 133, 139, 13 P. 315; McDonald v. Huff, 77 Cal. 279, 282, 19 P. 499; Bradbury v. Davenport, 120 Cal. 152, 154, 52 P. 301; Trask v. Garza, 51 Cal. App. 739, 743, 197 P. 807; Law v. Title Guar. & Trust Co., supra.

Clearly the complaint in Carlsen v. Security Trust & Savings Bank, supra, stated a cause of action against the depositary for an alleged breach of duty to the plaintiff. Law v. Title Guar. & Trust Co., supra; Vinson, Jones, etc., v. Pugh, 172 N. C. 843, 90 S. E. 122; Collins v. Kares, 46 S. D. 385, 193 N. W. 130; Johnston Realty v. Nat. City Bank (Fla.) 116 So. 229. Under these facts, upon what ground can it be contended that a bill of interpleader is allowable? Does there exist a defendant who would not want to shed his troubles on another by this method if it could be done? The case of Johnston Realty v. Nat. City Bank, supra, is similar in facts and identical in principle with the case before us, and the court there said:

> "The bank seeking an interpleader has no ground for the relief. It cannot cast upon the parties defendant the burden of settling the question of whether it had obligated itself to one of them. By declining to comply with its duty a situation afterwards arose which the bank now makes the occasion for its bill, but the bank had nothing to do with that controversy, even assuming that the question had been properly raised."

The other members of the court seem to base their holding almost entirely upon the wording of the escrow agreement appended to the original agreement of the parties, as follows.

> "No rescission of this escrow or modification of its terms or any notice or demand shall be of any effect without joint consent in writing, subscribed by the undersigned, and assented to by the bank."

It is said that the seller wrote into that provision indemnity against his own failure to perform. I cannot attribute this weakness to it. Extended discussion would weaken and not clarify the answer to such a contention. Did the parties contract or was the seller guilty of a sham? In the first place, he only agreed to transfer all of his right, title, and interest, the legal equivalent of a quitclaim deed. Shall it be held that he did even less than this by ruling that he was always protected against any covenant on his own part? It seems self-evident that the contract should not be held to have been merely an idle act.

Importance also may have been attached to the provision that the bank should assent to any modification of the terms of the escrow. It seems too clear for argument that under said clause it is not a change or modification of the escrow for one party to waive a provision expressly intended for his sole benefit. In 13 C. J. p. 672, the law in this respect is stated as follows:

> "In general proof of the waiver of performance by the party who is entitled to insist on performance is tantamount to a performance. * * * A mere waiver of a condition in the contract does not amount to the substitution of a new contract. On the contrary, waiver of performance of a contract or extension of the time therefor, in the case of a condition precedent, is equivalent to the performance thereof at the stipulated time and leaves the original contract intact."

See, also, Barton v. Gray, 57 Mich. 622, 24 N. W. 638; Leahy v. Engineering Co., 186 App. Div. 354, 174 N. Y. S. 310.

It is my view that the petition for rehearing in this case should have been granted.

NEWPORT et al. v. HATTON et al.★
(Sac. 4047.)

Supreme Court of California. Oct. 29, 1928.
Rehearing Granted Nov. 28, 1928.

1. Judgment ⚷486(1)—Judgment will be sustained on collateral attack, unless absolutely void.

Judgment will be sustained on collateral attack, unless the judgment is absolutely void.

2. Judgment ⚷21—Judgment will not be pronounced void for uncertainty of description unless court can see that nothing is described.

Judgment affecting property will not be pronounced a nullity for uncertainty of description, unless the court can see from the judgment that nothing is described.

3. Quieting title ⚷52—Judgment quieting title, describing land as "fractional northwest quarter of section," held not void on its face.

Description of land in judgment quieting title as "fractional northwest quarter of section, * * * the said land being the land which is described in the complaint and in the answer in this action," *held* not to render judgment void on its face for want of adequate description.

4. Quieting title ⚷52—Description of land in judgment need not be such that mere inspection of description will show lands intended.

It is not essential to validity of judgment that court should from mere inspection of the description be enabled to know what lands are intended.

5. Evidence ⚷460(4)—Extrinsic evidence held admissible to explain location of property described in judgment as "fractional northwest quarter of section," though judgment was not void on its face.

Where judgment quieted title to "fractional northwest quarter of section," extrinsic evidence was properly admitted to explain any uncertainties as to the exact parcel of real property covered, though judgment was not void on its face.

★Rehearing granted. 279 P. 134.

6. Deeds 🔑138—Intention of parties determines whether withdrawal, from land conveyed, of property for railroad right of way, constitutes reservation of easement or exception of land affected.

Intention of parties determines whether clause withdrawing property from deed, for right of way of railroad, constitutes reservation of easement or exception of the land affected; mere use of word "excepting" or "reserving" not being controlling.

7. Deeds 🔑138—Clause "excepting and reserving" land for railroad purposes held exception and not reservation.

Where main line of railroad had been constructed across property and actually existed prior to execution of deed, trial court's construction of clause in deed excepting and reserving strip of land for railroad purposes as exception of the parcel, rather than reservation of an easement, *held* not error.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Exception (In Deed).]

8. Deeds 🔑138—Abortive attempt to except land along railroad tracks to be constructed held not to prevent construction of clause in deed as exception and not reservation; "excepting and reserving."

Clause excepting and reserving property for right of way of railroad passing through property at the time of the deed could be construed as exception of land, and not mere reservation of easement, notwithstanding abortive attempt to except strip of land on either side of other railroad tracks to be subsequently constructed.

In Bank.

Appeal from Superior Court, Stanislaus County; George F. Buck, Judge.

Action by Clara E. Newport and others against W. H. Hatton and others. Judgments for defendants, and plaintiffs apeal. Affirmed.

Grant & Zimdars, Beverly L. Hodghead, Henry E. Monroe, C. F. Humphrey, and Chas. A. Shurtleff, all of San Francisco, and L. J. Maddux and Nathan B. McVay, both of Modesto, for appellants.

Frank Thunen, Herbert Chamberlin, Redman & Alexander, and James F. Peck, all of San Francisco, D. M. Maclean and S. P. Elias, both of Modesto, Leslie K. Floyd, of Los Angeles, Thomas M. Anaya, W. J. Brown, H. L. Chamberlain, L. E. Jones, A. J. Carlson, Dennett & Zion, Griffin, Boone & Boone, Hawkins & Hawkins, T. B. Scott, Joseph M. Cross, J. M. Walthall, Albert L. Johnson, and F. O. Hoover, all of Modesto, J. W. Coleberd, of South San Francisco, and Brown & Chamberlain and Griffin & Boone, all of Modesto, for respondents.

Pillsbury, Madison & Sutro, of San Francisco, amici curiæ.

WASTE, C. J. Claiming to be the owners in remainder, subject only to a life estate in their mother, of a quarter section of land situate in Stanislaus county, the plaintiffs instituted this action to establish such ownership, to remove an alleged cloud upon their title, and to recover the proceeds derived from sales of the land. The facts and circumstances giving rise to this litigation are very fully set forth in an opinion of this court, heretofore handed down, reversing the judgment entered on an order sustaining demurrers to the complaint without leave to amend. Newport v. Hatton, 195 Cal. 132, 231 P. 987. The plaintiffs' present appeal is from the judgment entered after a trial on the merits. Preliminarily, it may be said that plaintiffs, upon this appeal, have abandoned their pursuit of the proceeds of the sales of the land in controversy because of their confessed inability to trace the same into the hands or possession of the defendants charged in the complaint with the receipt thereof. In support of their claim of ownership of the land in remainder, the plaintiffs set forth at length in their complaint certain events which transpired during their minority, and which culminated in a tax sale of the premises and the entry of a fraudulent and collusive judgment in an action entitled Plato v. Newport, and having for its purpose the quieting of the title of the purchaser at a tax sale as against a life tenant and the plaintiff remaindermen. As certain of the defendants herein deraign title under the Plato judgment, the plaintiffs upon the trial urged that by reason of the fraud practiced in its procurement that judgment was and is void. The court below so found, but further found that the defendants claiming thereunder were bona fide purchasers for value without notice, and therefore entitled to protection in the assertion of their respective claims to the land. This latter finding is not assailed by the plaintiffs upon this appeal. Both upon the prior appeal and herein the plaintiffs concede, as stated in the opinion heretofore filed, that—

> "Any person acquiring title to any part of the property in good faith, and without knowledge of the fraud, is fully protected, notwithstanding the interests of the plaintiffs. Their rights cannot prevail over those of innocent purchasers in good faith and for value."

As to this, there can be no dispute. Stern v. Judson, 163 Cal. 726, 735, 127 P. 38; Doyle v Hampton, 159 Cal. 729, 734, 116 P. 39.

The only attack the plaintiffs now make upon the judgment entered by the court below in favor of the defendants claiming under the Plato judgment is that the latter judgment is void for its asserted uncertain and inadequate description of the property involved. The land in controversy was described in the Plato judgment as:

"The fractional northwest quarter of section twenty-nine (29), township three (3) south, range nine (9) east, Mount Diablo Base and Meridian, in the County of Stanislaus, State of California, the said land being the land which is described in the complaint and in the answer in this action."

Despite plaintiffs' assault upon the Plato judgment, the court below found it not to be void for indefiniteness of description, declaring in its findings that—

> "The land described in the judgment in the action of Plato v. Newport et al., is all of the northwest quarter of section 29, excepting therefrom that part of the said quarter section assessed by the Modesto Irrigation District for the year 1894 to Charles Maze, and excepting that portion of the quarter section which in the year 1894 was owned by the Central Pacific Railroad Company, and this court concludes that the said description in said judgment is not void for indefiniteness or uncertainty, and that the plaintiffs are not entitled to a judgment against the defendants herein claiming title to that part of the land described in the complaint in the instant case which is included in the judgment in the case of Plato v. Newport et al., as hereinabove defined, who are bona fide purchasers for valuable consideration without notice as elsewhere in these findings set out, but on the contrary, the said defendants who are such bona fide purchasers for valuable consideration without notice are entitled to a judgment herein as against the plaintiffs declaring that they, the said defendants, are the owners of said lands as described in their respective answers, and in support of the foregoing conclusion of law that the said description in the judgment in the case of Plato v. Newport et al., is not void for uncertainty, and in explanation of the said conclusion, this court finds as follows:
>
> "That the attempted description of the property sought to be affected by the judgment in the case of Plato v. Newport et al. is insufficient and void so far as any description is set forth in any of the pleadings in said case, or in the judgment or decree or in the judgment roll in said action. That by reference to the transcript of the reporter's notes of the proceedings of the trial of said action filed therein as set forth in Finding 107, and not otherwise can it be ascertained from any paper or record in said action of Plato v. Newport, that the claim of title of the plaintiff in said action was based on the tax certificate and tax deed attached as exhibits to the complaint in the instant case. That in said tax certificate and tax deed reference is made to the assessment rolls of the Modesto Irrigation District for the year 1894 as a basis for the tax sale proceedings; that said assessment rolls were not introduced in evidence at the trial of said case of Plato v. Newport et al., but were introduced at the trial of the instant case; that by an examination of said assessment rolls, and not otherwise, it is the conclusion of this court that the judgment in said action of Plato v. Newport et al. was designed and intended to affect and describe all of the northwest quarter of said section 29, excepting and eliminating therefrom those parts or portions of said quarter section which were assessed for the year 1894 to Charles Maze, and further excepting and eliminating therefrom the interest or right in the said quarter section retained or owned by the Central Pacific Railroad Company as shown by the terms and limitations contained in said deed set out in Finding 1, subdivision (g)."

It is the contention of the plaintiffs and appellants herein that the description of the property as given in the Plato judgment is fatally defective, that recourse can be had to the judgment roll alone in an effort or attempt to supply any deficiency in such description, and that the court below erred in calling to its assistance evidence extrinsic to the judgment roll in the action of Plato v. Newport to bolster up the description contained in the judgment therein entered. Appellants go further and assert that such extrinsic evidence, even if admissible to assist in the identification of the property, falls short of accomplishing that result. In support of these contentions it is urged that a description which "simply refers to the land sought to be affected as part of a larger tract without any reference to its boundaries or to the extent of its acreage or in some way to indicate with certainty to which part the reference is made is bad. * * *"

The contention as to the inadequacy of the description in the Plato judgment was also advanced by the appellants upon the former hearing herein, and in the decision then handed down (supra) this court said:

> "Applied to judgments, the rule is that the description in a judgment affecting real property should be certain and specific, and that an impossible, wrong, or uncertain description, or no description at all, renders the judgment erroneous and void. (33 Cor. Jur. p. 1209, par. 147.) The same work is authority for the declaration that the judgment may be aided by intendments and additional data drawn from the pleadings and other parts of the records, or even, in some cases, by extrinsic documentary evidence. We do not see how a judgment can be pronounced a nullity for uncertainty of description unless the court can see that nothing is described. Those claiming under it must rely on the description, it is true, but whether or not the description is defective must be tested by rules of evidence ordinarily applied to the subject. * * * The plaintiffs in this case have not made it clear that the land described in the judgment quieting title is so uncertain that the property cannot be identified and established with sufficient certainty, by the application of the ordinary rules of evidence, to define the rights of the parties."

[1, 2] It must be borne in mind that the attack now made by the appellants upon the Plato judgment is a collateral attack, and for that reason must fall unless said judgment is an absolute nullity. In De Sepulveda v. Baugh, 74 Cal. 468, 474, 16 P. 223, 226 (5 Am. St. Rep. 455), it is declared:

> "I cannot see how a judgment can be pronounced a nullity for uncertainty of description, unless the court can see that nothing is described. But here the description is not even uncertain or doubtful. It simply does not come

up to some ideal standard laid down by the courts as more convenient for them and their officers. The true rule would seem to be that the judgment is not void. That the purchaser must, however, rely upon the description, and if it be found so defective when tested by rules of evidence ordinarily applied to the subject that nothing can be found, he will fail, otherwise he should recover."

[3, 4] As intimated by the quotation from our former opinion in this case, we are of the view, despite the trial court's finding to the contrary, that the Plato judgment is not void on its face for want of an adequate description of the property in controversy. For all that appears on the face of the judgment, it may have described the property in a manner best known to persons familiar therewith. It is by no means essential that, from a mere inspection of the description, the court should be enabled to know what lands are intended. In 15 R. C. L. 595, § 33, it is stated:

> "While in the description of real estate, as in other particulars, a judgment must be reasonably certain in its terms, the tract may be designated by some name not understood by the court, but perfectly familiar to all persons acquainted with the neighborhood in which the land is situated. Evidence may be received to show the signification of such a name, or to show that any other descriptive words, though apparently meaningless or uncertain, do in fact designate a particular tract in such manner that its identity would be apparent to persons with whom it is familiar. Thus it has been held that a judgment in ejectment describing the land as 'fraction No. 12, a part of the southeast quarter and northeast quarter of section 16, township 4, range 4, containing 34.75 acres,' is not void on its face for uncertainty in description."

Along this same line see, also, 1 Freeman on Judgments, 167, § 96; Threlkeld v. Allen, 133 Ind. 429, 32 N. E. 576, 577; Carlisle v. Killebrew, 91 Ala. 351, 8 So. 355, 24 Am. St. Rep. 915, 917. The court, in the case of Little Rock, etc., Co. v. Evins, 76 Ark. 261, 88 S. W. 992, held the following description appearing in a deed to be sufficient: "N. E. fr. quarter of the N. E. fr. quarter section 22—8—22 W." Again, in Key v. Ostrander, 29 Ind. 1, 6, a mortgage instrument described the property covered thereby as "the north-east quarter of section 36, in township 13 north, of range 9 west, north of Otter Creek, containing forty acres, lying in Vigo County, Indiana." This description was held adequate, the court declaring:

> "A practical difficulty might possibly arise in the actual location of the land by the description, but the existence of any such difficulty is not patent on the face of the deed. * * *"

In answer to a contention that "a deed is evidentiary, and may be helped out by other evidence, while a decree is final and determinative," it was held in De Sepulveda v. Baugh, supra, that "the distinction is illusory."

[5] Aside from our conclusion that the Plato judgment is not void on its face so as to permit of the collateral attack herein directed at it, we are of the opinion that the court below properly permitted the introduction of extrinsic evidence to explain away any uncertainties as to the exact parcel of real property intended to be covered thereby. The case of De Sepulveda v Baugh, supra, permitted the introduction in evidence of public records referred to in the judgment there assailed in order to identify the property intended to be affected. As we read the opinion in that case, it contains nothing prohibiting, as the appellants would have us hold, the introduction of extrinsic evidence to explain away any possible uncertainty in a description of property appearing in a judgment. The case of Smith v. Biscailuz, 83 Cal. 344, 360. 21 P. 15, 23 P. 314, is authority for the introduction of such evidence. There, in an action to quiet title, a probate decree was attacked because of its asserted inadequate description of a portion of the property. This court said:

> "Is the decree to be pronounced 'a nullity for uncertainty of description,' 'because' the court can see that 'nothing is described'? Is it one where the description is so defective that 'the purchaser,' relying 'upon the description,' and applying the ordinary rules of evidence to such a matter, can find nothing? If not, then the decree on a collateral attack, such as this, is not void. (De Sepulveda v. Baugh, 74 Cal. 468 [16 P. 223, 5 Am. St. Rep. 455].)
>
> "It is conceded here, upon all sides, that Jordan purchased the property for a valuable consideration. And the description in the decree, under the test of the application of the ordinary rules of evidence to the subject, can readily be shown to represent a specific and certain piece of land, the property of the decedent at the date of his death.
>
> "The decree of distribution is not, therefore, void upon this attack for want of a description of the land in which Gay claims an interest."

In an action in this state to recover possession of certain described real property, the trial court entered judgment for plaintiff, describing the property in its judgment as it was described in the complaint, but excepting therefrom such parts of the land "as were sown to grain by the defendant during the fall of 1890 and the winter of 1891." Upon appeal from the judgment, the defendant contended that the judgment was void because of inadequate description of the premises intended to be affected. This court held that—

> "Prima facie the description appears to be sufficient, and no reason why it cannot be applied so as to identify the excepted land is suggested. The boundary lines of the land sown to grain by defendant during the fall of 1890 and the following winter must have been distinctly apparent on the ground from the time the grain was sown until some time after it was harvested; and if the marks by which such boundary lines were designated were subsequently removed or destroyed, their original

location may be proved by extraneous evidence, as in cases of the removal or destruction of stakes or other monuments called for in deeds and patents. * * * " Rosenthal v. Matthews, 100 Cal. 81, 83, 34 P. 624.

> "Any description adopted in a deed by which the premises intended to be conveyed may be established and identified, is sufficient; and it is the settled doctrine, for the purpose of sustaining a grant, extrinsic evidence may always be used to identify and establish the objects of the call in the deed." Colcord v. Alexander, 67 Ill. 581, 583.

We perceive no good reason why the rule should be different as regards descriptions of real property contained in judgments.

[6-8] There is also presented herein an appeal by the plaintiffs from a judgment entered in favor of the defendants Central Pacific Railway Company and Southern Pacific Company, adjudging the former to be the owner in fee, and the latter, as lessee, to be entitled to the exclusive possession of a certain parcel of the quarter section already described, and paralleling their railroad tracks. The title or right of these particular defendants in and to this strip of land is founded upon the following clause appearing in a deed of conveyance from the patentee railroad companies to James M. Conley, executed in the year 1874:

> "Excepting and reserving, however, for railroad purposes a strip of land four hundred feet wide lying equally on each side of the track of the railroad of said company, or any branch railroad now or hereafter constructed on said lands, and the right to use all water needed for the operating and repairing of said railroad."

It has been the contention of plaintiffs throughout that this clause created and gave rise to a mere easement or right of way, while the defendants have insisted that it constitutes an exception of the land affected thereby. In determining whether a clause, such as that here involved, constitutes a reservation or an exception, the intention of the parties employing the same is, if possible, to be ascertained. 9 Cal Jur. 324, § 188. The mere use of the word "excepting" or "reserving" is not alone determinative of the question. Coon v. Sonoma Magnesite Co., 182 Cal. 597, 600, 189 P. 271. In view of the fact that the main railroad line had been constructed across the quarter section and actually existed at a time prior to the execution of the deed containing the clause now in dispute, thus giving definite location and identification to the strip to be affected thereby, we are not prepared to say that the court below erred in construing such clause to be an exception of the parcel rather than the reservation of an easement over the same. Butler v. Gosling, 130 Cal. 422, 425, 62 P. 596; Los Angeles, etc., R. R. Co. v. New Liverpool Salt Co., 150 Cal. 21, 24, 25, 87 P. 1029: Pritchard v. Lewis, 125 Wis. 604, 104 N. W. 989, 1 L. R. A. (N. S.) 565, 110 Am. St. Rep. 873. The cases of Coon v. Sonoma Magnesite Co., supra, and Biles v. Tacoma R. R. Co., 5 Wash. 509, 32 P. 211, cited by the appellants, tend to warrant the assumption that had the roads therein referred to been in existence at the time of the execution of the instrument there presented for interpretation, the conclusions announced would have been different. That the deed here in question abortively attempted to except a strip of land on either side of other railroad tracks to be thereafter constructed over the quarter section does not, in our opinion, alter the situation as regards the main line then in existence. We find no merit in appellants' further contention that, by adverse possession, they acquired title to the strip of land excepted in the deed of 1874. Aside from other considerations, this particular contention lacks in persuasive force because of the fact that, since the entry of the Plato judgment in 1902, no part or parcel of the quarter section has been in the possession of the appellants or their predecessors in interest, but, on the contrary, has been in the occupancy and possession of persons claiming title thereto as against them. In view of what has been said, it becomes unnecessary to pass upon the merits of respondents' motion to dismiss, upon technical grounds, the appeal from the judgment entered for the defendant railroad companies.

For the foregoing reasons, the judgments appealed from are, and each is, affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

205 Cal. 422

LA CUMBRE GOLF AND COUNTRY CLUB v. SANTA BARBARA HOTEL CO.

(L. A. 9658.)★

Supreme Court of California. Oct. 30, 1928.

Hearing Denied in Bank Nov. 26, 1928.

1. Contracts 🔑309(2)—Contract to extend country club privileges to hotel guests held not to bind hotel company to pay amount specified after destruction of hotel.

Country club's contract to extend membership privileges to guests in certain hotel *held* not to bind hotel company to pay amount specified, regardless of whether hotel and guests existed; there being implied condition that it should be excused from such payments if hotel were destroyed, as by fire, without such company's fault.

2. Contracts 🔑309(2)—Perishing of person or thing or cessation of condition, on basis of continued existence of which parties contracted, excuses performance.

Where it is evident from nature of contract that parties contracted on basis of continued existence of person or thing, condition or state of things to which it relates, subsequent perishing of such person or thing or cessation of existence of condition will excuse performance, though promise was unqualified.

Department 2.

Appeal from Superior Court, Santa Barbara County; Merle J. Rogers, Judge.

Action by the La Cumbre Golf and Country Club against the Santa Barbara Hotel Company. Judgment for defendant, and plaintiff appeals. Affirmed.

John M. Curran and W. G. Griffith, both of Santa Barbara, for appellant.

Heaney, Price & Postel, of Santa Barbara, for respondent.

LANGDON, J. This is an appeal by the plaintiff from a judgment against it in an action to recover $7,200, the sum of installment payments alleged to be due under a contract entered into between the parties. In 1920, the contract, which forms the subject of this action, was entered into. It recited that the defendant was engaged in the general hotel business in the county of Santa Barbara, state of California, and desired to furnish to its guests the privileges of golfing and all of the privileges appurtenant to a country club; that the defendant was operating a hotel called "The Ambassador" in the city of Santa Barbara and had previously entered into a contract with the plaintiff golf and country club for the extension of golfing privileges to the guests of the hotel company, and now desired to further promote the interests of its guests by increasing their means of transportation to and from the grounds of said golf club by purchasing and operating a bus between said hotel and club house, but was unwilling to engage in such undertaking unless the privileges accorded its guests under the previous contract be extended to cover an additional period of time. Following the foregoing recital of conditions and purposes, it was agreed between the parties that for a period ending December 31, 1923, the golf and country club should extend all the privileges of a membership in said club, except the privilege of voting or holding office, to any guest of the hotel company in said Ambassador Hotel. The contract continues:

> "Such privileges shall include the right on the part of said guest or guests of signing the usual cards of said club for green fees, supplies and all other purposes for which such cards of said club may be signed by a member of said club, and shall also include all the other privileges of a member of said second party. * * * Said cards when so signed shall be a valid charge in favor of second party, against first party which in turn shall look to the guest of first party so signing said card or cards for reimbursement from those to whom it shall have issued cards of request for the privileges of said club."

The hotel company agreed to pay to the golf and country club $300 for each and every month of the term of the contract. It was further provided that in the event that the golf and country club be compelled to discontinue its service to the guests of the first party by reason of lack of water or for any other cause, for a period of six months, the contract should terminate at the option of either party, and in the event the discontinuance of service be for a shorter period than six months, the monthly compensation should abate for the period of discontinuance.

[1] The trial court found:

> That at the time the contract between the parties was entered into, it was the understanding of the parties that said contract covered and referred to the use and enjoyment of said golf course and golf club by the guests of said hotel. "That said contract was by the parties contemplated to continue during the period of time covered thereby for the use of said course and club by said guests, and said parties each contemplated the continued existence of said hotel having guests using said golf course and that said golf club and golf course should be so patronized by the guests of said hotel, and that thereby a mutual advantage would accrue to both parties—to said plaintiff in having guests using said club house, in receiving the monthly payments plus expenditures made by said hotel guests at said club house, green fees, etc., and that the defendant would receive an advantage in having facilities at its disposal in the nature of a golf course and golf club for its guests which would lead to a patronage of said hotel by parties seeking and enjoying such privileges.
>
> "That it was contemplated and intended by said parties to said contract, at the time of the execution thereof and subsequently, that there should be guests at the said The Ambassador Hotel during the continuance of said contract; that it was contemplated and intended by said

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★Hearing denied in bank.

parties that said club house and golf course should at all times be open to the use and enjoyment of said guests of said hotel; that the said parties to said contract contemplated and intended at the time of the execution thereof and subsequently, that the said The Ambassador Hotel should continue to exist during the life of said contract and that the operation of said contract should be limited to the particular building known as The Ambassador Hotel; that it was contemplated and intended by said parties at the time of the execution of said contract and subsequently, as being of the essence of the said contract, and essential and vital and requisite and necessary to its performance by said defendant or plaintiff, that said building should continue to exist during the life of said contract.

"That at the date of the execution of said written agreement, and at all times thereafter, the only hotel owned by said defendant in the county of Santa Barbara, and in fact the only hotel owned at all by said defendant, was said The Ambassador Hotel; that the sole consideration received by said defendant upon the execution of said agreement, and in return for the payment of $300 a month, as set forth in said agreement, was the right and privilege extended by plaintiff to guests of said The Ambassador Hotel to use said golf club and golf course; that said plaintiff at the time of the execution of said contract knew that said defendant was the owner and operator of said The Ambassador Hotel, and that the rights and privileges provided for in said agreement and to be furnished and provided by said plaintiff were to be the use and enjoyment by the guests of said The Ambassador Hotel only and the rights and privileges so to be extended by plaintiff to said guests of The Ambassador Hotel were the sole consideration of said agreement on the part of defendant.

"That on or about the 13th day of April, 1921, without fault on the part of defendant, said The Ambassador Hotel was entirely destroyed by fire; that by reason of the destruction of said hotel by fire, defendant became unable to and has ever since continued to be unable to care for or accommodate hotel guests in said city of Santa Barbara in any manner, and that there were after said 13th day of April, 1921, no persons who might or could enjoy the rights and privileges set forth and provided for in said agreement; that said defendant did not thereafter ever build, construct, operate or maintain any hotel whatsoever, and subsequently thereto sold and disposed of its real property on which said hotel was located."

From the foregoing findings the court concluded that there was an implied condition in the contract between the parties that there should be guests in said The Ambassador Hotel, and that if through no fault of the hotel company the hotel was destroyed and there were no longer guests, the hotel company should be excused from paying for guest privileges.

The appellant argues for a construction of the contract, which would bind the defendant to pay the amount specified for club privileges for guests of a hotel, regardless of whether the hotel and guests were in existence or not. We think such a construction unwarranted and unreasonable and contrary to the intent of persons situated as were the plaintiff and defendant at the time this contract was entered into.

[2] In the case of Hackfeld & Co., Ltd., v. Castle, 186 Cal. 53, 198 P. 1041, it was said, quoting from Williston on Contracts, § 1948:

> "Not only where a specific thing is itself to be sold or transferred, but wherever a contract requires for its performance the existence of a specific thing, the fortuitous destruction of that thing, or such impairment of it as makes it unavailable, excuses the promisor unless he has clearly assumed the risk of its continued existence. A contract to manufacture goods in a particular factory is discharged by the destruction of the factory. * * *"

In the case last cited appear other quotations from leading cases in support of the doctrine applied by the trial court in the instant case. It is unnecessary to set forth these statements again herein. The rule is concisely stated in 13 Corpus Juris, 642, § 717d, as follows:

> "Where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of a person or thing, condition or state of things, to which it relates, the subsequent perishing of the person or thing, or cessation of the existence of the condition will excuse the performance, a condition to such effect being implied in spite of the fact that the promise may have been unqualified."

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; SHENK, J.

205 Cal. 420

BARSTOW-SAN ANTONIO OIL CO. v. WHITNEY et al. (L. A. 9398.) ★

Supreme Court of California. Oct. 30, 1928.

Hearing Denied in Bank Nov. 26, 1928.

1. Judgment 🔑538—Judgment without date, but duly signed by judge, took effect from time of entry.

Judgment duly signed by trial judge took effect from time of its entry, though judgment was undated.

2. Quieting title 🔑52—Judgment quieting title, which decreed that plaintiff had no right in certain portions of property, and that plaintiff was owner of other parts, held not void on its face.

Judgment quieting title to certain portions of property, decreeing that plaintiff had no right, title, or interest therein, and that defendant was rightfully in possession as tenant of codefendant, and decreeing that plaintiff was owner of certain other portions of the prop-

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★Hearing denied in bank.

erty, *held* not void on its face, and therefore not subject to motion to vacate on that ground.

Department 2.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by the Barstow-San Antonio Oil Company against L. P. Whitney, Harvey S. Mourning, and another. From an order denying plaintiff's motion to set aside a judgment previously rendered in the case in defendant Mourning's favor, plaintiff appeals. Affirmed.

May F. Hogan, of Los Angeles, for appellant.

Swing & Wilson, of San Bernardino, for respondents.

LANGDON, J. This is an appeal from an order of the superior court, state of California, in and for the county of San Bernardino, denying plaintiff's motion to set aside a judgment rendered in said cause in 1920, in favor of defendants, quieting their title to certain mining land, and enjoining plaintiff from interfering therewith. The motion also sought to set aside certain contempt proceedings against the attorney representing the plaintiff herein, in which said attorney was adjudged guilty of contempt for disobeying the former judgment and decree in the quiet title suit.

The ground of the motion and amended motion to vacate the former judgment and the subsequent proceedings founded thereon is that said judgment is void upon its face. It is contended that this patent invalidity appears from the following facts: (1) That the court lacked jurisdiction of the parties defendant; (2) that the judgment fails to state that the issues are determined therein as between the parties defendant, and that, as a matter of fact, they were not so determined; (3) that the recitals in the judgment regarding the defendant Fuller's Earth Company of America dispute the records of the superior court in another action, and are a fraud upon the plaintiff and upon the court.

The judgment under attack was rendered and entered on January 19, 1920. It is in form a judgment quieting the title of the defendant H. S. Mourning to certain described portions of the property in question, and decreeing that the plaintiff corporation herein has no right, title, or interest therein, and that as to the defendant the Fuller's Earth Company of America it is rightfully in possession of said property and of the whole thereof as the tenant of the said defendant Mourning, and further decreeing that as to certain other portions of said property set forth in the complaint the plaintiff is the owner, and entitled to the possession thereof, and that none of the defendants has any right, title, or interest therein.

[1, 2] The foregoing judgment, while undated, was duly signed by the trial judge, and takes effect from the time the same was entered, to wit, January 19, 1920. The judgment is not void upon its face, and hence was not subject to motion to vacate the same upon that ground. Much of the material relied upon by appellant upon its motion to vacate was irrelevant upon the issue presented by the motion, i. e., the invalidity of the judgment upon its face, although it might possibly have value in a direct attack upon the judgment in a proceeding in equity to set the same aside.

The order appealed from is affirmed.

We concur: RICHARDS, J.; SHENK, J.

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205 Cal. 441

PEOPLE v. KEMPLEY et al. (Cr. 3124.)

Supreme Court of California. Oct. 31, 1928.

1. Grand jury ⇨34—Special counsel, appointed by Attorney General, had power to appear before and assist grand jury to same extent district attorney might have done had he not been disqualified (Pol. Code, § 472).

Where Attorney General appointed special counsel under Pol. Code, § 472, to assist in investigation and prosecution of charges against district attorney and his assistant, special counsel had authority to appear before and assist grand jury to same extent that district attorney might have done had he not been disqualified.

2. District and prosecuting attorneys ⇨2(4)—Special counsel for state, in prosecution of district attorney and assistant, who assumed and exercised duties of public officer under authorized appointment, was officer de facto, though not taking oath of office (Pol. Code, §§ 472, 904).

Where Attorney General appointed special counsel to assist in investigation and prosecution of charges against district attorney and assistant, under Pol. Code, § 472, but special counsel did not take oath of office following appointment, as required by section 904, but he did actually assume and exercise duties of public officer under authorized appointment, he was at least an officer de facto.

3. Indictment and information ⇨137(2)—Bias of grand juror is not ground for setting aside an indictment (Pen. Code, §§ 894, 895, as amended in 1911).

Under Pen. Code, §§ 894, 895, as amended in 1911, and section 995, relating to grand juries, bias of grand juror is not ground for setting aside an indictment.

4. Criminal law ⇨511(1)—More is required by way of corroboration of accomplice's testimony than mere suspicion (Pen. Code, § 1111).

Under Pen. Code, § 1111, more is required by way of corroboration of testimony of accomplice than mere suspicion.

5. Criminal law 🔑510—Statute relating to corroborating evidence is mandatory, and conviction cannot stand unless accomplice's testimony is properly corroborated (Pen. Code, § 1111).

Pen. Code, § 1111, relating to evidence corroborating testimony of accomplice, is mandatory, and conviction cannot stand unless testimony of accomplice is corroborated in accordance with standards laid down by courts in interpretation of statute.

6. Criminal law 🔑511(1)—Accomplice's testimony must be eliminated from case in determining sufficiency of corroborating evidence.

Testimony of accomplice must be eliminated from case for purpose of determining sufficiency of corroborating evidence.

7. Criminal law 🔑511(3)—Where circumstances are consistent with innocence of accused, there is no corroboration (Pen. Code, § 1111).

Where circumstances, when proved, taken separately or collectively, are consistent with innocence of accused, there is no corroboration of accomplice's testimony required by Pen. Code, § 1111.

8. Criminal law 🔑511(2)—Corroborating evidence held insufficient to connect district attorney and assistant with commission of offense of accepting bribe (Pen. Code, § 1111).

In prosecution of district attorney and his assistant for accepting bribe, corroborating evidence *held* insufficient to connect defendants with commission of offense, as required by Pen. Code, § 1111.

In Bank.

Appeal from Superior Court, San Diego County; Edwin F. Hahn and S. M. Marsh, Judges.

Chester C. Kempley and another were convicted of soliciting and accepting a bribe, and they appeal. Reversed.

Superseding opinion in 265 P. 310.

Dempster McKee, Adam Thompson, Edgar A. Luce, and Gordon Thompson, all of San Diego, for appellants.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and W. A. Sloane, E. J. Kelly, and Fred A. Steiner, all of San Diego, for the People.

SHENK, J. The defendants, Chester C. Kempley and Guy Selleck, district attorney and assistant district attorney, respectively, of the county of San Diego, were charged and convicted of the crime of soliciting and accepting a bribe. They appeal from the judgment of conviction and from an order denying their motion for a new trial.

On October 7, 1926, the grand jury of said county returned an indictment charging the defendants in two counts. The first count charged that on or about the 20th day of March, 1925, in said county of San Diego, the defendants, executive officers of the county, did "wilfully, unlawfully, feloniously and corruptly ask for and offer to receive of one William R. Johnson," a bribe in the sum of $40,000; that at said time and place the defendants represented to said William R. Johnson that if he would pay to them the sum of $40,000 they "would withhold true evidence from the trial jury during the trial of the case of the People of the State of California against Thomas A. Johnson and Hugh McGovern, Mrs. Mae Johnson and Dan McGory, then and there pending" in the superior court in and for said San Diego county; that the defendants "would withhold said true evidence and prevent the same from being presented to said trial jury during the trial" of said cause, in the following particulars: (1) That they would get possession of two certain suits of clothes belonging to said Thomas A. Johnson and Hugh McGovern, found in the attic of the house of said defendants at 2735 San Marcos street, and would alter and cause to be made smaller said two suits of clothes so that when said Johnson and McGovern should try them on during the trial they would not fit said defendants; (2) that the defendants, as further reason for being paid said sum of $40,000, represented that they would obtain possession of a certain knife found stuck in the breast of the deceased, George McMahon, and prevent said knife from being introduced in evidence at the trial of said Thomas A. Johnson and Hugh McGovern; (3) that for the same consideration the defendants herein would not introduce in evidence an admission made by Thomas A. Johnson to the San Diego police department that he was the owner of the gun used to crack the skull of said George McMahon; (4) that the defendants herein, as a further reason why they should be paid the sum of $40,000, stated and represented to William R. Johnson that they would cause the court to make an order directing that all the exhibits introduced in evidence during the trial be delivered to the attorneys for Thomas A. Johnson and Hugh McGovern, and that Mrs. Mae Johnson and Dan McGory, codefendants with said Thomas A. Johnson and Hugh McGovern, would never be convicted in the event that Mrs. Mae Johnson and Dan McGory were apprehended and placed upon trial; (5) that when the defendants herein were asking said William R. Johnson for said $40,000 they represented to him that they had evidence in their possession sufficient to hang the said Thomas A. Johnson, Hugh McGovern, Mrs. Mae Johnson, and Dan McGory and that unless the $40,000 were paid those four persons would certainly be hanged for the murder of George McMahon.

In the second count it was charged that the defendants Kempley and Selleck carried out the alleged corrupt agreement in all respects, except that it is not charged in the second count that the knife found in the breast of the deceased was not introduced in evidence at the trial. It was further charged in the second count that upon their trial the defendants Thomas A. Johnson and Hugh McGovern were acquitted and that the defendants herein received said sum of $40,000 in consideration of the carrying out of their alleged corrupt agreement; that the defendants herein represented the people at said trial and that after the verdict of acquittal and in order to prevent the trial and conviction of Mrs. Mae Johnson and Dan McGory, they made written application to said court for an order releasing the exhibits in said cause to the attorneys for the defendants Thomas A. Johnson and Hugh McGovern.

The defendants herein were arraigned on October 11, 1926, and at that time moved to quash the indictment on the grounds: (1) That said indictment was not found, indorsed, nor presented as prescribed by the Penal Code, in that it was not voted, passed upon, nor concurred in by 12 grand jurors; (2) that names of witnesses examined by, or whose depositions were read before, the grand jury were not inserted at the foot of the indictment nor indorsed thereon; and (3) that certain persons were permitted to be present during sessions of the grand jury when the charges embraced in the indictment were under consideration other than the persons permitted to be present under the provisions of section 925 of the Penal Code, and particularly that one Richard Kittrelle, one Mrs. Firman, and one Fleming were permitted so unlawfully to be present. Testimony respecting grounds (2) and (3) was taken by the court. Upon such evidence the court concluded that the motion was unsupported on those two grounds.

[1] Only one point need be commented upon in this connection. When it appeared that the conduct of the district attorney and his assistant under the criminal laws of the state was to be under investigation by the grand jury, the Attorney General was requested to appoint special counsel to assist in the investigation and prosecution of the charges made against those public officials. Under date of August 19, 1926, the Attorney General in writing appointed Richard Kittrelle as special counsel to conduct the investigation and prosecution in the place and stead of the district attorney. This appointment was made under the authority of section 472 of the Political Code, which provides that—

> "Whenever a district attorney in any county of this state shall, for any reason, become disqualified from conducting any criminal prosecution within such county, the attorney-general may employ special counsel to conduct such prosecution."

It has not been and is not now contended by the defendants that they were not disqualified in the matter of the investigation of their own conduct. Beyond question the Political Code, § 472, vested in the Attorney General the power to appoint special counsel, and when appointed the authority of the special counsel would be coextensive with that of the district attorney had the latter not been disqualified (see Sloane v. Hammond, 81 Cal. App. 590, 254 P. 648), including the authority to appear before and assist the grand jury to the same extent that the district attorney might have done had he not been disqualified (see State ex rel. Nolan v. District Court, 22 Mont. 25, 55 P. 916; State ex rel. Miller v. District Court, 19 N. D. 819, 124 N. W. 417, Ann. Cas. 1912D, 935).

[2] Mr. Kittrelle did not take an oath of office following his appointment as special counsel. It is contended that his appointment was therefore a nullity for failure to comply with the requirements of section 904 of the Political Code, which provides that "before any officer enters on the duties of his office, he must take and subscribe" to the oath of office. But he actually assumed and exercised the duties of a public officer under an authorized appointment, and as such was at least an officer de facto. People v. Turner, 85 Cal. 432, 24 P. 857; People v. Sehorn, 116 Cal. 503, 48 P. 495; People v. Cradlebaugh, 24 Cal. App. 489, 141 P. 943.

[3] To sustain their first ground of the motion to quash the indictment, viz., that it was not found, indorsed, and presented by the concurrence of 12 grand jurors, the defendants offered to prove that prior to the return of the indictment members of the grand jury who subsequently voted to return the indictment personally interviewed persons apart from regular sessions of the grand jury concerning the charges under investigation; that certain of the grand jurors from their private funds employed detectives to obtain evidence; that with the sanction and approval of certain members of the grand jury offers of aid were extended to Agnes Keller, a convicted felon, to assist her in being released on parole or otherwise if she would testify before the grand jury; and that two grand jurors, before they had heard any evidence, stated that they were going to indict the district attorney. The court sustained an objection to such offer, and it is argued that if proved such facts would serve to disqualify a sufficient number of grand jurors, so that the indictment was not found "with the concurrence of at least twelve grand jurors," as required by section 940 of the Penal Code.

It was in evidence that at least 14 grand jurors voted to return the indictment. It also appears that the grand jury was properly formed in the first instance. The offer of proof can, therefore, be taken in no other light than as a challenge to the individual members of the grand jury on the ground of bias or prejudice.

Prior to 1911, section 896, of the Penal Code provided for a challenge to an individual grand juror on the ground that "a state of mind exists on his part in reference to the case, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging." In 1911 that section and the succeeding sections (sections 897–901), relating to challenges to the panel and to the individual grand jurors, were repealed, and section 895, which previously provided for a challenge to the panel, was amended to read:

> "No challenge shall be made or allowed to the panel from which the grand jury is drawn, nor to an individual grand juror, unless when made by the court for want of qualification, as presented in the next preceding section."

The preceding section, 894, as amended in 1911, provides:

> "Before accepting a person drawn as a grand juror, the court must be satisfied that such person is duly qualified to act as such juror, but when drawn and found qualified he must be accepted unless the court, on the application of the juror and before he is sworn, shall excuse him from such service for any of the reasons prescribed in Chapter 1, Title 3, Part I (secs. 190–254), of the Code of Civil Procedure."

The reasons for excusing persons from grand jury service as prescribed by sections 190–254 of the Code of Civil Procedure have no pertinency here. Section 907 of the Penal Code, which, with the three succeeding sections, had provided for a special grand jury, was re-enacted in 1911 so as to provide:

> "Before considering a charge against any person, the foreman of the grand jury shall state to those present the matter to be considered and the person to be charged with an offense in connection therewith, and direct any member of the grand jury who has a state of mind in reference to the case or to either party which will prevent him from acting impartially and without prejudice to the substantial rights of the party to retire. Any violation of this section by the foreman or any member of the grand jury is punishable by the court as a contempt."

The provisions of the foregoing section were not complied with; but the neglect or failure of the foreman to comply therewith is not made a ground for setting aside the indictment by section 995 of the Penal Code, and section 907 contains within itself the penalty for the violation of its provisions. The first subdivision of said section 995 provides that the indictment must be set aside on the motion of the defendant if "it is not found, indorsed, and presented as prescribed in this Code." It is under this subdivision that the point now under discussion was made by the defendants. By its terms this subdivision refers to the portions of the Code which prescribe the mode of finding, indorsing, and presenting an indictment. People v. Colby, 54 Cal. 37. Prior to 1911 an indictment could be set aside upon any ground which would have been good ground for challenge either to the panel or to an individual grand juror on account of disqualification for bias. See People v. Bright, 157 Cal. 663, 109 P. 33; People v. Landis, 139 Cal. 426, 73 P. 153; 14 Cal. Jur. 76. But in that year the provision of the Code for the setting aside of the indictment on the ground of the bias of the grand juror was abolished. People v. Schmidt, 33 Cal. App. 426, 165 P. 555. In view of the change in the law in 1911, it must be held that since that time the bias of a grand juror has not been a ground for setting aside an indictment. It may be noted that at the same session of the Legislature at which the Code rules were so radically changed, a constitutional amendment was submitted to the people of the state to add section 4½ to article 6 of our fundamental law and which was ratified on October 10, 1911. The theory of the change in the law in that year would appear to have been that the return of an indictment should be the means of bringing a person accused of crime before the court for a trial of the issues more nearly as an alternative to the method of holding a defendant to answer after a preliminary examination, and that irregularities attending the procedural steps should not void the proceeding provided the defendant was accorded a fair and impartial trial on the merits. We conclude that the trial court was not in error in refusing to set aside the indictment herein on any of the grounds of the defendants' motion.

The remaining contentions in support of the appeal are that the evidence is insufficient to support the verdict and that the court committed prejudicial error in admitting and rejecting certain evidence and in giving and refusing certain instructions. As to the insufficiency of the evidence, it is pointed out that the evidence, aside from that of Agnes Keller, the chief witness for the prosecution and an admitted accomplice, was as consistent with innocence as with guilt and that the evidence of the accomplice was not corroborated sufficiently to connect the defendants with the commission of the crime as required by section 1111 of the Penal Code. These contentions seem to require a brief review of the evidence.

On or about the 1st day of February, 1925, Thomas A. Johnson, with his wife, Mae Johnson, and their child, Hugh McGovern, George McMahon, and Dan McGory, Mrs. Johnson's father, moved from Chicago to San Diego to reside. They lived about in hotels for a time and until Johnson purchased a house on San Marcos avenue in San Diego, which the six persons thereafter occupied as their home. On the evening of March 1, 1925, the body of a man was found on a hillside in a new subdivision north of the San Diego river. The man had been shot, his skull had been crushed, and the blade of a pocket knife, about 2½ inches long, was imbedded in his chest in the region of the heart. A rag and some towels were found on or near the body identical in marking with similar articles later found in the San Marcos avenue house. Upon going to that house the police officers found two suits of clothes in the attic with human blood spots thereon. The bathroom was bespotted with blood and bloody rags and towels were found in and around the premises. The body was identified as that of George McMahon. As a result of the police investigation, Johnson and his wife, Hugh McGovern, and Dan McGory were charged with murder. Johnson and McGovern were apprehended. Mrs. Johnson and Dan McGory left San Diego with the child about 11 o'clock on the night of February 28th, proceeded by automobile to Los Angeles, and from there disappeared to parts unknown. They were never apprehended. Johnson and McGovern were arraigned and entered pleas of not guilty. They were at first represented by attorney Arthur Dorn. Later on a brother of Thomas A. Johnson, W. R. Johnson by name, appeared in San Diego, having come from Chicago in his brother's interest. The law firm of Sample & Hardin was substituted in the place and stead of Arthur Dorn as the attorneys for the defendants in said action through an arrangement made by W. R. Johnson at Sacramento with E. P. Sample, a member of the firm of Sample & Hardin, and while Sample, as a state senator, was in attendance upon a session of the Legislature. After the adjournment of the Legislature, and at the instance of Sample & Hardin, the court made an order for the taking, at Chicago, of depositions on oral interrogatories of witnesses on behalf of the defendants Johnson and McGovern. The time for the taking of such depositions was agreed upon between the district attorney and the attorneys for the defendants, and Mr. Kempley arranged to be present at the taking thereof. Accordingly, he left San Diego about June 2d. He had with him his wife and his small son. He arrived in Chicago on Friday, June 5th, and the depositions were taken on Monday, June 8th. On Sunday afternoon, June 7th, Kempley and his wife and boy attended a baseball game at Chicago as the guests of Senator Sample. W. R. Johnson was also a member of the party as a guest of Senator Sample. After the depositions were taken, Mr. Kempley and his wife and boy departed for Wisconsin to visit Mr. Kempley's parents and other relatives. Thereafter the Kempleys visited eastern cities and returned to California, going directly to Santa Cruz to attend the state convention of the District Attorneys' Association. At this convention Mr. Kempley was elected president of the association. At the conclusion of the convention, he left for San Diego, arriving there on Sunday, June 28th. The Johnson-McGovern murder case was on for trial and went to trial on the following day. Mr. Kempley and Mr. Selleck participated in that trial, each engaging in the examination and cross-examination of witnesses and in the argument to the jury. Messrs. Sample & Hardin represented the defendants. The trial extended over a period of several days, and resulted in a verdict of acquittal of both defendants on July 3d.

On June 11, 1925, Agnes Keller was arrested on a charge of grand larceny issued out of Mr. Kempley's office. Shortly after the conclusion of the Johnson-McGovern murder case, these defendants caused the case against Agnes Keller to be brought on for trial. At the first trial the jury disagreed but on a retrial she was found guilty as charged, sentenced to the state prison at San Quentin, and in due time was delivered to the warden. Just when the investigation of the charges against these defendants herein was commenced does not clearly appear. Prominent in the investigation was Mrs. M. E. Firman, a detective of the Firman Detective Service of Los Angeles, and her assistant, Mr. Freeman. Mrs. Firman interviewed Agnes Keller in the penitentiary, and as a result of this interview Agnes Keller appeared before the grand jury of San Diego county. Richard Kittrelle was appointed special counsel by the Attorney General on August 19, 1926. At that time the defendant Kempley was a candidate to succeed himself at the primary election held later in the same month. The indictment herein was returned on October 7, 1926. After preliminary motions had been disposed of the cause came on for trial on November 29th, resulting in a verdict of guilty as to both defendants on both counts on December 16, 1926.

Agnes Keller was taken from San Quentin to San Diego and was the principal witness for the prosecution at the trial. She testified that she had been the owner of the Sonora Bar at Tijuana, Mexico, and had been the proprietress of a house of assignation in San Diego; that prior to January, 1923, in which month Mr. Kempley assumed his duties as district attorney, she had appeared before Mr. Kempley for preliminary examination and was held to answer on a felony charge at a time when Mr. Kempley was justice of the peace and that she had known him since that time; that in 1923 she was the proprietress of the Dearborn Hotel in San Diego, which she conducted as a hotel, a house of assignation, and a gambling house; that during that time the defendants herein, as district attorney and assistant district attorney, threatened her with red light abatement proceedings; that she then employed Mr. Kempley to assist her in obtaining a transfer of the lease of the premises to a party satisfactory to the public authorities and paid him for his services. The record shows that the red light abatement proceedings were actually brought by the defendants herein; that subsequently Agnes Keller vacated the Dearborn Hotel; and that in the immediately subsequent years she was interested in horse racing and was a prominent figure in the San Diego and Tijuana underworld.

She further testified that in the year 1924 she employed Mr. Selleck as her attorney in connection with some legal difficulties she was having with her ten year old son at Oakland, and that prior to the murder of George McMahon she and the defendants had been "very friendly"; that early in March, 1925, the defendant Selleck called her to his office and asked her if she wanted to make some money, to which she replied that she did; that the defendant Selleck, in the presence of defendant Kempley, told her to go to Coroner Kelley and make inquiry about a diamond stud and a ring and $3,000 that was supposed to have belonged to George McMahon; that she should also go to the office of Arthur Dorn, try to get in touch with W. R. Johnson, and tell the latter that the charges against the four defendants in the murder case were very serious and that it would take $10,000 or $20,000 apiece for the two defendants herein to save the defendants in the murder case from the gallows; that she met W. R. Johnson at Mr. Dorn's office and had a talk with him, and also with Mr. Dorn, after which she related the conversation she had had with them to Selleck; that she told Selleck that Johnson said he first wanted to get possession of the knife that was found stuck in McMahon's chest, as it belonged to his brother and had been involved in a Chicago murder case that had just been "fixed"; that Johnson wanted other evidence, and particularly a gun that had been found in the San Marcos avenue house; that Johnson stated that he was willing to spend any amount of money, but that when $20,000 apiece was named he said such a sum was too much and that the murder case in Chicago that "had just been squared up didn't cost one-half that much money"; that the defendant Selleck instructed her to tell Johnson that it would not do to have Dorn in the case and that the only man who should handle the case was Sample; that she later introduced W. R. Johnson to Kempley and Selleck in the latter's office; that at that time W. R. Johnson agreed to put up $40,000 if Kempley would go to Chicago with him and receive it after the defendants Johnson and McGovern had been acquitted of the murder charge and if the exhibits in the case should be released and turned over to him; that a few days later she told Kempley that W. R. Johnson had given her $500 as expense money and that she thereupon gave Kempley $200 or $300 out of it; that about the 6th or 7th of March she handed to the defendant Kempley an additional $500 in the defendant Selleck's office; that in her presence W. R. Johnson handed to Selleck a $1,000 bill in the latter's office, saying: "You better take this for expense money"; that about the latter part of March the defendant Kempley told her that he was intending to go to Chicago and arrange to have the money put up there and for her not to worry, that he would take care of her; that after the defendant Kempley returned from Chicago, she talked with him in Selleck's office, Selleck being present, and that at that time Kempley said to her "that he had received the money all right"; that she then asked Kempley if he had delivered the $3,000 to McMahon's sister in Chicago, and he said "No," that Selleck had it; that before Kempley went to Chicago she talked to Selleck about the bloody suits of clothes that had been found in the attic of the San Marcos avenue house, and that Selleck said he thought it would be best to have them cleaned up a little, have some of the blood taken off and have them shortened or shrunk; that he could not have them exhibited to the jury in their then condition unless Ivan Rice, a friend of his, could get on the jury; that Selleck said that if Ivan Rice was on the jury the jury could be tampered with in some way; that nothing was done with reference to cleaning or altering the suits of clothes until after the return of Kempley from Chicago, when, in Selleck's office, Kempley told her it would help a whole lot "if they were fixed, some"; that thereafter Selleck called her up and told her to meet him at a drug store at Fifth and B streets, which she did; that she then told Selleck in effect that she would not have the clothes fixed until she was sure that W. R. Johnson had put up the money; that she later called Johnson at the Biltmore Hotel in Los Angeles; that Johnson came to San Diego and went with her to the district attorney's office, where they met and talked to Kempley and Selleck; that when all of said four persons were present she asked Johnson how much money had been put up, and that Johnson had replied that $40,000 had been put up in Chicago for Kempley, and $10,000 for Sample in the First National Bank of San Diego, and that $1,500 had been given to Arthur Dorn; that she then said that the suits of clothes would have to be tampered with, and, "of course, it falls to me to do it"; that Johnson then said to Selleck, "When you sign over in the court all the evidence to me there will never be any comeback on the wife and the father"; that this conversation took place a couple of days after the return of Kempley from Chicago; that the next day after said conversation Selleck called her and asked her to meet him at Sixth and C streets in front of Marstons, which she did, and at this meeting Selleck handed to her a bundle containing the suits of clothes, wrapped in a newspaper; that she took the clothes to her house, sent one suit "to be scoured and kind of gone over"; that this suit was returned to her by the cleaner but it did not look as if it had been cleaned and pressed, "just kind of scoured, some of the blood taken out of it"; that she shrank the other suit herself by soaking it in gasoline over night; that she returned the two suits to Selleck at his office, at which time he said he did not want the suits to fit the defendants Johnson and McGovern, like they did when they were tried on at the police station, but as they were returned to him they did not appear to be in a satisfactory condition.

The defendants took the stand in their own defense and denied in toto that they had said or done any of the things attributed to them by Agnes Keller, except that Selleck admitted having transacted some legal business for her at Oakland and Kempley admitted having made the trip to Chicago.

On cross-examination, and otherwise, Agnes Keller was impeached in every way known to the law. On her direct examination she announced her own infamy as the keeper of a house of prostitution and gambling in San Diego, and as the proprietress of a bar at Tijuana. She had been twice convicted of a felony, once in Kansas City for larceny of the person and again in San Diego for grand larceny. Numerous witnesses testified that her reputation in San Diego for truth, veracity, and integrity was extremely bad. The prosecution concedes that the defendant Kempley left San Diego about the first of June and did not return until Sunday, the day before the commencement of the trial of the murder case. Yet Agnes Keller testified that she talked with Selleck in the presence of Kempley a few days before the commencement of the trial about the alteration of the two suits of clothes. By reason of her criminal record, her bad character, and her conceded inconsistent statements on the stand, the law, in its "solicitation for the protection of the citizen, watches with scrutiny" her testimony. People v. Williams, 18 Cal. 187, 191. Bearing upon the corrupt motive which she might entertain against these defendants, it appears from the testimony of the chief matron and an assistant matron at San Quentin that Agnes Keller stated just prior to her departure for San Diego to appear before the grand jury that if she went to San Diego to testify against some county officials she would not have to come back to prison, and that Mrs. Firman had promised her that if she would testify against them she would get a new trial. Witness Fossler also testified that Agnes Keller had stated to him in September, 1926, in San Diego, that she had been double-crossed and that "something very big" was about to transpire. It will be remembered that these defendants had prosecuted her and had brought about her conviction on October 6, 1925, on the grand larceny charge. Abundant reasons for her hope of reward, if she should testify against these defendants, and for her resentment against them, are manifest from the record.

The foregoing testimony of Agnes Keller, her impeachment, and her motive have been adverted to, not for the purpose of arriving at a conclusion that her story might not be believed by the jury, but for the purpose of indicating that it is our duty to focus the spotlight on other evidence in the record which the prosecution claims measures up to the standard of corroborative evidence demanded by our law. In pursuance of this purpose, and having in mind the rules governing the functions of the trial court and jury and the powers of a reviewing court, it will be assumed that the testimony of Agnes Keller, if so corroborated, was sufficient to sustain the verdict. It is earnestly contended by the defendants that the story of Agnes Keller is inherently improbable and unworthy of belief as a matter of law. Considered in all of its dips, spurs and angles, there is much force in the contention. But we are disposed to resolve this point against the defendants for the purpose of the disposition of this appeal and proceed to a consideration of the question of the corroboration of the testimony of Agnes Keller, who, by her own testimony, the proper ruling of the trial court with reference thereto, and the concessions of the prosecution, was in the position of an accomplice.

[4, 5] The law of this state on the question of corroboration is now well settled. The statutory rule is found in section 1111 of the Penal Code, which provides:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offence; and the corroboration is not sufficient if it merely shows the commission of the offence or the circumstances thereof."

This Code rule has been the same since its adoption as a part of the Criminal Practice Act in 1851. In the early case of People v. Ames, 39 Cal. 403, it was said that the purpose of the statute "was to prohibit a conviction, unless there was some evidence, entirely exclusive of that of the accomplice, which, of itself, and without the aid of the accomplice, tended to raise at least a suspicion of the guilt of the accused." In the later case of People v. Thompson, 50 Cal. 480, this court was at pains to point out that the language of People v. Ames, supra, should not be taken as a correct statement of the rule, and that it was not intended to lay down a rule "that if the corroborating evidence sufficed to raise merely a suspicion of the defendant's guilt, and nothing more, that it would be a sufficient corroboration within the meaning of section 1111." People v. Thompson, supra, page 482. In People v. McLean, 84 Cal. 480, 24 P. 32, it was said:

> "But although more is required by way of corroboration than to raise a mere suspicion (see People v. Thompson, 50 Cal. 480), yet the corroborating evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the offense, although it is slight,

and entitled, when standing by itself, to but little consideration."

That more is required by way of corroboration than mere suspicion is firmly imbedded in our law. People v. Yeager, 194 Cal. 452, 473, 229 P. 40; People v. Kelly, 69 Cal. App. 558, 570, 231 P. 767; People v. Taylor, 70 Cal. App. 239, 244, 232 P. 998; People v. Jones (Cal. App.) 262 P. 361; 8 Cal. Jur. 178, 180.

The question of how much more than a mere suspicion is required in order to constitute corroboration has been answered by many cases in declaring further that—

> "Corroborative evidence is insufficient where it merely casts a grave suspicion upon the accused." People v. Robbins, 171 Cal. 466, 470, 154 P. 317; People v. Woodcock, 52 Cal. App. 412, 417, 199 P. 565; People v. Janssen, 74 Cal. App. 402, 407, 240 P. 799.

The Code section is mandatory (People v. Allison, 200 Cal. 404, 253 P. 318), and a conviction cannot stand unless the testimony of the accomplice is corroborated in accordance with the standards laid down by the courts in the interpretation of the statute. "The court has no discretion in the matter, but is bound to apply the statute indiscriminately to all cases wherever an accomplice appears as a witness, and the State's case depends solely upon his uncorroborated testimony." People v. Robbins, 171 Cal. 466, 469, 154 P. 317, 318. If the testimony of the accomplice is not sufficiently corroborated, the conviction of the accused is wholly wanting in a legal foundation to support it. People v. Viets, 79 Cal. App. 576, 587, 250 P. 588.

With the foregoing principles of law in mind, we now turn to the record to discover in what respects, if at all, the testimony of Agnes Keller was sufficiently corroborated. By the testimony of other witnesses numerous facts were proved. It was in evidence that in company with Arthur Dorn, W. R. Johnson went to the office of the district attorney shortly after the return of the indictments against Johnson and McGovern and there met Mr. Kempley; that the purpose of his going to interview the district attorney was to find out if the trial of his brother could not be avoided because of the effect even of a trial on the mother of the two Johnsons. It was also shown that Arthur Dorn had been substituted out of the murder case and that Sample & Hardin had become attorneys of record for the defendants in that case. Senator Sample, as a witness for the people, testified that at his invitation Kempley and his family had attended a ball game in Chicago at which W. R. Johnson also was present as one of Sample's guests. Kempley also testified that he was present on that occasion. Kempley also testified that he made an ineffectual attempt while in Chicago to interview a sister of McMahon who had theretofore indicated a desire to see him. It also appeared by undisputed evidence that Kempley was absent from San Diego during the month of June; that he attended the district attorneys' convention at Santa Cruz during the latter part of that month; and that he did not return to San Diego until the day before the trial of the murder case. The record in the murder case was introduced in evidence. The trial resulted in an acquittal of the defendants therein after a five days' trial. It also appeared that Ivan Rice was a member of the jury in that case and was the foreman who signed the verdict of acquittal. It also appeared that a few days after the return of the verdict the defendant Selleck consented in writing to the release of the exhibits in that case at a time when Mae Johnson and Dan McGory were still at large.

[6-8] On the foregoing independent proof in the main the prosecution contends that the defendants have been sufficiently connected with the crimes of soliciting and receiving a bribe to satisfy the requirements of the law. The entire voluminous record in the case has been read with care, and the extended briefs and arguments presented by able counsel on both sides have been carefully considered to the end that it may properly be declared whether the judgment of conviction may stand. Upon a consideration of the entire record we are compelled to state that when the testimony of the accomplice is eliminated from the case, as it must be, for the purpose of determining the question of corroboration (People v. Robbins, supra; 8 Cal. Jur. 178, and cases cited), the other evidence in the case has no substantial connection with any crime, is as consistent with innocence as with guilt, and that it is questionable whether it raises even a suspicion of guilt. It is significant that neither Kempley, nor Selleck, nor the district attorney's office were ever mentioned in any conversation which Agnes Keller had with any outside witness. So that the corroboration must rest alone on circumstantial evidence. No essential element of bribery may be adduced from the fact that W. R. Johnson with his attorney called on Kempley at the latter's office soon after the return of the indictment in the murder case in an endeavor to ascertain if the trial of the murder case might be avoided. If a district attorney is to be subjected even to the suspicion of bribery every time an attorney or others interested in the defense interviews him, he is indeed in a precarious situation. Nor does a suspicion of bribery arise by reason of the substitution of Sample & Hardin for Arthur Dorn as counsel for the defendants. The record shows without conflict that Dorn was in poor health, verging on a nervous breakdown, at the time of the substitution, and that thereafter he was unable to attend to his business for a considerable length of time. A circumstance much stressed by the prosecution as tending to connect

the defendant Kempley with the crime of bribery is the fact that he attended the baseball game in Chicago in company with Senator Sample and W. R. Johnson. It is undoubtedly true that social intercourse between opposing counsel during pending litigation is often viewed as a suspicious circumstance, especially by those interested in the litigation. Proper regard for the proprieties may well prompt the recognition of the precept to avoid the "appearance of evil," yet such social intercourse, within proper bounds, is not inconsistent with innocence and may not rise to the dignity of evidence of corruption. The presence of W. R. Johnson at the baseball party has seemed to accentuate the claim of the prosecution; but the entire incident falls short of proof that the defendant Kempley was engaged with Senator Sample and W. R. Johnson in the nefarious scheme of "throwing" the murder case by the soliciting and the acceptance of a bribe of $40,000 or any other sum. The record shows that a sister of the murdered man was in Chicago at the time of the homicide; that she communicated with the police department of the city of San Diego, offering assistance in the prosecution of the guilty parties; that before he left San Diego Kempley examined the police file and took the address of the sister; that when in Chicago at the time of the taking of the depositions he endeavored to locate her but was misdirected as to the location of her address; and that upon his return to Chicago he telegraphed her to meet him at his hotel, but that she failed to appear before the departure of his train. There was no showing that the sister knew anything whatsoever of the circumstances attending the commission of the crime of murder or had any other information that would be helpful to the prosecution. Stress is laid upon the fact that Kempley did not return to San Diego until the day before the commencement of the murder trial, and the inference is attempted to be drawn that he was neglectful of his duties as a prosecuting officer to the extent of suggesting that he was corruptly caused to remain away. That he was interested in the affairs of the District Attorneys' Association of the state and had good reason to attend the convention at Santa Cruz in so far as his official duties would permit is evidenced by the fact that while in Santa Cruz he was elected president of the association. He testified that before he left San Diego he placed the preparation for trial of the murder case in the hands of his assistant, Selleck, who, it is conceded by all, was competent to discharge that important duty. The record in the murder case has been read. The evidence presented and the arguments of both Kempley and Selleck to the jury disclose that the case was presented with reasonable diligence. There was abundant evidence to convict the defendants then on trial and more directly pointing to the guilt of Thomas A. Johnson and Hugh McGovern than to the guilt of Mae Johnson and Dan McGory. The judge who presided at the trial testified in the present case that in his opinion, based wholly on the evidence produced at the former trial, the acquittal of said defendants resulted in a miscarriage of justice. From a reading of the evidence in that case we are in accord with the conclusion of the trial judge. It is true that if the defendants in that case had been convicted the defendants herein might nevertheless be guilty of bribery, but the fact that the jury in that case failed to perform its duty does not rise to the dignity of a suspicion that Kempley and Selleck were bribed to thwart the prosecution. The unsatisfactory state of the record with reference to the alleged alteration of the two suits of clothes renders it unnecessary to dwell further upon that phase of the case.

The point mainly relied upon by the prosecution to connect the defendant Selleck with the commission of the alleged crime is the fact that said defendant signed a consent that the exhibits in the murder case be released at a time when the cause was still pending against Mae Johnson and Dan McGory. The clerk in the department of the judge who tried that case testified that a few days after the verdict of acquittal Senator Sample appeared before the court and made a motion that the exhibits be released; that the judge instructed him (the clerk) to prepare the order of release and secure the consent of the district attorney's office; that he prepared the order in his own handwriting designating the exhibits as Nos. 1 to 34, inclusive, without further describing them, and that he then took the document to Selleck's office and there secured the latter's signature thereto. The defendant Selleck's testimony is in accord with that of the clerk. The trial judge testified that, according to his recollection, Senator Sample made the motion for the release of the exhibits; that he requested Sample to secure the consent of the district attorney's office; and that thereupon Selleck appeared in his courtroom and consented to the release. This discrepancy in the testimony is deemed of no great significance. The trial judge further testified that he attached no importance to the release of the exhibits; that he believed that the two persons who were guilty had been prosecuted; and that if a motion to dismiss the case as to the other two defendants had been made he would have granted the same and would have thought the motion not at all unusual under the circumstances. The exhibits consisted of a wardrobe trunk containing men's clothing, chairs and rugs from the house on San Marcos avenue, two guns, and numerous other exhibits, all of which were claimed by the defendants in the murder case. A few exhibits were also released to them which were not claimed by them, but this is deemed of no importance. The knife and the gun which, according to Agnes Keller's testimony, were of such controlling importance to W. R. Johnson, were turned over to others, the knife to a deputy district attorney and the gun to a member of the police department. The fact that Ivan Rice served on the jury in the murder case cannot of itself be considered a suspicious circumstance tending to connect the defendants herein with the commission of the alleged crime of bribery. There was no evidence at all concerning any alleged confession of the defendants in the murder case at the time of their arrest. Consequently there is nothing in the record to support the allegations of the indictment that the defendants herein agreed to suppress such alleged confession. Other minor points on the question of corroboration are made by the prosecution, but they are not deemed of sufficient importance to merit further notice.

As to all of the claimed corroborative evidence the prosecution must fail, for it does not even show "the commission of the offence or the circumstances thereof" within the rule laid down in section 1111 of the Penal Code, and must further fail under the well-established rule approved in People v. Robbins, 171 Cal. 466, where, at page 470 (154 P. 317, 319), it is said that—

> "Where the circumstances when proved, taken separately or collectively, are consistent with the innocence of the accused, there is no corroboration, and a verdict of conviction thereon will be set aside."

Therefore, eliminating, as we must, the evidence of the accomplice in order to determine whether the other evidence is sufficient to connect the defendants with the crime of bribery, we conclude that such other evidence falls far short of the legal requirements to constitute corroboration.

There is much merit in the further contention of the defendants that the corpus delicti was not established. This is especially true with reference to the alleged crime of accepting the bribe of $40,000. The evidence, other than that of the accomplice, is entirely insufficient to establish it. The only testimony of Agnes Keller tending to prove the receipt of the $40,000 is her uncorroborated statement that the defendant Kempley admitted after his return from Chicago that the money had been put up. In People v. Vertrees, 169 Cal. 404, at page 408 (146 P. 890, 892) it is said:

> "It is the settled law that no conviction may be had upon the extra-judicial confession of a defendant unless such confession be corroborated by proof aliunde of the corpus delicti, and while slight proof of the corpus delicti has in many cases been properly held a sufficient basis for the admission of such confessions, it is nevertheless true that the confessions and admissions of the defendant cannot be used to establish any necessary element for the commission of the crime."

In the present case there is no evidence of the receipt of the money by Kempley except his alleged admission that it was put up in Chicago. However, for the purpose of this appeal it has been assumed that the corpus delicti had been established as to both counts of the indictment.

Numerous other contentions are advanced by the defendants. It would unduly further prolong this opinion to discuss them. What has been said sufficiently disposes of the appeal.

The judgment and order as to each defendant are reversed.

We concur: WASTE, C. J.; RICHARDS, J; PRESTON, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

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205 Cal. 426

BROUGHER et al. v. BOARD OF PUBLIC WORKS OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 12800.)

Supreme Court of California. Oct. 31, 1928.

1. Municipal corporations ⊂⇒621—Application for building permit may be denied on amendment of ordinance after filing application prohibiting permit.

Application for permit to construct building may be denied on amendment of ordinance after filing such application making it illegal to issue such permit, there being no opportunity for privilege to ripen into vested right, where no permit has been issued.

2. Municipal corporations ⊂⇒621—Application for permit to build hotel, filed when ordinances permitted hotel, held properly denied, where new ordinance enacted before final action on application prohibited permit.

Where applicant for permit to erect hotel filed application at time when ordinances of city permitted erection of hotel, but before final action was taken on application board of supervisors enacted ordinance limiting buildings in locality to 40 feet in height, applicants were not entitled to have permit applied for granted merely because they had complied with all laws effective at time application was filed.

3. Municipal corporations ⊂⇒60—Board of supervisors of San Francisco have plenary power to legislate in purely municipal matters subject to charter restrictions (Const. art. 11, §§ 6, 8).

Under Const. art. 11, § 8, under which San Francisco adopted charter, and section 6, amended to permit cities and towns heretofore organized to enforce all laws respecting municipal affairs, subject to restrictions in charters, and amendment to charter in compliance with Constitution, board of supervisors of city of San Francisco were given plenary power to legislate in all purely municipal affairs, subject only to restrictions in its charter.

4. Municipal corporations 🔑65—Act requiring public hearing and publication before enactment of zoning ordinance merely prescribes procedure which was municipal affair (Enabling Act 1917, § 4).

Enabling Act 1917, § 4 (St. 1917, p. 1419; Deering's Gen. Laws 1923, Act 994), providing for hearing on report of planning commission recommending zoning districts, and providing for publication of ordinances before final action thereon, merely prescribes procedure to be followed by council in enactment of zoning ordinances, which procedure is municipal affair.

5. Municipal corporations 🔑79—Enabling Act prescribing method for enacting zoning ordinance held not applicable to city and county of San Francisco, and zoning ordinance complying with charter provisions, though not with enabling act, was not illegal (Enabling Act 1917; Const. art. 11, §§ 6, 8).

Enabling Act of 1917, prescribing steps necessary to be taken by municipality in enacting zoning ordinance, has no application to city and county of San Francisco, which has availed itself of Const. art. 11, §§ 6, 8, by amending charter to authorize city to enforce all laws respecting municipal affairs subject only to restrictions in charter, and hence zoning ordinance complying with provisions of charter for enactment of ordinances was not illegal on ground that provisions of Enabling Act were not observed.

6. Municipal corporations 🔑601—San Francisco charter providing for beautification of public properties did not prohibit zoning ordinance affecting private property only (San Francisco City Charter, c. 2, art. 2, § 42).

San Francisco City Charter, c. 2, art. 2, § 42, providing for improvement and beautification of public properties of city, *held* not to prohibit enactment of zoning ordinances affecting private property only.

7. Municipal corporations 🔑591—San Francisco charter conferred on board of supervisors police power authorizing zoning ordinances.

City charter of San Francisco *held* to confer on board of supervisors all police power invested in said municipality by Constitution of state, under which city was authorized to enact zoning ordinances.

8. Mandamus 🔑172—Issues of fact necessary to determine reasonableness of building ordinance should be first determined in superior court, and not by Supreme Court on application for mandamus to compel issuance of building permit.

Where pleadings, in mandamus to compel board of public works to issue permit for construction of hotel, raised issues of fact to be determined by referee or court in determining validity of zoning ordinance limiting height of buildings to 40 feet, Supreme Court will not assume jurisdiction to settle issues on application for mandamus, but such issues should be first determined in superior court.

In Bank.

Application for writ of mandate by E. B. Brougher and others, doing business under the firm name and style of the Moana Hotel Company, an unincorporated company, to compel the Board of Public Works of the City and County of San Francisco and others to issue a building permit. Motion to file amended petition and order to show cause dismissed without prejudice.

Joseph J. McShane and David K. Watkins, both of San Francisco, for petitioners.

John J. O'Toole and Walter A. Dold, both of San Francisco, for respondents.

Charles A. Christin, Otto K. Grau, and Alan C. Van Fleet, all of San Francisco, amici curiæ.

CURTIS, J. The petitioners are asking for a writ of mandamus against the board of public works of the city and county of San Francisco, requiring said board to grant the application of petitioners for a permit to construct upon certain real property belonging to petitioners, described in said application and situated in said city and county, a building to be used as a hotel. The original petition was filed herein on the 23d day of December, 1927, and was denied by this court. Thereupon petitioners asked for a rehearing of said matter. On January 26, 1928, the order denying said petition was vacated and set aside, and the matter was taken under advisement for further consideration. On February 2, 1928, this court made an order for the respondents to show cause before this court on April 3, 1928, why an alternative writ of mandate should not issue as prayed for in petitioners' original petition. On March 23, 1928, the respondents filed an answer to said petition. In the meantime the petitioners had filed an amendment to said petition, and the answer of respondents covered said amendment, as well as said original petition. The matter then came on for hearing on April 3, 1928, and by the agreement of the parties was continued to May 8, 1928. On this last-named date the matter was argued, and in addition thereto petitioners moved the court for leave to file an amended petition setting up more fully the grounds upon which they base their claim that ordinance No. 7519 (New Series), which will be hereafter more particularly referred to, is void by reason of its provisions being unreasonable, oppressive, arbitrary, and confiscatory. This motion was also argued and taken under consideration by the court. At that time it was announced by the court that the questions of law presented by the pleadings would be first considered and decided, and that at the time of their determination the court would further indicate its views as to the time and manner of disposing of the questions of fact made by the pleadings in their present form, and those that might arise in case the court granted petitioners' motion to file their amended petition. It was evident then, as it is now, that should the court in passing on these questions of law decide them in favor of the petitioners, then there would be no necessity of petitioners pressing their motion to file an amended petition. On the other hand, should the court's decision be adverse to petitioners upon these questions of law, then the court would pass upon their motion to file an amended petition, and make such other and additional order regarding the further consideration of this proceeding as to the court might appear proper.

The facts brought out by the pleadings herein are briefly stated as follows: Petitioners are the owners of certain real property in the city and county of San Francisco located within the second residential district of said municipality, as shown by its general zoning ordinance (Ordinance No. 5464). This ordinance permits the erection of hotels and apartment houses in said residential district. Petitioners made application to the board of public works of said municipality for a permit to erect in said district and upon their said real property a ten-story class A concrete hotel. Their application was in legal form, and in all other respects petitioners had complied with the ordinances of said municipality then in force prescribing the steps necessary to be taken in order to secure a permit to erect a building in said city and county. Their application was presented on the 18th day of April, 1927. The board of public works took no final action thereon until after the 9th day of May, 1927, on which day the mayor of said city and county approved ordinance No. 7519 (New Series), passed by the board of supervisors of said city and county on the 2d day of May, 1927. This ordinance provided that no building, with certain exceptions not necessary to mention here, exceeding 40 feet in height should be erected within a certain territory, described in said ordinance, and in which territory the real property of petitioners is located. By reason of the passage and enactment of this ordinance, the board of public works refused to grant said application of petitioners for a permit to erect a ten-story building upon their real property, and thereafter denied the same. In the adoption of Ordinance No. 7519 (New Series), the board of supervisors followed the procedure provided by the charter of said city and county relative to the passage and enactment of ordinances generally, and failed to comply with the provisions of that certain act of the Legislature, entitled "An act to provide for the establishment within municipalities of districts or zones within which the use of property, height of improvements and requisite open spaces for light and ventilation of such buildings, may be regulated by ordinance," adopted May 31, 1917 (Stats. 1917, p. 1419; Deering's General Laws of 1923, p. 369). This act is frequently referred to by the parties hereto as the "Enabling Act of 1917," and in our own reference to said act we will use the designation thereof adopted by said parties. Section 4 of said act is as follows:

> "In municipalities having a city planning commission the council shall require such commission to recommend the boundaries of such districts and appropriate regulations and restrictions to be enforced therein. Such commission shall make a tentative report and hold public hearings thereon at such times and places as said council shall require before submitting its final report. Said council shall not hereafter determine the boundaries of any district or impose any regulations until after the final report of the city planning commission is filed with the city clerk. Upon receiving such final report said council shall afford persons particularly interested, and the general public, an opportunity to be heard, at a time and place to be specified in a notice of hearing to be published in a newspaper to be designated for that purpose. Said newspaper to be a local newspaper, if there be one, otherwise a newspaper of general circulation within the municipality, and to be published not less than three times in any daily, or not less than once in any other newspaper of general circulation within the municipality, and, within the week within which said meeting is to be held."

The charter of the city and county of San Francisco provides for a planning commission, and it is admitted that said municipality had such a planning commission at all the times mentioned in the petition, and that it was at all of said times performing its duties as prescribed by said charter, but that said Ordinance No. 7519 (New Series) was not adopted as a result of any hearing had before said commission, or in pursuance of any report from it. The provision of the charter of said municipality prescribing the notice to be given of proposed ordinances before their final passage is that—

> "Every ordinance * * * shall after its introduction, be published in the official newspaper * * * for at least five consecutive days (Sundays and legal holidays excepted) before the final action upon the same."

There is no contention but that this provision of the charter was followed and that all of its requirements were complied with in the adoption of Ordinance No. 7519 (New Series).

We will now proceed to a consideration of the questions of law appearing upon the face of the pleadings already referred to, and which may be stated as follows:

First. Having complied with every requirement of the ordinances of said city and county in effect at the time of the presentation of their application for such permit, are petitioners entitled as a matter of right to have granted to them the permit therein prayed for?

Second. Is Ordinance No. 7519 (New Series), enacted by the board of supervisors of said city and county of San Francisco, invalid and void by reason of the failure of said board of supervisors to conform to the procedure provided by the "Enabling Act of 1917," in its enactment and adoption, or, in other words, is the "Enabling Act of 1917" applicable to the city and county of San Francisco?

As we have already seen, at the time petitioners filed with the board of public works their application to erect a ten-story hotel upon their said real property, the ordinances of said city and county of San Francisco permitted the erection thereon of a building of that character, but before final action had been taken upon petitioners' said application, the board of supervisors had enacted, or had attempted to enact, Ordinance No. 7519 (New Series), which limited all buildings in the locality in said city and county where petitioners' said real property was located to 40 feet in height. A similar situation was shown in Miller v. Board of Public Works of the City of Los Angeles, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479, except that in that case the board of public works had actually issued a permit to erect the building applied for by the plaintiffs therein, when it learned that the city council of Los Angeles contemplated the passage of a general zoning ordinance which might affect the right of said plaintiffs to erect the style of building described in their application in that part of the city wherein their property was located. The board of public works thereupon canceled and revoked said permit, and after said city council had enacted a general zoning ordinance, said board denied plaintiffs' application for the reason that to issue the same would be in violation of said general zoning ordinance. The point raised by petitioners herein was not raised by the plaintiffs in that action, and the opinion of the court expressly states:

> "No point is made that the board has not the power to revoke a permit once it has been duly issued nor that the ordinance, if valid, may not operate retroactively to nullify a permit previously issued."

In view of this express statement of the court the case of Miller v. Board of Public Works, supra, may not be said to be a direct authority adverse to the contention of petitioners, yet it is hardly probable that this court would have denied the plaintiffs any relief in said action had it entertained any serious doubt of the board's power to revoke the permit previously issued by it. No authority has been called to our attention directly bearing upon the question of the power of the board of public works to refuse a permit to petitioners under the circumstances set out in the pleadings. It is held, however, in a number of well-considered cases, that a board of public works, or a body exercising similar powers to those exercised by the board of public works of the city and county of San Francisco, may cancel or revoke a permit issued by it when the ordinance under which the permit was issued had been amended in such a manner as to render the erection of the building covered by the permit objectionable and contrary to the terms of the ordinance as amended. This precise question was considered and decided in the very recent case of Brett v. Building Commissioner of Brookline, 250 Mass. 73, 145 N. E. 269, wherein the court, on page 271 of the opinion (250 Mass. 79), says:

> "The petitioners have no special and peculiar immunity arising from the fact that permits had been issued to them. They had begun work pursuant to those permits, although such work had not progressed very far. Commonwealth v. Atlas, 244 Mass. 78, 138 N. E. 243. Permits of the nature here in question do not constitute a pure personal privilege. When acted upon by the landowner, they cannot commonly be revoked by the licensing board in the absence of special power to that end or a change in legislation. General Baking Co. v. Street Commissioners of Boston, 242 Mass. 194, 197, 136 N. E. 245, and cases collected. The revocation of the permits in the case at bar rests exclusively upon the change in the by-law and not upon a change of mind in the licensing officer. We have already decided that that by-law was a valid exercise of the power conferred upon the town by a constitutional statute. Since the petitioners had only barely begun work pursuant to their permits, they had acquired no vested rights against a change in the by-law by the exercise of the law-making power."

See, also, Salem v. Maynes, 123 Mass. 372; City of Des Moines v. Manhattan Oil Co., 193 Iowa, 1096, 184 N. W. 823, 188 N. W. 921, 23 A. L. R. 1322, and Southern Leasing Co. v. Ludwig, 168 App. Div. 233, 153 N. Y. S. 545, 547. In this last-named case the building superintendent had issued to a building company a permit to construct an 80-foot sky sign so as to carry it to a height of 135 feet, but thereafter, and before the company had done any work under said permit, an ordinance was passed making it unlawful to erect a sky sign of that height. In an action to restrain the building superintendent from permitting the erection of said sign, it was held that the erection of said sign at the height designated in the permit was unlawful after the enactment of said ordinance, and an injunction was granted enjoining the erection of said sign, the court holding that—

> "As a general rule a permit or license is revocable, except where the licensee had done something under the license from which the mere privilege would ripen into a vested right. This exception, it may be noted, does not apply where the act which operates as a revocation lies within the police power of the state."

[1, 2] If a permit already issued may be revoked upon the subsequent amendment of the ordinance under which it was issued, un-

doubtedly an application for a permit may be denied upon the amendment of the ordinance after the filing of such application, making it illegal to issue such a permit. The exception noted in the foregoing authorities, that a permit would not be revoked in those cases where the licensee "had done something under the license from which the mere privilege would ripen into a vested right," does not exist in those cases like the one before us, where no permit has ever been issued. In such cases there is no opportunity for any privilege to ripen into a vested right, for the reason that no privilege, in the sense used in the authorities cited, is acquired until a permit has been issued. The case of City of Buffalo v. Kellner, 90 Misc. Rep. 407, 153 N. Y. S. 472, cited by petitioners, is not applicable to the facts in the present proceeding. In that case it was held that—

> "So long as the applicant complies with the valid building laws of the state or ordinances of a city, he is entitled to his permit as matter of right, and, if refused, may enfore the right by mandamus."

But the statement of facts in that case does not show that there had been any change either in the laws of the state or the ordinances of the city, under which the application for a permit had been made, after the filing of the application, which in any way affected or changed the applicant's right to a permit as it existed at the time said application was made. There can be no question, had the board of supervisors not amended the ordinances of the city and county of San Francisco after petitioners had filed their application for a permit, but that upon the refusal of the board of public works to issue such permit to petitioners, it could have been forced to do so by mandamus. But as we have already seen, the board of supervisors, before the board of public works had acted upon said application, enacted, or attempted to enact, Ordinance No. 7519 (New Series), which, if valid, made it illegal for petitioners to erect a ten-story building upon their said real property. These facts bring the case clearly within the principles enunciated in the authorities above cited, and justified the board of public works in denying petitioners' application for a permit, provided Ordinance No. 7519 (New Series) is a valid ordinance of said municipality. It follows, therefore, from what we have said, that the petitioners were not entitled to have granted to them the permit applied for by merely showing that they had complied with all the laws and ordinances effective in said municipality at the time of the filing of the application with said board of public works when the further fact appeared that before final action had been taken on their application the ordinances under which said application had been made had been amended by the board of supervisors.

This brings us to a consideration of the second question of law presented by the pleadings herein, and that is: Is Ordinance No. 7519 (New Series) of the city and county of San Francisco invalid by reason of the failure of the board of supervisors in its enactment and adoption to follow the procedure prescribed by the Zoning Act of 1917? Or, as we have also stated the question in a different form: Is the "Enabling Act of 1917" applicable to the city and county of San Francisco? It is confidently asserted by petitioners that in this state it has been held on many occasions that the zoning power of freeholder chartered cities of this state is derived from the Zoning Act of 1917 (Stats. 1917, p. 1419), and in support of that assertion they cite the following cases: Miller v. Board of Public Works of the City of Los Angeles, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479; Zahn v. Board of Public Works of the City of Los Angeles, 195 Cal. 497, 234 P. 388; Fourcade v. City and County of San Francisco, 196 Cal. 655, 238 P. 934; In re White, 195 Cal. 516, 234 P. 396; Dwyer v. City Council of the City of Berkeley, 200 Cal. 505, 253 P. 932; A. C. Blumenthal & Co., Inc., v. Cryer, Mayor, 71 Cal. App. 668, 236 P. 216. It is true that there are to be found in these decisions a number of instances where this court has referred to said act as one of the sources of power from which chartered cities in this state derive their right and authority to enact zoning ordinances. In every instance, we find, in which such reference has been made, it has also been stated that such power is also derived from the Constitution of the state. In none of these cases was the direct question presented to this court which is now before us; that is, whether the "Enabling Act of 1917" is applicable to chartered cities which have availed themselves of the power granted to them by the amendment of section 6 of article 11 of the Constitution of this state, effective November 3, 1914, to amend their charters so as to become empowered "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws." The decision of this question was not necessary to the decision of any question which arose in any of the cases relied upon by petitioners and which have been cited by them in support of their contention that said "Enabling Act of 1917" is applicable to the city and county of San Francisco in the enactment of Ordinance No. 7519 (New Series). We are therefore not able to agree with petitioners that this court, by reason of any pronouncement appearing in its former decisions, is foreclosed from the decision upon its merits of the question presented in the present proceeding and which has just been stated.

[3] In compliance with the provisions of section 8, article 11, of the Constitution of this state, the city and county of San Francisco adopted a freeholders' charter, which charter become effective January 8, 1900, and is still in full force and effect in said municipality. On November 3, 1914, section 6 of article 11 of the state Constitution was amended so as to include the following provision:

> "Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and towns heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws."

In pursuance of the power granted to chartered municipalities by the above provision of the Constitution the city and county of San Francisco amended its charter, and by said amendment conferred upon its board of supervisors, in addition to those already exercised by it, the power "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter." This amendment became effective January 17, 1925, and is still in full force and effect. By virtue of the Constitution and this charter amendment, the board of supervisors of said city and county is given plenary power to legislate in all purely municipal matters, subject only to such restrictions as are found in its charter. Civic Center Ass'n v. Railroad Comm., 175 Cal. 441, 166 P. 351; Heilbron v. Sumner, 186 Cal. 648, 200 P. 409.

[4] It is contended, however, by petitioners that the matter of regulating the height of buildings in a municipality is not a municipal affair, and in support of this contention petitioners rely upon the case of May v. Craig, 13 Cal. App. 368, 109 P. 842, wherein that court held that—

> "The construction of improvements upon private property within a charter city is not a municipal affair."

Assuming that the regulation of private buildings in a municipality is not a municipal affair, it is not shown that the requirements as to the height of buildings, provided by Ordinance No. 7519 (New Series), contravenes any general law of the state upon the subject. It is, however, claimed that the board of supervisors in the enactment of said ordinance failed to follow the procedure provided by the general laws of the state, and particularly that contained in section 4 of the "Enabling Act of 1917," quoted above. This section, as we have seen, provides that in cities having a planning commission, the council shall require said commission to recommend the boundaries of any proposed zoning district, and the regulations and restrictions to be enforced therein; that the commission shall make a tentative report and hold public meetings thereon before submitting its final report to the council; that the council shall not determine the boundaries of any district or approve any regulation until after the report of said planning commission is filed with the city clerk; upon receiving the final report the council shall afford interested persons and the public an opportunity to be heard at a time and place to be specified in a notice to be published in a newspaper of general circulation. These requirements of section 4 of said act simply prescribe the steps to be taken and the acts to be done by the council before and at the time of the passage of a zoning ordinance, or, in other words, they simply supply the procedure to be followed by the council in the enactment of an ordinance of this character. It has repeatedly been held by this court that the manner of enacting municipal ordinances is a municipal affair. Morton v. Broderick, 118 Cal. 474, 50 P. 644; In re Pfahler, 150 Cal. 71, 88 P. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911, and O. T. Johnson Corp. v. City of Los Angeles, 198 Cal. 308, 245 P. 164. In the first of these cases the act of 1897 (Stats. 1897, p. 190), requiring ordinances and resolutions passed by the city council, or other legislative body of any municipality, to be presented to the mayor or other executive officer of such municipality for his approval, was under consideration by the court, and it was there said:

> "The act of 1897 unquestionably deals with a municipal affair, the mode and manner of the passage of ordinances and resolutions provided for in the charter. Under this constitutional amendment [sec. 6, article XI, as amended Nov. 3, 1896], such acts now apply only to cities and to their charters which have organized under the general scheme embraced in the municipal corporation act. (Stats. 1883, p. 93.) San Francisco is not one of such cities, and the act of 1897 has, therefore, no application to it." Morton v. Broderick, 118 Cal. 474, 487, 50 P. 644, 648.

In re Pfahler, supra, this court, at page 82 of 150 Cal. (88 P. 275), affirms this doctrine in the following language:

> "Our Constitution declares that when a freeholders' charter is finally approved by the Legislature it 'shall become the organic law of the city' (sec. 8, art. XI), and such a charter has elsewhere been aptly termed the local constitution of the city. As such, provisions as to the distribution of the governmental functions, and the manner of their exercise, obtain, so far as the same are consistent with the Constitution of the state. It has already been held by this court that the manner of enacting municipal ordinances and resolutions is unquestionably a municipal affair (Morton v. Broderick, 118 Cal.

474, 487 [50 P. 644]), and, therefore, under section 6 of article XI of the Constitution, as amended in 1896, the provisions of a city charter in regard thereto are paramount to general laws of the state."

[5] The pleadings show, not only that the charter of the city of San Francisco has prescribed the mode and manner of enacting ordinances in said municipality, but that the board of supervisors in the adoption of said Ordinance No. 7519 (New Series) complied with all these requirements of said charter in reference to the passage and enactment of ordinances. Its legality, therefore, cannot be successfully assailed upon the ground that in its adoption the board of supervisors failed to observe the requirements of the "Enabling Act of 1917," as said act, in so far as it prescribes the steps necessary to be taken by a legislative body of a municipality in the enactment of a zoning ordinance, has no application to the city and county of San Francisco.

Petitioners contend, however, that even assuming the "Enabling Act" does not apply, yet the board of supervisors of said municipality have no power to enact said Ordinance No. 7519 (New Series) by reason of restrictions contained in subsection 42 of section 1, chapter 2 of article 2 of its charter. The provision of the charter reads as follows:

> "To provide by ordinance for the establishment of a City Planning Commission, which shall devise plans for the improvement and beautification of San Francisco. Members of said Planning Commission shall receive no compensation and shall not be subject to any prohibition forbidding officials from holding more than one office or position. The Board of Supervisors shall prescribe the duties of said Commission, the number and qualifications of the members thereof, and in general shall enact all legislation not expressly forbidden by this Charter or by general law necessary or incident to carrying into execution the propositions for which said City Planning Commission is instituted."

[6, 7] Petitioners claim that under this subsection of the charter the board of supervisors is confined to the enactment of ordinances which have for their object and purpose the "improvement and beautification" of public streets, parks, buildings, and other public properties, and that it is without authority or jurisdiction to legislate regarding private property. In other words, petitioners claim that the board of supervisors has no power whatever to enact a zoning ordinance, as such an ordinance affects private property only. We see nothing in this subsection of the charter which would warrant our holding that the board of supervisors is so limited. But even if this provision contains the limitation upon the powers of the board of supervisors as contended for by petitioners, there are other provisions of the charter which by their terms confer upon the board of supervisors of said city and county all the police power invested in said municipality by the Constitution of the state, and it is by virtue of the police power possessed by municipalities that they are authorized to enact zoning ordinances. Miller v. Board of Public Works, supra.

This disposes of the questions of law made by the pleadings, and the result of our decision of them is that in the enactment of Ordinance No. 7519 (New Series) the board of supervisors complied with all legal requirements applicable to said board in the enactment of said ordinance, and therefore that said ordinance furnished a sufficient and legal justification for the denial by the board of public works of petitioners' application for a permit, provided said ordinance is otherwise legal and valid.

[8] Petitioners are also contending that said Ordinance No. 7519 (New Series) is invalid for the reason that its provisions are unreasonable, oppressive, and otherwise legally objectionable. The allegations of their petition and the amendment thereto setting forth the grounds upon which the petitioners base this last-mentioned contention are denied by the answer filed by the respondents. From the nature of the issues thus made and from statements of counsel at the hearing of this proceeding, it will be necessary before the validity of said ordinance can be finally determined to have the issues of fact settled either by a referee or some competent court. Petitioners have advanced no sufficient reason why this court should assume jurisdiction of the proceedings to determine and settle in the first instance the facts involved in this controversy. The matter is now before us simply upon an order to show cause why the alternative writ of mandate prayed for by petitioners should not issue. It has never been the policy of this court to encourage the institution of proceedings herein, particularly where there is a dispute as to the facts involved, when such proceedings could as well have been instituted in the first instance in the superior court of the county where the controversy arose. No good reason appears to us why we should depart from this policy in the present proceeding. The motion of petitioners to file an amended petition, therefore, is hereby denied, and the order to show cause dismissed.

These orders are made, however, without prejudice to the right of petitioners to seek in the proper tribunal such relief, not inconsistent with the views herein expressed, as they may be advised they are entitled to.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; PRESTON, J.; SEAWELL, J.

205 Cal. 413

USHER v. HENKEL. (L. A. 9518.)

Supreme Court of California. Oct. 30, 1928.

1. Corporations ⇨605—Suspension of corporation's business for nonpayment of taxes rendered conveyance by corporation void (Pol. Code, § 3669c, subd. 2).

Corporation, after suspension of its right to transact business by operation of law for nonpayment of taxes under Pol. Code, § 3669c, subd. 2, had no power to convey property, and deed executed by corporation during period of its suspension was void.

2. Corporations ⇨605—Judgment against persons described as trustees of corporation held void and subject to collateral attack as to corporation whose business suspended (Pol. Code, § 3669c, subd. 2).

Where right of corporation to transact business was suspended by operation of law for nonpayment of taxes under Pol. Code, § 3669c, subd. 2, there was no forfeiture of charter, and corporation had no trustees, and therefore judgment against persons described as trustees in action to quiet title was void as to corporation, and subject to collateral attack when corporation was revived.

3. Taxation ⇨734(10)—Tax sale held pursuant to continuance held valid, where sale was first held within time (Pol. Code, §§ 3764, 3771a).

Where deed recited that sale for taxes was continuation of original sale, and that the sale had been continued from day to day in accordance with Pol. Code, § 3771a, and where the first day of the sale was within 28 days after the first publication of notice as required by section 3764, it was no objection to the tax deed that the sale actually took place more than 28 days after publication.

4. Taxation ⇨788(5)—Court must presume, in support of judgment upholding tax deed, that person to whom notice of tax sale was sent and address to which it was sent appeared on assessment rolls, concerning which no testimony was introduced (Pol. Code, §§ 3771a, 3786).

Where there was evidence that property sold for taxes was assessed to particular person for certain years with no address appearing on assessment roll, but there was no testimony as to person assessed during intermediate years, court must presume in support of judgment upholding tax deed and in accordance with presumption of its validity under Pol. Code, § 3786, making deed prima facie evidence that sale was lawful, that such person's name appeared on assessment roll with address to which notice of sale was directed under section 3771, during one of intermediate years.

5. Appeal and error ⇨179(2)—Sufficiency of affidavits to delinquent assessment roll could not be considered on appeal, where assessment roll was not in evidence.

Sufficiency of affidavit of tax collector and auditor to delinquent assessment roll was not presented on appeal in suit involving validity of tax deed, where neither original delinquent assessment roll, nor authenticated copy thereof, was introduced in evidence.

6. Taxation ⇨730—Purchaser under tax deed acquired any outstanding rights of corporation, whose powers were suspended, by judgment quieting title after revival of corporation's powers (Pol. Code, § 3669c, subd. 2).

If rights of corporation whose powers were suspended for nonpayment of taxes under Pol. Code, § 3669c, subd. 2, were not acquired by purchaser under tax deed, purchaser acquired them in subsequent action to quiet title against corporation, commenced after corporation's license tax had been paid and corporate powers revived.

Department 2.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by W. A. Usher against G. V. Henkel. Judgment for plaintiff, and defendant appeals. Affirmed.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellant.

Hugh L. Dickson, Emmet H. Wilson, and Randall J. Hood, all of Los Angeles, for respondent.

LANGDON, J. Appeal by defendant from a judgment against him in an action to quiet title to a certain parcel of land in Los Angeles county. It was stipulated at the trial that the Southern Land Company, a corporation, became the owner of the property by deed dated July 10, 1916. In 1922, the plaintiff received a tax deed from the tax collector of Los Angeles county for the property involved in the action, and subsequently commenced an action against the said Southern Land Company and procured a decree against the said company quieting his title to said property.

The defendant claims title to the property by virtue of a purported deed from Southern Land Company to Josephine Blanchard and a deed from Blanchard to the defendant; also, by virtue of a decree purporting to quiet title in the defendant herein as substituted plaintiff in an action entitled Josephine Blanchard v. W. A. Usher et al.

In July, 1916, a corporation entitled the Southern Land Company was organized under the laws of the state of California, with its principal place of business at Los Angeles, Cal. It acquired the property in controversy by deed. Thereafter, in 1921, this corporation failed to pay its license tax, and a declaration to that effect was duly filed in the office of the county clerk by the state controller on March 29, 1921, as provided by law. By reason of said failure of said Southern Land Company to pay its tax, its corporate powers, rights, and privileges were suspended March 5, 1921, as appears from the certificate of the state controller. These corporate powers, rights, and privileges were revived on December 6, 1924, by appropriate proceedings.

In September, 1922, the Southern Land Company, by Brush, its secretary, and Raum, its vice president, executed and delivered to Josephine Blanchard, as grantee, a deed to the property under consideration. While this deed is dated September, 1920, it was not executed or delivered until two years later, according to the testimony in the record, and at the time of its execution and delivery the corporation was without powers and continued so until its revival in 1924.

In July, 1922, the plaintiff purchased the land at a tax sale for delinquent taxes of 1916. The proceedings incident to this purchase will be discussed hereinafter.

In October, 1922, Josephine Blanchard commenced an action to quiet title against the plaintiff here and alleged trustees of the Southern Land Company, reciting the fact that said corporation had failed to pay its license tax and had forfeited its charter thereby, and that Raum and Brush were members of the board of directors at the time of the failure to pay the tax and still were such and were resulting trustees of said corporation. Service was had upon these parties and their defaults taken. The action was dismissed before trial as to the defendant Usher, the present plaintiff, and he was not a party to the decree purporting to quiet the title of the plaintiff in that action against the defendants therein. Before the decree was entered Josephine Blanchard conveyed her rights to one G. V. Henkel, and the judgment was taken in his name.

[1, 2] Since it is obvious from the facts herein recited that Josephine Blanchard could receive nothing under the deed from Southern Land Company, since that company had no powers at the time said deed was executed and delivered, it remains to be considered whether or not the decree in the action just mentioned has any force and effect. The present plaintiff was not a party to said decree, and is not estopped thereby. Did said decree operate to vest plaintiff in said action with all the right, title, and interest of the Southern Land Company in said land? It is maintained by respondent that said decree is void upon its face because the judgment roll discloses that the Southern Land Company was not sued and there were no trustees of the said company who could be sued. The complaint is entitled:

> "Josephine Blanchard, plaintiff, v. W. A. Usher and W. S. Brush, Geo. B. Raum and One Doe, as trustees of Southern Land Company, a corporation, whose charter is forfeited; Two Doe and One Doe Company, a corporation, defendants."

The complaint alleges:

> "That defendant, One Doe Company, is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the state of California; that defendants W. S. Brush, Geo. B. Raum and One Doe are now and at all times since the 5th day of March, 1921, have been trustees of the Southern Land Company; that on March 5th, 1921, the charter of the said corporation was forfeited for nonpayment of taxes due to the state of California, and on said date said defendants were the directors of said corporation."

Under the law then existing there was no provision for the forfeiture of the charter of the corporation because of its nonpayment of taxes, but its right to transact business was suspended by operation of law. Stats. 1917, pp. 371, 377; Pol. Code, § 3669c, subd. 2; Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446; Rossi v. Caire, 186 Cal. 544, 549, 199 P. 1042. The decree in the action brought by Josephine Blanchard to quiet title contains the following recital:

> "That it further appearing to the court that the action has been dismissed as to the defendant W. A. Usher and that Geo. B. Raum and W. S. Brush, as trustees for the Southern Land Company were duly and regularly served with summons and complaint in this action, and that the Southern Land Company is a defunct corporation, whose charter is forfeited for nonpayment of the state corporation tax, and that the said Geo. B. Raum and W. S. Brush are the surviving members of the last board of directors of the said Southern Land Company."

As we have shown, the Southern Land Company was not a party to the said action; it was never served with process; its default was never entered, and the decree does not purport to be against the said company, but is against certain persons described as trustees. We think the contentions of the respondent are correct that, under the existing facts and law, there were no trustees for the corporation and that the decree is a nullity in so far as it attempts to bar any rights of the Southern Land Company. In the case of Ransome-Crummey Co. v. Superior Court, supra, it is pointed out that by the Statutes of 1917, page 377, "the corporate rights, privileges and powers of every * * * corporation which has failed to pay the [license] tax * * * shall * * * be suspended, and * * * that all corporate powers, rights and privileges so suspended" might be "revived and restored to full force and effect" as provided by the statute. It is also pointed out in the said decision that under subdivision 2 of section 3669c of the Political Code it is likewise provided that "the corporate rights, privileges and powers of every domestic corporation which has failed to pay said tax" shall be suspended and incapable of being exercised for any purpose, except to defend any action brought in court against such corporation. The court further points out that before the enactment of the above mentioned statute the penalty imposed upon a corporation for failure to pay its license and franchise taxes was a forfeiture of its charter, and that after such forfeiture the corporation was governed by the rules relating to dissolved corporations. The court then said:

> "Under the terms of the present statutes, the penalty for nonpayment of license and franchise taxes has been changed, and the result of such nonpayment is no longer a forfeiture of its charter and consequent dissolution of the corporation, but only a suspension of its rights, powers, and privileges, with a provision for revivor. Furthermore, the statutes above quoted expressly provide that there shall be no dissolution of a corporation until all license and other taxes have been paid."

Under the former law, when the charter was forfeited, the directors then in office became the trustees of the creditors and of the stockholders of the corporation. Under the present law, however, the charter is not forfeited, the corporation does not become defunct, and there are no trustees. It appearing, therefore, on the face of the judgment roll, that the court did not acquire jurisdiction of the corporation and that there were no trustees for said corporation, the judgment purporting to quiet title in the defendant as against such corporation is a nullity and is subject to collateral attack.

[3] It appears, therefore, that the defendant and appellant has established no title to the property in question. But he attacks the title of the plaintiff upon numerous grounds. It is objected first that the tax deed shows on its face that the sale took place more than 28 days after the first publication of notice of sale. Section 3764, Pol. Code. The sale was had on July 7, 1922, and the deed recited that the sale was a continuation of the sale of the 3d day of July, 1922, and that said sale was continued from day to day in accordance with section 3771a, Political Code. In the case at bar, the tax collector published his notice of sale on June 8, 1922, and gave notice that the sale would take place on July 3, 1922, and would be "continued from day to day thereafter if additional time is required to complete the sale." It is obvious that it might be impossible for the tax collector to sell all the property advertised in one day, and this being true, he would have power to continue the sale from day to day, as was done. Some of the property was sold on July 3 and the sale was continued to July 5 and then to July 6, etc., up to the 11th day of July, property being sold on each day.

It is contended by appellant that the property was sold for an excess of one cent over the sum of taxes assessed against the property. A reference to the portions of the transcript printed in the brief of respondent shows this contention to be without merit.

[4] It is further contended that the tax deed was void because the tax collector did not mail the notice of sale, as provided in section 3771a, Political Code, to the last-known address of the party to whom the property was assessed. The property was assessed to George E. Hart, and the notice was mailed to 1010 West Washington street, Los Angeles, on June 10, 1922, and returned to the tax collector on July 12 of that year. Section 3786, Political Code, makes the deed prima facie evidence that the property was "sold as prescribed by law," including the proper notice properly given. To overcome this presumption defendant introduced evidence that in 1916 and in 1921 the property was assessed to George E. Hart, no address appearing on the assessment roll. There is no testimony as to the person to whom it was assessed during the intermediate years, or the address of such person. We must presume, therefore, in aid of the judgment and in accordance with the presumptions of the deed, that the name of Hart appeared as the person to whom the property was assessed, with the address to which the notice was directed, during one of these intermediate years, and that the notice was mailed, therefore, to the last address appearing in the assessment roll.

[5] It is also claimed that the affidavit required by law of the tax collector and auditor to the delinquent roll was not in proper form. Neither the original delinquent assessment roll nor a properly authenticated copy thereof was introduced in evidence, so the point is not presented by the record.

[6] However, we shall consider no further the objections urged by appellant with reference to the tax deed to plaintiff. We think they are all without merit, but, be that as it may, the conclusion which we have reached with reference to the invalidity of the attempted transfer of title to Josephine Blanchard, and of the attempt on her part to quiet title against the Southern Land Company, would leave outstanding in that company any rights which were not transferred to plaintiff by said tax deed, and these were successfully acquired by plaintiff in the subsequent action to quiet title against the Southern Land Company, after he had paid the license tax and secured the revival of the corporate powers of said company.

Judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.

205 Cal. 462

PEOPLE v. LAPIERRE. (Cr. 3121.)

Supreme Court of California. Nov. 5, 1928.

1. Homicide 🔑166(1)—Evidence of other crimes held admissible to show motive for killing policeman.

In murder trial, testimony as to forgeries, burglaries, robberies, and kindred crimes committed by defendant, *held* admissible to prove motive actuating him to kill police officer seeking to arrest him.

2. Homicide 🔑166(1)—Evidence of other crimes held admissible, in trial for murdering policeman, to show general conspiracy contemplating resistance of arrest by taking human life if necessary.

Evidence of other crimes committed by defendants *held* admissible, in trial for murdering policeman, under exception to general rule that evidence of separate and independent crimes will not be heard on trial for separate and distinct felony, on theory that general conspiracy contemplating resistance of attempts to arrest conspirators to extent of taking human life, if necessary, existed at time of homicide.

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Edgar Lapierre was convicted of murder in the first degree, and he appeals. Affirmed.

T. J. O'Leary, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

PRESTON, J. This appeal is by Edgar Lapierre from judgment of conviction and order denying his motion for a new trial.

Appellant and one Leo Archambault are brothers-in-law; Gabrielle Lapierre, the wife of appellant, being the sister of Archambault. These three persons were jointly charged on the 13th day of January, 1928, in the superior court of Alameda county by the district attorney with the crime of murder, alleged to have been committed on January 3, 1928, in the unlawful taking of the life of William J. Davis, a police officer of the city of Oakland. All three defendants were tried together and expeditiously, and on February 15, 1928, convicted, the two men of murder in the first degree, and the woman of manslaughter. Appellant was sentenced to death, Archambault to life imprisonment, and the wife of appellant to San Quentin for the term prescribed by law for manslaughter. Archambault did not appeal, but the other two defendants did, and we are to consider first the appeal of this defendant, Edgar Lapierre.

The facts are that on January 3, 1928, two police officers, in civilian clothes, deceased, and one Jules Sternitsky, having knowledge of the commission of felonies by these parties and of the existence of a warrant for the arrest of appellant and his wife issued from the county of Los Angeles, went to the residence at 1712 Sixty-Eighth avenue, Oakland, about 3:15 p. m. of said day, to arrest the defendants above named. Sternitsky was admitted to the house through the front door by the wife, Gabrielle Lapierre, who gave as her name Mrs. Warner, and denied her identity as Mrs. Lapierre. The officer told her that he had information that her name was Lapierre and that her husband and brother were home. To this she replied:

> "No, they are working, they won't be home until 5 p. m."

Sternitsky displayed his badge of office, told her he was an officer and that he was going to make a search of the house for the men. The movements of the woman were peculiar, and the officer watched her glances toward the door leading to the kitchen, which was slightly ajar. He saw the face of a man peering out from the kitchen through this door. Officer Davis meanwhile had gone to the back of the house. At this juncture, Sternitsky called out to him:

> "They are in the kitchen, Bill * * * break in. Be careful."

Following this a pistol duel ensued between the defendant and Davis, in which Davis was mortally wounded by bullets from the revolver of defendant, who used two guns in the battle. Following the shooting of Davis, the alarm was turned in and uniformed police officers arrived. After an exchange of shots between appellant and some of these officers, appellant, upon the advice of his wife, surrendered, coming out with the two guns in his hand held by the barrels thereof. After the shooting of Davis and before and while the officers were arriving, Mrs. Lapierre moved around the house from one window to another, looking out, evidently acting as a lookout and informing the two men as to the number of officers who were surrounding the house. After the surrender, appellant made the statement, given as a reason for the shooting:

> "Because I was caught, and I wanted to shoot my way out, and my wife spoke up to me in the house and asked me to quit shooting and give myself up."

As showing that these defendants had given themselves over wholly to a career of crime of all types, the following résumé of part of the evidence, as briefed by respondent, is here given:

On July 1, 1927, the office of the Mother's Cookie Company of Oakland was burglarized and 75 pay roll checks were stolen; those checks were made out in the names of various payees, the amounts were filled in but the checks were not signed. On July 3d or 9th

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(a Saturday) Edgar Lapierre and his wife passed one of those checks in the store of Edward Frustman in Los Angeles, the check being indorsed "M. J. Boyle" by Edgar Lapierre, in the presence of Frustman. A pair of shoes was purchased and $46 was given in change.

On July 7th Gabrielle Lapierre passed another one of the checks in the Morris Shirt Shop in Los Angeles, getting a shirt and a tie and $14.35 in change. Gabrielle Lapierre signed the name "Mrs. Nichols" in the presence of M. T. Greenberg.

On July 8th Mr. and Mrs. Lapierre rented a house in Los Angeles, paying one month's rent in advance, and giving their name as Mr. and Mrs. Roberts. They stayed in the house but 10 days, left it unlocked, and did not return. At that time Gabrielle Lapierre's hair was dark, although it was evidently either blond or red at the time of the trial.

During the month of July, Gabrielle Lapierre, accompanied by her three year old child, made a purchase in the Gates Drug Store in Los Angeles, and passed one of the Mother's Cookie Company pay roll checks, indorsing it "Dorothy France."

On November 22d Edgar Lapierre and Archambault rented a Chrysler roadster in Los Angeles; Lapierre giving his name as Elmer E. Warner, and his address as 216 North Hoover street. He put up a $35 deposit, and stated that he would return at about 4 o'clock p. m. The car was returned to the owner on February 4, 1928, by the police; it having different license plates on it, having been recovered by the Oakland police on January 3, 1928. Edgar Lapierre testified that he had intended to keep it.

On November 23d George Lee was held up and robbed at the point of a pistol by Edgar Lapierre and Archambault in Oakland, and on the same day John Holly was also held up and robbed at the point of a pistol by these men.

On November 25th the drug store of Leonard G. Ellis was burglarized by Edgar Lapierre and Archambault. Goods of the value of $150 were taken, and about $85 worth of the goods were returned by the police after the arrest of Lapierre and Archambault.

On November 25th Muller's Grocery Store was burglarized, and groceries were taken which were later found in the house of appellants. On November 25th the place of Glaser, a florist, was burglarized by Edgar Lapierre and Archambault.

On December 1st Muller's Brothers Market was burglarized by them.

On December 2d Rouska's Grocery Store was burglarized by them.

On December 2d Thomas' Drug Store was burglarized by them.

On December 2d Lange's Meat Market was burglarized and a .45 frontier model Colt's revolver, which was used by Edgar Lapierre in his "duel" with Davis, was stolen.

On December 3d they burglarized the Barsi Barber Shop, and a gold watch was taken, which was later found in the possession of appellants and returned to the owner.

On December 4th Green's Hardware Store was burglarized by them.

On December 5th the Sanders Grocery Store was burglarized by them.

On December 6th Skaggs' store was burglarized by them, and an overcoat taken was found in the possession of appellants and returned by the police.

On December 8th the Bay State Market was burglarized by them, but nothing was taken.

On December 14th the place of business of the Black & Decker Electric Tool Company was burglarized, and three electric drills stolen, two of which were later found in the house in which the murder of Davis occurred, and the third was found in a black bag which was dropped by Edgar Lapierre on December 17th, as hereinafter set forth.

On December 15th the Bay City Lumber Company's office was burglarized, the combination of the safe being drilled out by a circle of small holes.

On December 17th Police Officer Blackstone, in police uniform, saw Edgar Lapierre and Leo Archambault, became suspicious of them, and, approaching them, asked them where they were going. As he did so, the two men separated so as to form a triangle about eight feet on each side. In this position it was impossible for the officer to watch both of them at once, whereupon Lapierre said, "Throw up your hands, we will show you where we're going," and as the officer looked Lapierre drew a pistol. Lapierre then kept the officer covered with the pistol, while Archambault left to return a few minutes later with an automobile. The officer was then commanded to turn his face to the wall. The two men then got into the automobile and drove away. The officer started shooting at them, and they returned his fire. They drove away in a Chrysler roadster. During the course of this occurrence Lapierre said to the officer, "If you bat an eye I will shoot you."

Upon that occasion Lapierre carried a black bag which was identified by the officer and received in evidence. A few minutes later it was found by Officer Reedy and contained an electric drill, an extension wire, a two-celled spotlight with a piece of playing card over the glass with a small pin hole through the playing card, and a set of drills. The electric drill was of Black & Decker manufacture and was identified by Frank Malley of the Black & Decker Electric Tool Company. After his arrest Lapierre admitted to Officer Blackstone that he had disposed of the bag upon that occasion, and that he was on his way to crack the safe in the Grandma's Cookie Company plant and also the Rawley plant.

On December 19th Gabrielle Lapierre opened a bank account under the name of Hollenbach. She signed the name Hollenbach by printing it, and explained that her reason for so doing was that she was French and had difficulty writing in English.

On December 21st Lapierre and Archambault burglarized the Chandler Grocery Store.

On December 23d they burglarized the Smithson Meat Market.

On December 21st Gabrielle Lapierre established credit at Capwell's Department Store in Oakland by entering into a contract of sale for a fur coat, and giving a check signed "Hollenbach" by her, the signature being printed; the check was found to be good. On December 24th she passed five checks signed in the name of Hollenbach, but in the meantime she had withdrawn her balance.

On December 25th Lapierre and Archambault burglarized the store at 7637 Foothill boulevard in Oakland. On December 28th they burglarized the Hagey Meat Market. On December 29th they burglarized the Roberts Coal Yard.

Only a few of these various burglaries were established by independent evidence; most of them were established by the admissions of Lapierre and Archambault made to the police after their arrest, in which they admitted having committed 22 burglaries between November 22d and January 3d. They were also admitted by Edgar Lapierre while on the witness stand. The robberies mentioned in the foregoing résumé, however, were all established by independent evidence, as were the bad and forged check offenses and the embezzlement of the automobile.

The evidence is too clear for controversy that these defendants were acting in concert in the commission of forgeries, burglaries, robberies, and kindred crimes; that they had committed crimes of this character almost without number, and were prepared to resist all attempts to arrest them, even to the extent of taking human life if necessary to prevent the frustration of their bold and desperate plans. That some brave officer of the law should be shot down in cold blood, as an incident in the career of such criminals as these defendants were shown to be, is not surprising.

[1] The brief of appellant is extremely scant in material, and it is doubtful whether any real assignments of error appear in the record. The most that can be ascertained is that complaint is made of the court's action in admitting over objection the recounting of a number of said alleged independent crimes. The only real objection made to the introduction of this testimony was during a preliminary discussion between counsel and the court, wherein the court announced his tentative intention to hold the testimony admissible. When the testimony was actually offered, witness after witness was allowed to take the stand and was examined and cross-examined on this subject without objection on the part of appellant. Treating the assignment as properly made, however, the question presents no difficulty. In the first place, such testimony, and the whole thereof, was admissible for the purpose of showing the motive actuating defendant in the shooting of the police officer. His career of crime, the presence of the officers, his consciousness of guilt, and the fact that he knew that he would probably be arrested, were strong and convincing reasons for his unprovoked murder of the officer. These crimes, therefore, furnished clear proof of the motive actuating the defendant to kill. Abundant authority may be found upon the question in this state, among which are the following cases: People v. Valliere, 123 Cal. 576, 577, 56 P. 433; People v. Prantikos, 164 Cal. 113, 116, 127 P. 1029; People v. Bringhurst, 192 Cal. 748, 752, 221 P. 897; People v. Woods, 147 Cal. 265, 271, 272, 81 P. 652, 109 Am. St. Rep. 151; People v. Middleton, 65 Cal. App. 175, 179, 223 P. 448; People v. Cook, 148 Cal. 334, 340, 83 P. 43.

[2] There was also ample evidence to warrant the admission of this evidence, and the whole thereof, upon the theory that a general conspiracy to rob victims and burglarize buildings and places of business and to commit forgeries existed and was in flourishing operation at the time of this homicide, and this conspiracy contemplated resistance in case of attempts on the part of police officers to apprehend and arrest all or any of them, such resistance to be to the extent of taking human life, if necessary. Under this state of the record, the court was justified in the application of an exception to the general rule that evidence of separate and independent crimes will not be heard on the trial of a defendant for a separate and distinct felony. People v. Yeager, 194 Cal. 452, 483, 229 P. 40; People v. Brown, 59 Cal. 345; People v. Kauffman, 152 Cal. 331, 92 P. 861; People v. Arnold, 199 Cal. 471, 487, 250 P. 168.

The rule and its exception are stated in People v. Morani, 196 Cal. 154, 236 P. 135, as follows:

> "It is well settled that a defendant in a criminal case can be tried for no other offense than that charged in the indictment or information, and therefore it is not competent for the prosecution to prove the commission of independent crimes by the defendant, the evidence of which has no tendency to prove some material fact in connection with the particular crime charged. But this rule does not exclude such evidence when it logically tends to prove any fact necessary or pertinent to the proof of the crime for which the defendant is being tried. Such evidence is not to be rejected because it also tends to prove the commission of other crimes or because it may prejudice the defendant in the minds of the jurors. Generally speaking, such

evidence is admissible when it tends to establish intent, guilty knowledge, motive, a common scheme, plan or system, or when it tends to connect the defendant with the crime charged, or when the other crimes are part of the res gestæ (8 Cal. Jur., p. 60 et seq.)."

See, also, People v. Wilson, 76 Cal. App. 688, 699, 245 P. 781.

No other assignments of error require attention. We have examined the whole record in this case and find no reason whatever for disturbing the action of the court and jury. The judgment and order appealed from are affirmed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

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205 Cal. 470

PEOPLE of State of California, Plaintiff and Respondent, v. Gabrielle LAPIERRE, Defendant and Appellant. (Cr. 3125.)

Supreme Court of California. Nov. 5, 1928.

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

T. J. O'Leary, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

PRESTON, J. This is an appeal by the defendant Gabrielle Lapierre from an order denying a new trial, and from the judgment convicting her of manslaughter for her participation in the murder of William J. Davis, a police officer who was shot and killed on January 3, 1928, by her husband, Edgar Lapierre. Appellant, her husband, and one Leo Archambault were jointly tried on one indictment and duly convicted on the 15th day of February, 1928. A full recital of the necessary facts in this case is made in the appeal of defendant Edgar Lapierre, this day decided, 202 Cal. page —, 271 P. 497.

From the said facts it abundantly appears, not only that appellant participated in, aided, and abetted the murder of Davis, but the evidence also warrants the finding that appellant, her husband, and brother, Archambault, were coconspirators in an agreement or combination to rob victims, and burglarize buildings and places of business and to commit forgeries, even contemplating the resistance of attempts on the part of police officers to apprehend and arrest all or any of them, to the extent of taking human life if necessary. Not only this, but appellant under the evidence actually aided and abetted her said husband at the very time of the shooting, and she could well have been convicted of murder instead of manslaughter.

The question of whether or not a husband and wife may, under the laws of this state, be guilty of conspiracy, is not involved: First, because the conspiracy is not alleged to have been between husband and wife alone; and, second, this is not a prosecution for conspiracy, the existence of the conspiracy showing only that appellant aided and abetted the commission of the crime. Whether or not she and her husband could be prosecuted for the substantive offense of conspiracy under our law is immaterial.

Appellant makes no other assignment of error that is not treated in the appeal of Edgar Lapierre, 202 Cal. page —, 271 P. 497. She was fairly, accurately, and expeditiously tried, and there can be no legal cause for complaint.

The judgment and order appealed from are affirmed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

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94 Cal. App. 596

FIELD v. WALTON. (Civ. 4808.)

District Court of Appeal, Second District, Division 2, California. Oct. 30, 1928.

1. Landlord and tenant ⟹216—Statute requiring payment of treble rent by tenant holding over after notice to quit held impliedly repealed (Civ. Code, § 3345; Code Civ. Proc. §§ 1161, 1174).

Civ. Code, § 3345, requiring payment of treble rent by tenant holding over after notice to quit, *held* impliedly repealed by Code Civ. Proc. §§ 1161, 1174, permitting court in its discretion to allow treble damages in case of forcible entry and detainer.

2. Landlord and tenant ⟹291(14)—Court in unlawful detainer action properly exercised discretion in refusing treble damages, where lessee's holding over after expiration of term was not willful or malicious (Code Civ. Proc. §§ 1161, 1174).

In lessor's action for unlawful detainer on lessee's failure to surrender possession on notice given after expiration of 5-year lease, in which there was no showing that holding over was of willful, deliberate, or malicious character, which might call for imposition of punitive damages, refusal of trial court to award treble damages *held* proper exercise of discretion vested in court in such cases under Code Civ. Proc. §§ 1161, 1174 (Civ. Code, § 3345), requiring payment of treble rent when tenant holds over after notice to quit, being impliedly repealed.

Appeal from Superior Court, Santa Barbara County; John L. Hudner, Judge.

Action by Isobel Field against J. A. Walton. From the judgment plaintiff appeals, claiming insufficient damages were allowed. Affirmed.

G. H. Gould, of Santa Barbara, for appellant.

Major McGregor, of Santa Barbara, for respondent.

KEETCH, Justice pro tem. This is an appeal by the plaintiff from a judgment allowing but single damages in an action for unlawful detainer.

According to the allegations of the complaint the plaintiff leased to the defendant certain premises situated in the city of Santa Barbara for a term of five years, the lease expiring May 31, 1924. On April 21st, or a month prior to such expiration, the plaintiff notified the defendant in writing that she would require possession of the premises upon the termination of the lease. Defendant, however, failed to surrender possession on May 31st, and suit was filed immediately, or on June 2d. The agreed monthly rental in the lease at the time it terminated was $400. Plaintiff alleged the rental value to be $600 a month for the period occupied by the defendant after the lease had terminated, and prayed judgment for restitution of the premises, for rents and profits, and for treble damages for the detention. Only one allegation of the complaint was specifically denied in the answer, and that was as to the rental value, the defendant asserting it was not in excess of $400, the amount stipulated in the lease. The premises were surrendered by defendant June 28, 1924, or approximately one month after the lease terminated. The case was tried July 5, 1924, before the court without a jury. Findings were waived, but the court inserted in the judgment a finding for the plaintiff in the sum of $600 as "the rental value of the premises for the month of June."

The sole question presented is, in the language of the plaintiff and appellant: "Does the record require a judgment for the plaintiff in treble damages?" Assuming the affirmative, counsel for appellant contends that on the face of the record the detention was willful, and that under section 3345 of the Civil Code that alone was sufficient to require the imposition of treble damages. He cites in support the cases of Board of Public Service Commissioners v. Spear, 65 Cal. App. 214, 223 P. 423, and Alden v. Mayfield, 33 Cal. App. 724, 166 P. 382.

Section 3345 of the Civil Code reads in part as follows:

> "Tenant willfully holding over. If any tenant * * * holds over any lands or tenements after demand made and one month's notice, in writing given, requiring the possession thereof, such person holding over must pay to the landlord treble rent during the time he continues in possession after such notice."

It is urged by respondent that this section does not apply, for the reason that its terms are intended to apply to a condition where the right to possession has already accrued by the failure to surrender, and that the demand and one month's notice required are subsequent to the accrual of this right. In the instant case no such subsequent demand and notice were given, and as the section, being penal in its nature, was not strictly complied with, it did not govern the case or the judgment. However, we do not think it necessary to pass upon these points because we are satisfied that section 3345 does not apply, for the reasons hereafter to be stated.

Section 1161 of the Code of Civil Procedure reads in part as follows:

> "A tenant of real property, for a term less than life, is guilty of unlawful detainer: (1) When he continues in possession, in person or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let to him, without the permission of his landlord, or the successor in estate of his landlord, if any there be."

Section 1174 of the same Code covers the judgment in unlawful detainer, and in regard to the assessment of damages it reads:

> "The jury or the court, if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial. * * * Judgment against the defendant guilty of the forcible entry, or forcible or unlawful detainer may be entered *in the discretion of the court* either for the amount of the damages and rent found due, or for three times the amount so found." (Italics ours.)

[1] Section 3345 of the Civil Code was enacted into the Practice Act of 1872 from the common law, and its penal character was in conformity with the intent and purpose of the law to punish persons for forcibly entering upon, or forcibly detaining the possession of real property. Criminal prosecution was the original proceeding, but with the passing of time the severity of thought and procedure with regard to this subject has gradually been softened by statutory enactments, no doubt due to a recognition of the fact that circumstances and conditions may and do alter cases. It is to be noted in this connection that unlawful detainer, without a showing of force, has for some time been recognized as a part of the general law of forcible entry and detainer. While this is true, many of the punitive forms still remain on the statute books, and section 3345, Civil Code, and its companion section, 3344, Civil Code, are, perhaps, examples of this. It is a fair assumption that the recognition of these changed conditions brought about the amendment by the Legislature in 1907 of section 1174 of the Code of Civil Procedure, giving discretion to the trial courts in the matter of the judgment and assessment of damages. Prior to this amendment an examination of the history of that section discloses that as enacted in 1872 it provided that upon a finding in favor of the plaintiff of *forcible entry and detainer* the "judgment must be entered for three times the amount of such damage or rent, as the case may be." The section was amended in 1873-4, and it then provided that:

> "Judgment shall be rendered against the defendant guilty of the forcible entry, or forcible or *unlawful detainer*, for three times the amount of damages," etc.

In other words, unlawful detainer was added to the section. By the amendment of 1907 the language of the statute covering the assessment of damages in the judgment was changed to read:

> "Judgment against the defendant guilty of the forcible entry, or forcible or unlawful detainer may be entered *in the discretion of the court* either for the amount of the damages and rent found due, or for three times the amount so found." (Italics ours.)

The language is plain and unambiguous and vests discretion in the trial court in the conjunctive, to be exercised in accordance with the facts and circumstances of each case. It would seem that the plain effect of this amendment is to repeal by implication sections 3344 and 3345 of the Civil Code, both of which, under the title "Penal Damages," pertain to actions of forcible entry and detainer. The procedure being fully covered by the provisions of chapter 4, title 3, of the Code of Civil Procedure, these sections, in view of this amendment, are in conflict, serve no good purpose, and only create confusion.

[2] The discretionary power of the court under section 1174 of the Code of Civil Procedure is discussed at some length in the case of San Francisco, etc., Soc. v. Leonard, 17 Cal. App. 270, 119 P. 405. After quoting the language of the section and italicizing that portion giving the court discretion to assess damages in treble the amount found, and also quoting the language of section 735, Code of Civil Procedure, which provides that if a person recover damages for forcible or unlawful entry or detention the judgment *may* be entered for three times the amount at which the actual damages are assessed, the court says:

> "Thus, it will be perceived, the Legislature has clearly limited the power of the jury in such cases, so far as damages are concerned, to the assessment of such damages only as have actually been suffered by the complaining party, and has conferred upon the court the sole power of determining, in the exercise of its discretion, whether, in a given case, the circumstances are such as to justify the entry of judgment in favor of plaintiff, as a penalty for the acts of the defendant, for three times the amount found by the jury either as damages or for rent. That the power thus specially given the court was intended to be exercised in those cases only where the evidence discloses that the defendant has committed the tortious act charged against him wantonly or by oppression or with malice, express or implied (Civ. Code, § 3294, supra), is a proposition which, in our opinion, is rendered free from any kind of doubt, if not alone by the language of section 1174 of the Code of Civil Procedure, then most surely by that of section 735 of the same Code. In other words, the power to treble the damages or rent is a power to be exercised by way of punishment only, and the Legislature has (wisely, we think, as the writer further thinks would be true if it were so in all cases as to the awarding of punitive damages) committed the exercise of that power to the courts in preference to the jury, the theory of the lawmakers no doubt being that the court, having equal opportunity with the jury of hearing and passing upon the testimony, is better able to decide whether the evidence warrants the imposition of any penalty at all or an allowance in excess of the amount found by the jury to be the damages actually sustained."

The court in that case further held that this discretion as to whether or not treble or punitive damages shall be assessed is vested solely in the court and not in the jury, as it "is better able to decide whether the evidence warrants the imposition of any penalty at all or an allowance in excess of the amount found by the jury to be the damages actually sustained.

The case of Board of Public Service Commissioners v. Spear, supra, relied upon by appellant, presented the same question as the instant case—that is, whether or not the court had discretion to assess treble damages. In that case, however, the lower court found that the defendant willfully held over the premises involved "after demand and one month's notice, in writing given, requiring the possession thereof," and that such willful holding over was *deliberate, intentional, and obstinate*, and gave judgment for treble damages. (Italics ours.) In affirming the judgment, which, it held, came clearly within the provisions of section 3345, the appellate court said, in passing upon the question of discretion as vested in the court under section 1174 as amended and as urged by the appellant in that case, that "in a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases where an impartial mind hesitates"—citing Bailey v. Taaffe, 29 Cal. 422. The court also held, however, that the exercise of this discretion "must [be] in a sound, fair, and reasonable manner; it may not arbitrarily render judgment for either treble the amount or for the actual amount of rent found due; the facts must warrant the decree rendered." There is nothing inconsistent in this holding, as presented by the facts in that case, and the record in the instant case. In the former, the finding of the court was that the holding over was *deliberate, intentional and obstinate;* in the latter, the court simply found that the defendant, after notice to quit the possession of the premises at the expiration of the lease, did *unlawfully* continue in possession of said premises. There is nothing on the face of the record to show that the holding over was of that willful, deliberate, malicious and tortious character which might naturally and properly call for the imposition of punitive damages within the legal discretion of the trial judge as defined by the appellate court.

In the case of Alden v. Mayfield, supra. likewise relied upon by appellant, in which judgment for treble damages was rendered, the evidence also showed a deliberate, intentional, and obstinate refusal to surrender the premises; and the same argument applies as far as it applies to the instant case. The plaintiff was not entitled to exemplary damages where there was no evidence showing any overt or malicious act on the part of the defendant. Orly v. Russell, 53 Cal. App. 660, 200 P. 732. In Toplitz v. Standard Co., 25 Cal. App. 576, 143 P. 53, the court said:

> "Incidentally a judgment for the plaintiff in an action of unlawful detainer may award such actual damages as may have been occasioned by a withholding over after a breach of the covenants of the lease; and in addition may, *if the circumstances of the case justify it*, award to the plaintiff by way of punitive damages a sum equal to treble the amount of the rent then due" —citing section 1174 of the Code of Civil Procedure. (Italics ours.)

We are of the opinion that the court below properly exercised the discretion vested in it by section 1174 of the Code of Civil Procedure, and the judgment is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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94 Cal. App. 361

TASKER v. COCHRANE. (Civ. 3573.)★

District Court of Appeal, Third District, California. Oct. 18, 1928.

Rehearing Denied Nov. 17, 1928. Hearing Denied by Supreme Court Dec. 17, 1928.

1. Appeal and error 🔑854(6)—Order granting new trial, not specifying grounds therefor, will be sustained on appeal, if any ground assigned was sufficient.

Where trial court failed to specify any of grounds on which motion for new trial was granted, order granting new trial will not be disturbed on appeal, if any one of grounds set forth was sufficient to sustain motion.

2. Appeal and error 🔑854(6)—On appeal from order granting new trial not specifying grounds therefor, appellate court may inquire into grounds assigned, except as limited by statute (Code Civ. Proc. § 657).

Where trial court fails to specify any grounds on which motion for new trial was granted, District Court of Appeal may inquire into respective grounds assigned as basis for motion, except as limited by Code Civ. Proc. § 657.

3. Attorney and client 🔑167(2)—Reasonable value of opinion obtained from attorney held for jury.

In action to recover for legal services and expenses incurred in defendant's behalf, reasonable value of opinion obtained from another attorney was question of fact for jury under proper instructions, regardless whether transaction was shown to be an authorization or an approval of opinion obtained.

4. Attorney and client 🔑152—Attorney may recover costs of litigation from client, but not personal and traveling expenses or expense of additional counsel, in absence of special agreement.

Attorney is entitled to reimbursement from client for costs of litigation, but not for personal and traveling expenses or for expenditures in retaining additional counsel, in absence of special agreement therefor.

5. Trial 🔑260(9)—Instruction denying recovery for personal and traveling expenses of attorney held erroneously refused as covered by other instructions.

In action to recover reasonable value of services rendered by attorney and his expenses, where evidence showed that no instruction was given calling jury's attention to fact that expenditures outside of costs usually attendant on litigation, if made by counsel, can only be recovered where there is special agreement therefor, instruction that attorney could not otherwise recover for personal and traveling expenses was erroneously refused as covered by instructions given.

6. Attorney and client 🔑140—Overhead expense of counsel and cost of traveling expenses may be considered in determining value of attorney's services.

Ordinarily, overhead expense of counsel in maintaining their offices, cost of their traveling expenses, and similar outlays are matters to be taken into consideration in determining value of attorney's services and in fixing his fees therefor.

7. Attorney and client 🔑152—Instruction authorizing recovery for expenses of attorneys regardless whether they were reasonably necessary held error.

In action to recover reasonable value of attorney's services and expenses, instruction entitling plaintiff to recover for all outlays made by attorneys whether expenses or expenditures were or were not reasonably necessary *held* error.

8. Attorney and client 🔑152—Attorneys may recover court costs necessarily incurred and reasonable value of expenditures authorized or ratified by client and must prove such facts by preponderance of evidence.

Attorneys are entitled to recover all court costs necessarily incurred and reasonable value of all expenditures made by them authorized or ratified by client and must prove such facts by preponderance of evidence.

9. Attorney and client 🔑167(3)—Instruction, in action for attorney's services, that contracts between attorneys and clients relative to costs are presumptively void, held properly refused.

In action to recover reasonable value of attorney's services and expenses incurred, instruction based on theory that contracts or agreements between attorneys and clients relative to costs or expenditures are presumptively void *held* properly refused.

★Rehearing denied. Hearing denied by Supreme Court.

10. Guardian and ward 🔑49—Guardian whose personal liability is not waived is liable for attorney's fees in relation to guardianship matters.

Where personal liability of guardian is not waived, guardian is liable for attorney's fees in relation to guardianship matters.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Barbara A. Tasker against Genevieve C. J. Cochrane. Verdict for plaintiff, defendant's motion for new trial was granted, and plaintiff appeals. Affirmed.

Lissner, Roth & Gunter, of Los Angeles, Raymond E. Hodge, of San Bernardino, and Lester Wm. Roth, of Los Angeles, for appellant.

U. F. Lewis, of Redlands, and Swing & Wilson, of San Bernardino, for respondent.

PLUMMER, J. This is an appeal by the plaintiff from an order of the superior court granting a new trial after judgment had been rendered in favor of the plaintiff, based upon the verdict of the jury.

The action was prosecuted by the plaintiff as the assignee of Messrs. Janeway, Beach & Pratt, attorneys at law of Los Angeles, Cal., to recover the sum of $6,000, alleged to be the reasonable value of legal services rendered the defendant, and also to recover the further sum of $1,500.30, moneys alleged to have been paid out and advanced by said attorneys for and on behalf of the defendant.

The answer of the defendant practically admits the employment of said firm of attorneys, but denies that the value of the services rendered was greater than the sum of $500. The answer also contains a complete denial of any part of the sum of $1,500.30, representing the moneys paid out by the attorneys. The jury awarded the plaintiff the sum of $6,000 as the value of the legal services performed, and also found in favor of the plaintiff in the sum of $1,500.30 on account of moneys paid out, costs, etc.

The defendant's motion for a new trial contained the following specifications:

> "(1) Excessive damages appearing to have been given under the influence of passion or prejudice.
>
> "(2) Insufficiency of the evidence to sustain the verdict.
>
> "(3) Insufficiency of the evidence to support the judgment.
>
> "(4) That the verdict and judgment are against law.
>
> "(5) Errors in law occurring at the trial and excepted to by said defendant.
>
> "(6) Error in giving instructions to the jury.
>
> "(7) Error in refusing instructions requested by the defendant.
>
> "(8) Error in modifying instructions given to the jury and requested by the defendant."

[1, 2] The order of the court granting a new trial is in these words:

> "The motion for new trial having heretofore been submitted, the court at this time grants the motion for a new trial."

It will thus be seen that the trial court failed to specify any of the grounds upon which the motion for a new trial was granted. Under such circumstances, if any one of the grounds set forth is sufficient to sustain the motion, the order of the court granting the same will not be disturbed upon appeal, and we are at liberty to inquire into the respective grounds assigned as a basis for the motion, save and except as limited by the last paragraph of section 657, Code of Civil Procedure, which reads:

> "When a new trial is granted upon the ground of the insufficiency of the evidence to sustain the verdict, the order shall so specify; otherwise, on appeal from such order, it will be presumed that the order was not based upon that ground."

Counsel for the respective parties have called our attention to the various cases having to do with interpreting subdivisions 5 and 6 of section 657, Code of Civil Procedure subdivision 5 referring to excessive damages appearing to have been given under the influence of passion or prejudice, and subdivision 6 relating to the insufficiency of evidence as a reason for setting aside a verdict. On the part of the appellant the argument is advanced rather tentatively, however, that there is a distinction between granting a new trial on the ground that the verdict is excessive, and on the ground that the evidence is insufficient to sustain the verdict. This distinction may be admitted to exist in personal injury cases where the amount of the verdict may be possibly increased on account of sympathy for the plaintiff or prejudice or passion against the defendant, but upon an action in the nature of quantum meruit for services performed, the distinction, if it exists at all, is little more than a fiction. The nonexistence of a distinction between the two grounds in actions such as the one before us is very clearly stated in an opinion by Justice Finlayson in the case of Griffey v. Pacific Electric Ry. Co., 58 Cal. App. 509, 209 P. 45, as follows:

> "If a new trial on the ground of 'excessive damages' be granted under the sixth subdivision, it necessarily is granted on the ground of the insufficiency of the evidence to sustain a verdict for the amount awarded by the jury. If it be granted under the fifth subdivision, it is equally true that it is granted on the ground of the insufficiency of the evidence to sustain a verdict for an amount as great as that returned by the jury; for, as our Supreme Court has pointed out, to say that a verdict has been influenced by passion or prejudice is but another way of saying that it exceeds any amount justified by the evidence. Doolin v. Omnibus Ca-

ble Co., 125 Cal. 144, 57 P. 774; Graybill v. De Young, 140 Cal. 327, 73 P. 1067; Zibbell v. Southern Pac. Co., 160 Cal. 254, 116 P. 513. See, also, Meinberg v. Jordan, 29 Cal. App. 762, 157 P. 1005, 1007. For these reasons there is no merit in the claim that on this appeal we are precluded from determining whether the trial court abused its discretion in granting a new trial on the ground that the damages are excessive."

In that case the order granting a new trial contained a statement that it was granted "on the ground of excessive damages." In the instant case the order is silent, and if, in actions based upon a complaint seeking a recovery for the reasonable value of services performed, the reason for granting a new trial is not stated, we do not very well see how any distinction can be drawn between subdivision 5 of section 657, Code of Civil Procedure, relating to excessive damages where no passion or prejudice is shown, and subdivision 6, relating to the insufficiency of the evidence, without entirely eliminating the last paragraph of said section, which requires that, if a new trial is granted upon the insufficiency of the evidence, the order must be so stated, or if not so stated, upon appeal it will be presumed that the order was not based upon that ground. In view of the quotation which we have taken from the case of Griffey v. Pacific Electric Ry. Co., supra, we will confine our discussion to other grounds set forth in the notice of motion and motion upon which the new trial was granted, two of which we think sufficient to sustain the order, to wit: The assignment of error on the part of the court in giving instructions to the jury; and also error of the court in refusing an instruction requested by the defendant.

[3, 4] As we have stated, the complaint in one of the causes of action set forth asked for a judgment against the defendant in the sum of $1,500.30 for and on account of moneys expended by the law firm of Janeway, Beach & Pratt, the assignor of the plaintiff, during the course of their employment by the defendant or during the time when they were rendering legal services for and on behalf of the defendant. The items making up the claim for $1,500.30 are set forth in a bill of particulars rendered by the plaintiff to the defendant and include items for telegrams, expenses of trips by Mr. Pratt, one of the firm, from Los Angeles to Redlands and return, like expenses to Riverside from Los Angeles, long-distance telephone calls, items for filing petitions for letters of guardianship, cost of bonds, cost of certified copies of letters of guardianship, expenses of trip by Mr. Pratt from Los Angeles to San Bernardino, Pullman reservations of Mr. Beach, a member of the firm, from Los Angeles to Duluth, Minn., and return, railroad fare of Mr. Beach to Duluth and return, $500 for a legal opinion obtained from Mr. Gunter by Janeway, Beach & Pratt, and $533, amount paid by plaintiff's assignors to attorneys Washburn, Bailey & Mitchell at Duluth, Minn. An examination of the record discloses that several of the items included in the bill of particulars listed as traveling expenses were not authorized or subsequently ratified by the defendant. As to the item of $500 alleged to have been expended in obtaining an opinion from an attorney by the name of Gunter, the record shows that the opinion was obtained by Janeway, Beach & Pratt without any knowledge or authorization on the part of the defendant, and that, after it had been obtained, information of such fact was conveyed to the defendant by Mr. Beach, and all the authorization or ratification of the defendant pertaining to that transaction is summed up in the conclusion of the witness, who expressed his conclusions as follows: "She said she quite approved of that; she understood those things cost money." In either case, whether that transaction was shown by the conclusion character of the witness' testimony to be either an authorization or an approval, the reasonable value thereof was certainly a question of fact for the jury, under proper instructions calling attention thereto. The cases having to do with the expenditures by counsel draw a line of demarcation between costs of the litigation, such as clerk's fees, filing fees, witness fees, jury fees, and the like, and the personal and traveling expenses of attorneys. The rule is thus stated in 3 California Jurisprudence, p. 702, § 100:

> "In the absence of a special agreement to the contrary, a client is bound to repay his attorneys for all outlays made by him in the payment of the expenses of carrying on the litigation, and an attorney is bound to bear his own personal and traveling expenses."

A like rule is set forth in relation to the employment by the retained attorney of some other attorney to assist him or to give his advice or an opinion upon any of the questions involved. To this effect are the cases of Cooley v. Miller & Lux, 156 Cal. 510, 105 P. 981; Miller v. Ballerino, 135 Cal. 566, 67 P. 1046, 68 P. 600; Porter v. Elizalde, 125 Cal. 204, 57 P. 899; Alexander v. Denaveaux, 59 Cal. 476. A somewhat similar question was presented in the case of Davis v. Mackay, 50 Cal. App. 251, 194 P. 738, where it was held that an attorney had no power, without previous authorization, to employ a detective, at the expense of his client to assist in securing evidence and preparing a case for trial.

This brings us to a consideration of the errors alleged to have been made by the trial court in the giving and refusing of instructions. At the request of the plaintiff the court first instructed the jury that, if they found that plaintiff's assignors had rendered services to the defendant or her children, or both, then the jury should find for the plaintiff in such sum as the jury might believe from the evidence that the services of plaintiff's assignors were reasonably worth, and in addition:

> "If you find that plaintiff's assignors, in the rendering of such services, if any, incurred for and on behalf of defendant or her minor children, or both, expenses reasonable and necessary in the rendering of such services, then you must add the total of such reasonable and necessary expenses as you may find, if any, to the amount, if any, that in your judgment plaintiff's assignors are entitled to recover for the reasonable value of their services."

The court then gave to the jury the following instruction:

> "No. ——. You are further instructed that if you find from the evidence that services were rendered by plaintiff's assignors at the instance and request of defendant and that moneys were advanced for and on behalf of defendant by plaintiff's assignors, that you must find for plaintiff in such sum as you believe such services as were rendered were reasonably worth; and you must further find for plaintiff in an additional sum for the total of all moneys advanced and expended for and on behalf of defendant in connection with the services rendered by plaintiff's assignors if you find such services were rendered and such sums were so expended,"

—and also an instruction called "No. 5," as follows:

> "No. 5. You are instructed that if you find from the evidence that plaintiff's assignors have performed services for the defendant with her consent and have advanced and paid moneys for her while acting as her attorneys in matters connected with said employment, that you must find for the plaintiff the reasonable value of such services, if any, as you may find from the evidence were rendered and also the amount of money, if any, which the evidence shows that plaintiff's assignors have advanced for and on behalf of defendant in connection with said employment,"

—and refused the following instruction requested by the defendant:

> "No. 8. The law of the State is that in the absence of any special agreement, an attorney cannot recover for personal and traveling expenses, and in the absence of proof establishing such an agreement by preponderance of the evidence, the plaintiff cannot recover any sum or sums claimed to have been expended for personal or traveling expenses of Janeway, Beach & Pratt."

[5-10] The reason for the refusal of the court to give defendant's instruction No. 8 is that it was already covered in substance by instructions elsewhere given. An examination of the record shows this to be erroneous. No instruction was given to the jury calling their attention specifically to the fact that expenditures made by counsel, outside of those costs usually attendant upon litigation which we have specified, if made by counsel, can only be recovered where the evidence shows that there is a special or express agreement that counsel may be reimbursed therefor. The ordinary rule is that the overhead expense of counsel in maintaining their offices, the cost of their traveling expenses, their board bill, and outlays of that kind are, save and except as to the board bill, matters to be taken into consideration in determining the value of an attorney's services and in fixing his fees therefor. But counsel are not entitled to have all of those matters taken into consideration in the fixing of fees, and then maintain an action to recover for their personal expenses, unless there has been an agreement to that effect. If, in this case there were any agreements to such effect, it would have to be proven by a preponderance of the testimony, and the defendant was entitled to have an instruction given to the jury calling attention to such fact. In this particular it will be noticed that the two instructions which were given by the court to the jury told the jury that the plaintiff was entitled to recover for all outlays made by her assignors, Janeway, Beach & Pratt, whether such expenses were or were not reasonably necessary. The language of the two instructions differs slightly, but both of them instruct the jury that the plaintiff was entitled to recover such sums irrespective of the reasonableness of the outlays. The jury was told that the plaintiff was entitled to recover for the reasonable value of the services of the attorneys, and, in addition thereto, all the expenses incurred by them or expenditures made by them. This is not a correct statement of the law. They were entitled to recover all court costs necessarily incurred, and the reasonable value of all expenditures made by them authorized or ratified by the defendant, and to do so, they must prove such facts by a preponderance of the evidence. We find no merit in the contention of respondent that the court committed error in refusing instructions based upon the theory that contracts or agreements between attorneys and clients relative to costs or expenditures are presumptively void. Nor do we find any merit in the contention of the respondent that the defendant was not liable for attorney's fees in relation to the guardianship matters. In the absence of an agreement to the contrary, where the personal liability of a guardian is not waived, the law appears to be very well established in this state that a guardian is liable. Hunt v. Maldonado, 89 Cal. 636, 27 P. 56; Morse v. Hinckley, 124 Cal. 154, 56 P. 896; McKee v. Hunt, 142 Cal. 526, 77 P. 1103; In re Price, 61 Cal. App. 592, 215 P. 710. In the case at bar the record fails to show that the respondent either proved or offered to prove that there was any contract between the attorneys and the defendant relative to fees for services for the defendant as guardian, by which personal liability would be waived. The respondent did offer to introduce in evidence certain unsigned writings which, if executed, would have justified the trial court in holding that personal liability had been waived, but that is the extent of the offered testimony.

In view of the fact that a new trial must be had in this action, as directed by the trial court, we have purposely refrained from expressing any opinion as to either the character or value of the services performed by plaintiff's assignors, and also in view of the cases having to do with section 657, Code of Civil Procedure, we have likewise refrained from expressing any opinion as to whether the award of the jury was excessive in fixing the fees of counsel.

The order of the trial court is affirmed.

We concur: FINCH P. J.; HART, J.

94 Cal. App. 480

FITZGERALD et ux. v. SMITH et ux.
(Civ. 6256.)

District Court of Appeal, First District, Division 1, California. Oct. 26, 1928.

1. Dedication 🔑19(1)—Recording map of plat without reservation constitutes offer to dedicate streets therein to public use, though there is no express declaration of dedication.

Where owner of subdivision of land records map thereof without reservation, he thereby offers to dedicate streets and roads shown thereon to public use, even where there is no express declaration of dedication in plat.

2. Dedication 🔑31, 38—Dedication of streets is complete after acceptance by public, and power of revocation is gone.

On acceptance by public of streets dedicated in plat to public use, dedication becomes complete, and power of revocation is gone.

3. Dedication 🔑31—Public rights are not affected by failure of municipal authorities to formally accept dedication.

Rights of public to use of streets dedicated after acceptance of dedication by public is not affected by fact that dedication has never been formally accepted by municipal authorities.

4. Dedication 🔑35(1)—Acceptance of dedication of streets may be actual or implied.

Acceptance of dedication by public of streets may be actual or implied, and is as effectual when made in one way as in another.

5. Dedication 🔑35(1)—Acceptance of dedication of streets is "actual" when formally accepted and "implied" from use for length of time showing intention to accept dedication.

Acceptance of dedication of streets is "actual" when formal acceptance is made by proper authorities and "implied" where use has been made of property by public for such length of time as will evidence an intention to accept dedication.

[Ed. Note.—For other definitions, see Words and Phrases, Actual; Implied Acceptance.]

6. Dedication 🔑43—Situation of property is to be considered in considering extent of use necessary for implied acceptance of dedication of streets.

In considering extent of use of streets by public sufficient to show implied acceptance of dedication of streets, situation of property is to be considered.

7. Dedication 🔑45—Whether land has been dedicated for highway is conclusion of fact to be drawn from circumstances of particular case.

Question whether dedication of land for highway purposes has occurred is conclusion of fact to be drawn from circumstances of particular case.

8. Municipal corporations 🔑663(1)—Owners of property abutting on streets or highways have special interest therein entitling them to sue for enforcement of rights.

Persons owning property abutting on streets or highways have such special property interest therein as entitles them to maintain suit for enforcement and preservation of such rights.

9. Easements 🔑1, 58(1)—Private easements in street appurtenant to lot abutting on street are private property, and obstruction impairing easements is private injury differing from injury to general public.

Lots fronting on street have as appurtenances thereto certain private easements in street which are part of lots and are private property, and any obstruction to use of street which impairs or destroys easements is private injury, special and peculiar to owners of lot and different from injury to general public.

10. Easements 🔑61(2), 64—Owners of property abutting on street may sue for damages or to enjoin injury to private easements in street, though same obstruction constitutes injury to public generally.

Owners of property abutting on streets may sue for damages or enjoin continuance of injury to private easements in street regardless of fact that same obstruction also constitutes injury to public right of travel and regardless of number of persons who may suffer similar injury to similar private easements appurtenant to other lots fronting on street, such injury constituting both private and public nuisance.

11. Municipal corporations 🔑671(1, 5), 692—Unlawful obstruction or interference with highway is per se a nuisance, giving abutting owner usual rights and remedies of owner of freehold.

Any unlawful obstruction or interference with highway is per se a nuisance, and abutting owner has all usual rights and remedies of owner of freehold concerning same, including trespass, ejectment, action for damages, injunction, or action to remove an obstruction or abate nuisance.

12. Municipal corporations 🔑697(1)—Authority vested in municipal officers over roads held not to prevent court from abating nuisance violating private rights (Pol. Code, §§ 2633, 2742, et seq.).

Authority vested in municipal officers under Pol. Code, §§ 2633, 2742, et seq., over roads and highways, *held* not intended to prevent court of competent jurisdiction from abating nuisance maintained in violation of private rights.

13. Municipal corporations 🔑671(7)—Maintenance of trees on land claimed as highway obstructing abutting owner's travel constitutes nuisance which may be abated and removed.

Maintenance of trees as part of an orchard and cultivation of same in strip of land claimed to be highway and obstructing passage and travel over land by owner of abutting property constitutes nuisance which court has power to abate and remove.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by P. J. Fitzgerald and wife against E. O. Smith and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

D. T. Jenkins and C. B. Wooster, both of San Jose, for appellants.

Louis Oneal and Maurice J. Rankin, both of San Jose, for respondents.

TYLER, P. J. Action to restrain defendants from obstructing or interfering with the use by plaintiffs of a certain strip of land, claimed to be a public highway; to remove obstructions thereon; and to establish a right of way over and across the same. The strip of land in dispute is described as that certain roadway known and designated as Delmas avenue as delineated upon a certain map entitled, "Map of I. J. Truman's Subdivision No. 2 near Mountain View, California." On September 12, 1904, defendants' predecessor in interest, I. J. Truman, recorded this map, which shows Delmas avenue as a 20-foot roadway. The certificate attached thereto recites that the streets, roads, and alleys as shown thereon are dedicated to the use of the public forever. Plaintiffs are the owners of certain lots in what is known as the Wright and Gibson tract, the westerly boundary of which tract is the easterly line of Delmas avenue as is shown on the Truman map. The Wright and Gibson tract was carved out of the Truman subdivision. Defendants are the owners of certain lots fronting on the westerly side of Delmas avenue directly opposite the lands owned by plaintiff. Fremont avenue is a main thoroughfare which forms an outlet to those having property on Delmas avenue and it is an open traveled street forty feet in width. Plaintiffs allege that Delmas avenue is their only means of ingress and egress from their lands to Fremont avenue and they charge that defendants have planted trees in and upon said right of way and roadway so as to obstruct plaintiffs' passage and travel thereon and have plowed up the road and replaced the same with loose dirt to the extent that it interferes with plaintiffs' use thereof and has made said road difficult and hazardous for travel purposes. Defendants denied that plaintiffs were the owners of any right of way or had any right to travel over the described strip of land, or that the same was the only means of ingress to or egress from plaintiffs' property to Fremont avenue. They admitted the planting of trees, but denied that they in any way interfered with the use of the road. The trial court found in substance that plaintiffs were the owners of a right of way for travel over Delmas avenue; that such right of way was the only means of ingress to and egress from plaintiffs' property to Fremont avenue; and that defendants had obstructed it by planting trees and doing the other acts complained of. It further found that Delmas avenue was, at all times mentioned in the complaint, a public road and highway; that plaintiffs' property abutted on said highway, and for more than six years last past they had maintained a dwelling house thereon where they resided, and also a garage and other outbuildings. Upon these findings a judgment was entered declaring plaintiffs to be the owners of a right of way for all purposes of travel over and across said road and highway, and defendants were enjoined from planting or maintaining trees thereon or from plowing it up or placing loose dirt thereon that might in any manner interfere with plaintiffs' use of the same for all purposes of travel. Defendants were also directed to remove the obstruction in the road. Several reasons are urged why the judgment should be reversed.

[1-7] It is first claimed that there is no evidence to support the finding that Delmas avenue is a public highway. The contention is without merit. Where an owner of a subdivision of land makes a map of the same and files it for record without reservation he thereby offers to dedicate the streets and roads shown thereon to public use, and this is so even where there is no express declaration of dedication in the plat. Where, as here, there is such an express dedication, the intention to dedicate is evident from the plat itself. Upon acceptance by the public the dedication becomes complete and the power of revocation is gone. The rights of the public thereafter to the use of the streets or roads thus dedicated is in no manner affected by the fact that the dedication has never been, as here, formally accepted by the municipal authorities. San Leandro v. Le Breton, 72 Cal. 170, 13 P. 405; 18 Cor. Jur., p. 132. The acceptance may be actual or implied, and it is as effectual when made in one way as in the other. Venice v. Short

Line Beach Land Co., 180 Cal. 447, 181 P. 658. It is actual when formal acceptance is made by the proper authorities, and implied where a use has been made of the property by the public for such a length of time as will evidence an intention to accept the dedication. Smith v. San Luis Obispo, 95 Cal. 470, 30 P. 591; People v. Laugenour, 25 Cal. App. 44, 142 P. 888. Here there is ample evidence to show that use was made of Delmas avenue by purchasers of land abutting thereon under a claim of right, and by the public generally, since the recording of the map in 1904, and that such user was sufficient in extent to constitute a valid acceptance of the offer of dedication. Nor is there any merit in the claim that the use was of such a casual character as might be referable to a mere license. In considering the extent of the use, the situation of the property is to be considered. Wheeler v. City of Oakland, 35 Cal. App. 671, 674, 170 P. 864. The question of whether dedication of land for highway purposes has occurred is a conclusion of fact to be drawn from the circumstances of the particular case. Venice v. Short Line Beach Land Co., supra.

[8-10] Nor is there any merit in the further contention that plaintiffs have no right to maintain their action, conceding Delmas avenue to be a public highway, as there is no evidence to show that they have suffered special injury different than that suffered by the general public. The rule is well established that persons owning property abutting on streets or highways have such special property interest therein as entitle them to maintain a suit for the enforcement and preservation of such rights. Every lot fronting upon a street has, as appurtenances thereto, certain private easements in the street, which easements are a part of the lot, and are private property as fully as the lot itself. Any obstruction to the use of the street which impairs or destroys these easements is a private injury, special and peculiar to the owners of the lot and different and distinct from the injury to the general public and from which such owners may suffer as a part of the general public. As abutting owners, they have the right to private easements, and may sue for damages or to enjoin the continuance of the injury thereto, regardless of the fact that the same obstruction also constitutes an injury to his public right of travel, and regardless of the number of persons who may suffer a similar injury to similar private easements appurtenant to other lots fronting on the street. Williams v. Los Angeles R. R. Co., 150 Cal. 592, 89 P. 330; Strong v. Sullivan, 180 Cal. 331, 181 P. 59, 4 A. L. R. 343; McLean v. Llewellyn Iron Works, 2 Cal. App. 346, 83 P. 1082, 1085. The injury in so far as it affects the value of their property is a right peculiar to the owners and any interference with it constitutes a private as well as a public nuisance. Voorheis v. Tidewater Co., 41 Cal. App. 315, 182 P. 797; Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 92 P. 70, 125 Am. St. Rep. 47.

[11-13] The final contention is made that the trial court was without jurisdiction to order the removal of the trees, it being claimed that such power resides exclusively in the municipal authorities by reason of sections 2633 and 2742 et seq. of the Political Code. There is no question that under the provisions invoked municipal authorities have certain power of control over streets and highways, including spaces occupied by trees, but no question concerning such statutory powers is here involved. These provisions have no application, as here, to suits to abate nuisances brought by one who suffers a special injury distinct from that suffered by the general public. Any unlawful obstruction or interference with a highway is per se a nuisance, and an abutting owner has all the usual rights and remedies of the owner of a freehold concerning the same, including trespass, ejectment, action for damages, injunction, or an action to remove an obstruction or abate a nuisance. Hargro v. Hodgdon, 89 Cal. 623, 26 P. 1106. The authority vested in municipal officers over roads and highways was never intended to prevent a court of competent jurisdiction from abating a nuisance maintained in violation of private rights. The maintenance of trees as a part of an orchard and the cultivation of the same in the manner indicated constitutes a nuisance which the court had power to abate and remove.

Judgment affirmed.

We concur: KNIGHT, J.; CASHIN, J.

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94 Cal. App. 463

MacPHERSON v. WEST COAST TRANSIT CO. (Civ. 6388.)

District Court of Appeal, First District, Division 1, California. Oct. 25, 1928.

1. Automobiles 🔑244(10)—Evidence held to warrant finding that collision between automobile and motorbus resulted solely from bus driver's negligence.

Evidence *held* to warrant finding that collision between plaintiff's automobile and motorbus on public highway resulted solely from motorbus driver's negligence.

2. Trial 🔑309—Knowledge gained by jurors' view of scene of accident was independent evidence to be considered in determining issues (Code Civ. Proc. § 610).

Knowledge gained by jury from viewing scene of collision between automobile and motorbus, under Code Civ. Proc. § 610, was independent evidence to be taken into consideration in determining issues in the case.

3. Trial 🔑28(2)—Trial court had discretion to permit jurors to view scene of collision between automobile and motorbus (Code Civ. Proc. § 610).

Under Code Civ. Proc. § 610, it was within discretion of trial court to permit jurors to view scene of collision between plaintiff's automobile and defendant's motorbus.

4. Evidence 🔑332(3)—Witnesses 🔑414(2)—Injured automobile passenger's complaint against bus company held admissible in automobile owner's action against bus company to corroborate plaintiff and to rebut inference that he transferred property to avoid passenger's claim.

Where cross-examination of plaintiff automobile owner suing bus company for injury in collision elicited that plaintiff had transferred personalty to his parents, and plaintiff's witnesses testified that transfer was made as security for loan and that passenger in plaintiff's car who was injured in collision had sued defendant alone before the transfer and had never filed action against plaintiff, said passenger's complaint against defendant was admissible in evidence as corroborating plaintiff's evidence and as tending to rebut inference that object of transfer was to avoid claim for damages against plaintiff.

5. Appeal and error 🔑933(5)—Conflicts between affidavits on motion for new trial must be presumed to have been resolved in favor of ruling, and implied findings thereon cannot be disturbed on appeal.

In reviewing ruling denying defendant's motion for new trial, it must be presumed that conflicts between affidavits filed thereon were resolved by trial court in favor of plaintiff, and its implied findings thereon cannot be disturbed on appeal.

6. New trial 🔑159—Denial of new trial impliedly determined that no prejudice was suffered through alleged misconduct of counsel or jury.

In denying defendant's motion for new trial, court impliedly determined that no prejudice was suffered by defendant through alleged misconduct of plaintiff's counsel or of jury.

7. Appeal and error 🔑1170(6)—Any misconduct of jurors while viewing scene of accident held not to require reversal, in absence of showing of prejudice (Code Civ. Proc. § 475).

Any misconduct of jurors in discussing facts of case while viewing scene of accident *held* not to justify new trial, in absence of showing of prejudice to substantial rights of party moving for new trial, under Code Civ. Proc. § 475.

8. Appeal and error 🔑1170(6)—Misconduct of attorneys not shown to be prejudicial does not require reversal (Code Civ. Proc. § 475).

Under Code Civ. Proc. § 475, any misconduct of attorneys in arguing to jury does not require reversal, in absence of showing of prejudice.

9. Appeal and error 🔑978(3)—Trial judge's determination that verdict did not result from misconduct will not be disturbed on appeal, unless plainly wrong.

Trial court's conclusion that verdict was not probably due wholly or in part to alleged misconduct of jurors or of counsel should not be disturbed on appeal, unless circumstances show that it is plainly wrong.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by John A. MacPherson against the West Coast Transit Company. Judgment for plaintiff, and defendant appeals. Affirmed.

H. C. Nelson and Nelson & Ricks, all of Eureka, for appellant.

Pierce H. Ryan and A. G. Bradford, both of Eureka, for respondent.

CASHIN, J. This action was brought to recover damages for injuries to the person and property of the plaintiff alleged to have been caused by the negligent operation of an automobile stage by defendant company. The latter denied that the injuries were caused by its acts or negligence, and alleged as a further defense the contributory negligence of the plaintiff. The jury found for the plaintiff in the sum of $2,500, and, from the judgment entered on the verdict, the defendant has appealed.

It is contended that the evidence was insufficient to support the verdict, and that the conduct of the jury and of counsel for the plaintiff was prejudicial to the rights of the defendant and prevented it from having a fair trial.

[1] The accident occurred at a point on the public highway between Korbel and Blue Lake in Humboldt county. The plaintiff, accompanied by Mrs. Hattie McDaniel, was driving his automobile—a Buick roadster—toward Korbel, and at the point where the accident occurred met the automobile stage owned and operated by the defendant. The road at this point passes around a hill which on the left, approaching Korbel, forms a steep bank. On the right a fence had been erected to prevent automobiles from leaving the highway, which is approximately 100 feet above the floor of the valley and the descent to which from the said road is precipitous. As this portion of the road came into view the plaintiff, as he testified, observed the approach of the stage, which was preceded by a horseman. The stage was then traveling behind the horseman, but on plaintiff's side of the road. The driver of the stage, instead of turning to his right and remaining behind the horseman until the plaintiff had passed, continued on his course, passed the horseman on the left, and thereupon turned the stage sharply and suddenly toward the bank. By this movement the stage was placed diagonally across

the road in such a position that the plaintiff was unable to pass without striking the vehicle. According to his testimony the stage when first seen was traveling about 30 miles per hour; he immediately sounded his horn and applied the brakes, thinking, as he testified, "that the driver of the stage would slow down and pull in back of the horse." Instead of so doing, the stage driver followed the course above described, with the result that the plaintiff was unable before striking the stage to fully stop his car, the left front wheel of which struck the rear end of the stage. As the result of the impact the car skidded to the right, passed through the fence and down the hill, causing physical injury to the plaintiff and damage to his car.

The defendant claimed that no collision occurred between the two vehicles and that the accident was due solely to the negligent driving of the plaintiff. The testimony of the latter, however, was corroborated in all material respects by that of Mrs. McDaniel, who also testified to a collision with the stage before the plaintiff's car passed through the fence and down the hillside.

[2] A view of the scene of the accident was ordered by the court, it being stipulated by counsel that travel at that point should be stopped while the jury was present. The court assented to the stipulation, and, among other instructions, admonished the jury with respect to the situation at the scene of the accident as follows: "I think it is better for you not to discuss it among yourselves." Testimony contradicting plaintiff's version of the affair was adduced by defendant; but it will be sufficient to say that the evidence as to the cause of the accident was conflicting, and the facts as related by the plaintiff and his witnesses, which the jury believed, were not improbable. Moreover, as stated, the jury, after hearing the testimony, viewed the scene of the accident, and knowledge so gained was independent evidence to be taken into consideration in determining the issues in the case (People v. Milner, 122 Cal. 171, 184, 185, 54 P. 833; People v. Pompa, 192 Cal. 412, 221 P. 198; Hatton v. Gregg, 4 Cal. App. 537, 88 P. 592; Vaughan v. County of Tulare, 56 Cal. App. 261, 205 P. 21), and a review of the evidence shows that their conclusion that the damage complained of resulted solely from the negligence of the defendant was sufficiently supported.

Defendant moved for a new trial, alleging, among other grounds, misconduct of the jury and by counsel for the plaintiff. In support of the motion affidavits were filed by defendant's counsel to the effect that, notwithstanding the instructions of the court, the jury, while viewing the scene of the accident, talked among themselves regarding the matters under observation; that traffic along the highway was not stopped as had been agreed: and that the jury endeavored to draw conclusions from passing traffic respecting facts in issue, those observed not being the same as those testified to; and, further, that the condition of the roadway since the accident had been materially changed, thus causing the jury to be misled. It was further alleged that the attorney for the plaintiff offered in evidence the complaint in an action brought by Hattie McDaniel against defendant to recover damages due to the same accident, stating in the course of his argument to the jury that defendant had settled the claim and that the claimant "had walked out of court satisfied," and that, notwithstanding defendant's objection to the above and reference to any settlement of the case, counsel continued to refer thereto in his argument. Plaintiff by affidavit of his counsel denied that reference was made through the latter to the McDaniel claim otherwise than to state that an action was filed by her after a certain date and that the same had been disposed of. It had developed on the cross-examination of the plaintiff that on March 6, 1925, he transferred certain personal property to his parents, who retransferred the same to him on January 28, 1926. The purpose of the question was to show that he feared an action for damages by Mrs. McDaniel. Both the plaintiff and his father testified that the transfer was made as security for a loan, and also that Mrs. McDaniel had brought suit against the defendant alone before the date first mentioned and had never filed an action against the plaintiff. The original complaint in the McDaniel suit was then offered, and the same, with the exception of the allegations therein as to the amount claimed as damages, was admitted in evidence for the purpose of showing that a suit had been brought by her against the defendant company and the date when the same was filed. This affidavit also alleged that upon objection being made to the statement respecting the McDaniel claim counsel withdrew the statement and requested the jury to disregard it, but that no request for a like instruction by the court was made by the defendant; that affiant saw but one automobile approach the scene of the accident during the view, and that the presiding judge, who was present, was then asked, in the presence of defendant's counsel, whether he wished the road closed to traffic; that the judge replied in the negative, his reason in substance being that owing to conditions at the scene of the accident such action was not feasible; that defendant made no objection thereto and made no further request that such an order be made; furthermore, that no objection to conversations between the members of the jury was made by defendant's counsel; that the matter was not called to the attention of the court by him nor a request made that the jury be discharged. It was further alleged that no change in the highway other than that there had been an increase of one foot in its width had been made, and that the fact was in evidence before the view by the jury.

[3, 4] The view was within the discretion of the trial court (Code Civ. Proc. § 610), which in the present case was not abused, nor was the admission of the McDaniel complaint as evidence corroborating the witness McPherson, and tending to rebut the inference that the object of the transfer was to avoid a claim for damages against the plaintiff, erroneous. The evidence being before the jury, references thereto by counsel in his endeavor to convince them that the transfer mentioned was for a purpose other than that claimed by the defendant were proper.

[5-8] In passing upon the motion for a new trial, it must be presumed that conflicts between the affidavits filed were resolved by the court in favor of the plaintiff, and its implied findings thereon cannot be disturbed. Ham v. County of Los Angeles, 46 Cal. App. 148, 189 P. 462. Moreover, in denying the motion, the court impliedly determined that no prejudice was suffered through the alleged misconduct of either counsel or the jury. Lafargue v. United Railroads, 183 Cal. 720, 192 P. 538. The affidavits made and filed by defendant's counsel in support of the motion did not disclose the conversations had between the jurors, nor did affiant claim to have heard all that was said. He states, however, that he knew that the jurors did discuss the facts of the case at the scene of the accident, to which he called the attention of the court at the time, and, further that he "observed said jurors scattered and separate over the scene of said accident, some of the jurors being many yards distant from others, and while so standing saw them talking to each other and pointing out various physical objects and conditions as they existed." It has been held to be improper for jurors to talk to each other about the case before its final submission (Monaghan v. Pac. Rolling Mill Co., 81 Cal. 190, 22 P. 590), but such misconduct does not justify a new trial, unless it appears that prejudice to the substantial rights of a party resulted therefrom (People v. Kramer, 117 Cal. 647, 49 P. 842; Siemsen v. Oakland S. L. & H. Electric Ry., 134 Cal. 494, 498, 66 P. 672; Code Civ. Proc. § 475). The same rule applies to misconduct of attorneys. In the present case, the statement so assigned having been withdrawn, with a request to the jury to disregard it, and no instruction by the court to that effect having been requested by defendant, we cannot say that the latter was prejudiced by the remark. Moreover, as was said in Lafargue v. United Railroads, supra, "the trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to such alleged misconduct * * * and his conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong."

After an examination of the entire record we are satisfied that the verdict, together with the implied findings of the trial court on the motion for a new trial, were fully sustained, and no error is shown which reasonably supports the conclusion that the matters complained of were prejudicial or that the trial resulted in a miscarriage of justice.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

94 Cal. App. 507

McCARTE et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6499.)

District Court of Appeal, First District, Division 2, California. Oct. 26, 1928.

1. Prohibition 🔑9—Prohibition must be denied on showing that petitioner's claims were fully heard, contrary to allegations.

Where it appeared, on hearing of motion for peremptory writ of prohibition, that one of two petitioners appeared in proceedings before respondent court, and that her claims were fully heard, contrary to allegations of petition, such court had complete jurisdiction as respects her rights, and her petition must be denied.

2. Receivers 🔑77(1)—Attorney for one claiming premises through corporation in receivership proceedings as agent cannot assert independent right to possession, nor possession as voluntary trustee for creditors without owners' consent.

Attorney for one asserting ownership and possession of premises through corporation as her agent could not assert independent right to possession in receivership proceedings, and his possession as voluntary trustee for creditors was that of mere interloper, in absence of assent of real owners.

3. Prohibition 🔑17—Objection to want of jurisdiction, not apparent on face of proceedings, should be made in lower court before applying for prohibition.

If want of jurisdiction is apparent on face of proceeding in lower court, no plea or preliminary objection is necessary before suing out a writ of prohibition, but, when want of jurisdiction is not apparent, objection to want or excess of jurisdiction should be made and overruled by lower court; rule being one of practice only, based on respect and consideration due lower court and expediency of preventing unnecessary litigation.

4. Prohibition 🔑9—One refusing to reduce motion for stay of receivership proceedings to writing held not entitled to prohibition for want of opportunity to present claim.

One merely walking into courtroom, asking stay of receivership proceedings on ground that he claims interest in premises, and refusing to comply with court's request that he reduce motion to writing, with proper statement of facts as basis for judicial hearing, *held* not entitled to peremptory writ of prohibition on ground that he had no opportunity to present his claim to court.

Application by Nettie E. McCarte and another for a writ of prohibition to the Superior Court in and for the City and County of San Francisco, and Walter Perry Johnson, as Judge thereof, in which John Joseph McCarte, administrator of applicant's estate, was substituted in her place on her death. Peremptory writ denied, and proceedings dismissed.

William F. Herron, of San Francisco, for petitioners.

Harry I. Stafford and Edward A. Cunha, both of San Francisco, for respondents.

NOURSE, J. An alternative writ of prohibition was issued on the application of the two petitioners which alleged that they were the joint owners and entitled to the possession of the El Patio dance hall; that in a proceeding before the respondent superior court, entitled Propper v. Poetz, a receiver was appointed by respondent to take possession of the premises; that neither of these petitioners were parties to said proceeding, had no notice thereof, and were not given an opportunity to be heard therein. Upon motion of respondent, and it appearing to this court that it had been imposed upon in the application for the alternative writ, said writ was set aside, and the proceedings were converted into a motion for a peremptory writ of prohibition. Pending this hearing, the death of petitioner McCarte was suggested, and her administrator was duly substituted.

[1] The gravamen of the petition is that the order of respondent in appointing a receiver to take possession of the premises was without jurisdiction because the petitioners are the real owners thereof, and, as such, were not given an opportunity to be heard in the trial below. Upon the hearing of the motion for the peremptory writ, it appeared that, contrary to the allegations of the petition, the petitioner McCarte did appear in the proceedings before the respondent court, and that her claims to the premises were fully heard by the respondent. In so far as the rights of the petitioner McCarte are concerned, the respondent court had complete jurisdiction, and her petition herein must be denied.

[2] The petitioner Herron claims that he is the joint owner of the premises, and that he has had no opportunity to present his claim to the superior court. The return of respondent herein alleges (and this is admitted) that, after the order appointing the receiver had been made, this petitioner appeared for the first time before respondent, and asked for a stay of proceedings, stating that he was a claimant of an interest in the premises; that respondent thereupon advised him that, if he would make formal application in writing, with a proper statement of facts as a basis for a hearing, the respondent would then entertain a hearing, and act upon any motion or application for relief which said petitioner should present. This petitioner failed to follow this course, and upon the hearing in this court two continuances were granted to enable him to make some showing that his claim of ownership in the premises was bona fide. He made no effort to show this other than his unverified statement that he held some written assignment of some interest, and that at some indefinite time he had become a voluntary trustee for certain unnamed creditors of his copetitioner, and that as such trustee he was in actual possession of the dance hall at the time of the appointment of the receiver. But it appears without dispute from the record of the trial before the respondent court that the Van Ness Amusement Company, party defendant in that action, was a corporation holding possession of the premises in dispute as a mere agency or instrumentality through which and by which the petitioner McCarte asserted her right to ownership and possession of the premises, and that her copetitioner is an attorney at law representing Mrs. McCarte in her private capacity until the time of her death. Thus any claim to possession on the part of petitioner Herron, as agent of his copetitioner, would not entitle him to assert an independent right to possession, and, in the absence of consent of the real owners, his possession as a voluntary trustee for creditors was that of a mere interloper.

[3, 4] The rule of law involved is discussed at length in the opinion of Havemeyer v. Superior Court, 84 Cal. 327, 402, et seq., 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192. Briefly, this rule is that, if a want of jurisdiction is apparent on the face of the proceeding in the lower court, no plea or preliminary objection is necessary before suing out a writ of prohibition, but, when the want of jurisdiction is not apparent, an objection to the want or excess of jurisdiction should be made in some form and overruled by the lower court. The rule is not that the court is without power to issue a writ of prohibition, where preliminary objection has not been made in the lower court, but it is a rule of practice only, based upon the respect and consideration due to the lower court and the expediency of preventing unnecessary litigation. In the case before us we hold that this rule is not followed when a petitioner merely walks into the courtroom and states his objection, and refuses to comply with the request of the court that he follow the ordinary procedure of reducing his motion to writing with a proper statement of the facts as a basis for a judicial hearing.

The peremptory writ is denied, and the proceedings are dismissed.

We concur: KOFORD, P. J., STURTEVANT, J.

94 Cal. App. 510

HERRON v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 6505.)

District Court of Appeal, First District, Division 2, California. Oct. 26, 1928.

Prohibition 🔑28—Whether applicant for prohibition of hearing for contempt in interfering with receiver had possession under claim of right is question for respondent.

Whether one applying for writ of prohibition to restrain court from hearing proceedings on accusation of contempt in interfering with receiver appointed by court was in possession of premises occupied by receiver under claim of right is a question of fact, which must be tried by respondent court in contempt proceedings.

Original application by William F. Herron for a writ of prohibition to the Superior Court in and for the City and County of San Francisco, and Walter Perry Johnson, Judge thereof, to prevent a hearing on an accusation of contempt. Writ denied.

William F. Herron, of San Francisco, for petitioner.

Harry I. Stafford and Edward A. Cunha, both of San Francisco, for respondents.

PER CURIAM. This is an original application for a writ of prohibition to restrain the respondent superior court from hearing proceedings upon an accusation of contempt based upon the petitioner's alleged interference with a receiver appointed by order of the superior court.

The theory of the petitioner is that he was in possession of the premises occupied by the receiver under a claim of right. This is a question of fact, which must be tried by the respondent court in the contempt proceedings. Goodrich v. Superior Court (Cal. App.) 268 P. 669.

The petition is denied.

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94 Cal. App. 511

WILBUR et al. v. BOARD OF DIRECTORS OF TIA JUANA RIVER IRR. DIST. (Civ. 3525.)

District Court of Appeal, Third District, California. Oct. 26, 1928.

1. Waters and water courses 🔑225—Warrants for salaries of regular officers of irrigation district must be deducted in determining whether outstanding unpaid warrants exceed limitation permitted for organization expenses (Irrigation Act, § 61, as amended by St. 1921, p. 1110, § 4).

Warrants covering the salaries of officers of irrigation district holding offices provided by California Irrigation Act *held* not to constitute preliminary expenses in organization of district, and outstanding salary warrants were therefore required to be subtracted from outstanding unpaid warrants of district in determining whether unpaid warrants exceeded $2,000 limit of indebtedness permitted for organization purposes under Irrigation Act (St. 1915, p. 1369) § 61, as amended by St. 1921, p. 1110, § 4.

2. Waters and water courses 🔑231—Irrigation district's issuance of warrants for payment of illegal claims does not invalidate tax levy (Irrigation Act, § 61, as amended by St. 1921, p. 1110, § 4).

Issuance by irrigation district of warrants for payment of illegal claims does not invalidate district's tax levy under California Irrigation Act (St. 1915, p. 1369) § 61, as amended by St. 1921, p. 1110, § 4, which limits aggregate amount of claims against district.

3. Waters and water courses 🔑231—Irrigation district's tax levy held not invalidated by fact that some of warrants were void because exceeding debt limit (Irrigation Act, § 61, as amended by St. 1921, p. 1110, § 4).

Fact that irrigation district issued warrants in excess of debt limit prescribed by Irrigation Act (St. 1915, p. 1369) § 61, as amended by St. 1921, p. 1110, § 4, making additional obligations incurred absolutely void, *held* not to invalidate district's tax levy, in injunction suit.

4. Waters and water courses 🔑230(6)—That irrigation district's tax levy is valid notwithstanding illegal warrants does not necessarily authorize payment of all warrants issued (Irrigation Act, § 61, as amended by St. 1921, p. 1110, § 4).

Fact that irrigation district's tax levy is valid notwithstanding warrants illegally issued does not necessarily authorize payment of all warrants issued by the district, where debt limit under Irrigation Act (St. 1915, p. 1369) § 61, as amended by St. 1921, p. 1110, § 4, is exceeded.

5. Waters and water courses 🔑225—Obligations of irrigation district in excess of statutory debt limit, excluding indebtedness incurred for salaries of officers, are void (Irrigation Act, § 61, as amended by St. 1921, p. 1110, § 4).

Any debt incurred by irrigation district in excess of $2,000 limit under Irrigation Act (St. 1915, p. 1369) § 61, as amended by St. 1921, p. 1110, § 4, is void, except that debts incurred for payment of salaries of officers are not included.

6. Waters and water courses 🔑225—Irrigation district's warrants, exclusive of salary warrants, which carried indebtedness beyond statutory debt limitation, held void (Irrigation Act, § 61, as amended by St. 1921, p. 1110, § 4).

In action by taxpayers of irrigation district to enjoin tax levy, warrants of district which, in order of their issuance, carried district's indebtedness over $2,000 limit, exclusive of indebtedness for salaries, under Irrigation Act (St. 1915, p. 1369) § 61, as amended by St. 1921, p. 1110, § 4, *held* void.

7. Waters and water courses 🔑225—Indebtedness represented by irrigation district's warrants cannot be prorated, where warrants are issued in excess of statutory debt limit, warrants issued over limit being absolutely void (Irrigation Act, § 61, as amended by St. 1921, p. 1110, § 4).

Under Irrigation Act (St. 1915, p. 1369) § 61, as amended by St. 1921, p. 1110, § 4, making debts incurred by irrigation district in excess of $2,000 limit absolutely void, claims cannot be prorated and allowed proportionately, since district's warrants exceeding limit are void while those first issued within the debt limit are valid.

8. Waters and water courses 🔑224—Statutory irrigation district is quasi public in character.

Irrigation district, organized pursuant to California Irrigation Act as amended in 1921, is quasi public in its character.

9. Waters and water courses 🔑227—Directors of irrigation district in incurring expenses and levying taxes act in quasi judicial capacity and their discretion is not generally disturbed.

Board of directors of irrigation district in employing agents, authorizing expenses and levying taxes, assessments, and determining reasonable value and character of materials and labor performed, act in quasi judicial capacity, and their discretion is not generally interfered with.

10. Appeal and error 🔑843(3)—Refusal to permit proof that value of engineer's services for irrigation district did not exceed $1,000 became moot, where warrants for engineer's services over $1,000 were void.

In action to enjoin tax levy against lands of irrigation district, refusal of trial court to permit proof that reasonable value of engineer's services did not exceed $1,000 was moot question, where reviewing court held part of warrants void, and aggregate sum of warrants for engineer's services which were approved did not exceed $1,000.

11. Trial 🔑388(4)—In case tried on stipulation of facts, court was not required to make findings in addition to findings concerning truth of allegations of complaint.

Where case was tried on stipulation of facts, court was not required to make findings additional to finding that allegations of plaintiff's causes of action were untrue.

12. Trial 🔑388(4)—Findings as to facts admitted by stipulation are unnecessary.

When facts are admitted by stipulation, findings as to such facts become unnecessary.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by John G. Wilbur and others against the Board of Directors of the Tia Juana River Irrigation District composed of A. G. Arnold and others. From a judgment for defendants, plaintiffs appeal. Modified and affirmed.

Jesse George, of San Diego, for appellants.

Sloane & Sloane, of San Diego, for respondents.

THOMPSON, Justice pro tem. This is an appeal by taxpayers from a judgment denying injunctive relief and upholding the proceedings and tax levy against the lands of Tia Juana River irrigation district, which was assessed to pay claims for preliminary organization of the district, together with other expenses of maintaining and operating the affairs of said district pursuant to law.

It is contended by the appellants that the entire tax levy is void, and that the several warrants which were issued in payment of obligations incurred for preliminary organization are in violation of section 61 of the California Irrigation Act as amended in 1921 (St. 1921, p. 1110), for the reason that the aggregate amount of these claims exceeds $2,000, which is the maximum sum authorized for that purpose.

The cause was tried upon a stipulation of facts. Appellants are taxpayers in the Tia Juana River irrigation district in San Diego county, Cal., which was duly organized August 18, 1924, and embraces 1600 acres of land. Respondents Arnold, Patterson, and Ables were thereafter elected directors of said district, and on February 9, 1925, appointed H. C. McCann as assessor, tax collector, and treasurer, fixing his salary at $75 per month. August 19, 1924, the board adopted a resolution employing John F. Covert as engineer of the district, and directed him to prepare preliminary plans and estimates for a proposed bond issue, which were subsequently filed and adopted. The engineer also made surveys and specifications for desired improvements, including a water pipe system. Ten acres of land was authorized to be purchased, upon which test wells for water supply were drilled by J. W. Brannon, who was hired for that purpose. Attorneys were employed and rendered services in organizing the district. Before the levying of an assessment or the calling of a bond election some 37 warrants aggregating the sum of $5,565.25 were ordered to be drawn in payment of expenditures for office rent, salaries, legal notices, purchase of land for test wells, cost of sinking wells, engineer's plans, labor, fees for certifying bonds and legal services. There was no money in the treasury with which to meet these preliminary expenses, or with which to pay the subsequent current expense of operating the affairs of the district. A detailed survey and plans for bonding the district for $219,200 was thereupon adopted and submitted to the California bonding commission for approval. On September 15, 1925, the directors levied an assessment against the district for the aggregate sum of $7,098.42, being 2 per cent. of the entire valuation of the property estimated to be $354,921. For this purpose a resolution was adopted by the directors of the irrigation district providing in part that:

> "* * * The sum of $2,471.83 is necessary for the payment of unpaid warrants of the district issued in accordance with the law, and that said district requires the additional sum of $4,626.59 * * * *for carrying out*, within the district, *the purposes of the California Irrigation Act.* * * *"

[1-3] Among the claims for the payment of which said tax assessment was levied were nine warrants aggregating the sum of $775, which had been previously issued to H. C. McCann, the duly elected secretary and treasurer of said district, in payment of his salary, which had been regularly fixed. These salary warrants must be assumed to have been included in the sum of $2,471.83 mentioned in the above resolution found to be "necessary for the payment of unpaid warrants of the district" for preliminary expenses. The salaries of regular officers, which offices are provided for by the Irrigation Act of the Legislature, are deemed to be continuing obligations and not merely preliminary expenses in the organization of a district. In order to ascertain what amount the directors sought to raise for the payment of preliminary expenses as represented by outstanding unpaid warrants of the district, said sum of $2,471.83 should be reduced by subtracting therefrom the sum of $775, which was the total amount of the outstanding salary warrants. This leaves only the sum of $1,693.83 sought to be raised by the tax levy for the payment of outstanding warrants for preliminary organization expenses, which was strictly within the $2,000 limitation prescribed by statute. The balance of the amount to be raised by means of this challenged tax levy was declared by the resolution to be "for carrying out * * * the purposes of the California Irrigation Act," after the organization was perfected. In the case of Mitchell v. Patterson, 120 Cal. 286, 52 P. 589, involving the construction of section 42 of the former Irrigation District Act (Stats. 1891, p. 147), which is similar to section 61 of the Irrigation Act under consideration in the present case, it was held that the statutory limitation which prohibited the directors from incurring obligations prior to the completion of the organization in excess of $2,000 did not include salaries for officers the appointment of which were provided for by the act. Under this authority these salary warrants may not be considered in determining either the validity of the tax levy or the outstanding warrants. There is, therefore, nothing in the record to indicate that the tax assessment was levied to pay illegal claims, for preliminary organization in excess of the inhibition of the statute. It was stipulated that the irrigation district was duly organized, and its officers regularly elected in August, 1924. The court specifically found that the board of directors "in all its proceedings relating to the assessment of lands and levy of assessment thereon in the year 1925 acted within the scope of its authority and in the manner required by law, and that the levy is in all respects regular and valid." The mere issuing of warrants for the payment of illegal claims does not invalidate the proceedings instituted for the tax levy. It follows that the tax levy is, therefore, valid and binding.

[4, 5] The fact that the tax levy was valid does not necessarily authorize the payment of all of the warrants which were issued. Section 61 of the California Irrigation Act as amended in 1921 provides that:

> "The board of directors * * * shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this act; and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void, except that for the purposes of organization, or for any of the purposes of this act, the board of directors may, before the levying of the first assessment, incur indebtedness in such sum or sums as shall amount to $2,000, or, if the district shall contain more than 4,000 acres, to one-half as many dollars as there are acres of land in the district, and may cause warrants of the district to be issued therefor."

This language seems too clear for serious controversy. Section 61 of this act specifically prohibits the incurring of debts or liabilities against the irrigation district, for any purpose whatever, in excess of those obligations which are expressly authorized by the act. It is, however, provided that the directors may incur obligations and issue warrants for preliminary organization purposes not to exceed the aggregate sum of $2,000. As Mr. Justice Harrison said in the case of Hughson v. Crane, 115 Cal. 404, 413, 47 P. 120, 122: "The irrigation act is evidently framed upon the theory, and with the intention on the part of the Legislature, that the affairs of the district shall be conducted upon a ready-money basis, and not upon credit, and, to enable the directors to carry out this purpose, provision is made for levying special assessments for the payments of salaries, wages, and expenses of management." Realizing that certain limited preliminary expenses would necessarily be incurred in organizing an irrigation district prior to the time when an assessment could be legally made against the lands of the district, the Legislature wisely authorized the incurring of such obligations in an aggregate sum not to exceed $2,000. Section 61 of this act is a specific limitation upon the powers of the directors to incur preliminary indebtedness, and any obligation incurred in excess of that amount becomes absolutely void. Except for the payment of salaries as above stated, the nature of such indebtedness is immaterial, and may, under no circumstances, exceed the specific inhibition of the statute which provides that:

> "* * * Any debt * * * in excess of such express provisions shall be * * * void, except that for the purposes of organization, or for any of the purposes of this act, the board of directors may * * * incur indebtedness in such sum * * * as shall amount to $2,000."

It follows that the board of directors in the present case was authorized to incur indebtedness, exclusive of the salaries of officers provided for by the act, and issue warrants in payment therefor, in an aggregate sum not to exceed $2,000. Therefore every warrant for a legal obligation, in addition to the salary warrants above mentioned, coming within the above limitation, is valid and binding upon the district. Upon the contrary, in the order in which these obligations were incurred, every warrant which carries the aggregate sum beyond the $2,000 limitation is void, except that in determining the validity of these warrants, the items for salary are not to be considered.

[6] In the order in which these warrants were issued, the numbers, dates, nature of indebtedness and amounts are as follows:

No.	Date.	Nature of indebtedness.	Amount.
1.	Jan. 2, '25	Services of engineer	$ 700 00
2.	Jan. 6, '25	Salary of McCann	200 00
3.	Jan. 6, '25	Premium on bonds	67 50
4.	Jan. 6, '25	Seal of district	7 50
5.	Jan. 6, '25	Warrant book	50
6.	Feb. 3, '25	Salary of McCann	100 00
7.	Mch. 4, '25	Well casings	172 00
8.	Mch. 4, '25	Hauling casings	10 00
9.	Mch. 4, '25	Premium on bonds	33 40
10.	Mch. 4, '25	Rubber stamp	1 35
11.	Mch. 4, '25	Services of engineer	100 00
12.	Mch. 4, '25	Services of engineer	100 00
13.	Mch. 4, '25	Services of engineer	100 00
*14.	Mch. 4, '25	Services of engineer	1,086 10
15.	Mch. 4, '25	Attorney's fee	500 00
*16.	Mch. 4, '25	Commissions on bond	450 00
17.	Mch. 4, '25	Salary of McCann	25 00
18.	Apr. 1, '25	Salary of McCann	75 00
19.	Apr. 8, '25	Advertising	46 50
*20.	Apr. 8, '25	Drilling wells	207 63
21.	May 1, '25	Salary of McCann	75 00
22.	May 8, '25	Printing stationery	10 50
23.	June 1, '25	Salary of McCann	75 00
24.	Jul. 1, '25	Salary of McCann	75 00
25.	Jul. 7, '25	Book binding	40 00
26.	Jul. 7, '25	Rubber stamp	4 50
27.	Aug. 1, '25	Salary of McCann	75 00
28.	Aug. 4, '25	Publishing notices	28 80
29.	Aug. 4, '25	Publishing notices	42 30
30.	Aug. 4, '25	Publishing notices	17 55
31.	Sep. 1, '25	Salary of McCann	75 00
*32.	Sep. 1, '25	Purchase of land	500 00
*33.	Sep. 15, '25	Attorney's fee	350 00
*34.	Sep. 15, '25	Premium on bonds	25 00
*35.	......	......	......
*36.	......	......	......
*37.	Nov. 3, '25	Arnold, court costs	185 74

Eliminating all salary warrants, numbers 2, 6, 17, 18, 21, 23, 24, 27, and 31 which are not within the inhibition of the statute and therefore valid, the first warrant which carries the aggregate sum of the indebtedness beyond the prohibited sum of $2,000 is warrant No. 14 for the sum of $1,086.10 for services of an engineer. This last-mentioned warrant is therefore void. The next warrant which carries the total indebtedness beyond the $2,000 limit is warrant No. 16 for the sum of $450 for commissions on bonds. This warrant is, therefore, also void. The next warrant in the order of their issuance which carries the total indebtedness above the maximum sum of $2,000 is warrant No. 20 for the sum of $207.63 for drilling wells, which therefore becomes void. All subsequent warrants from and including number 32 become void for the same reason. All warrants preceded with the sign of a star are void. All of the remaining warrants aggregating the sum of $1,982.40 are valid, and within the limitation of preliminary expenses authorized by statute.

[7] The respondents claim that if the aggregate sum of all warrants be held to be void for the reason that it exceeds the $2,000 limitation prescribed by statute, then all claims should be prorated and allowed in the proportion which their respective sums bear to the entire amount of the obligations incurred. But this method clearly violates the letter and the spirit of the statute, which declares that: "Any debt or liability incurred *in excess of such express provisions* shall be and remain absolutely void." Every obligation incurred beyond the express authorization of the act is therefore void, and no proportion of such claim is entitled to be allowed.

[8-10] The appellants claim that the trial court erred in refusing to permit them to prove that the value of the engineer's services which were rendered were not reasonably worth more than $1,000. An irrigation district which is organized pursuant to statute, similar to that of a reclamation district, is quasi public in its character. 15 R. C. L. 495, § 46; Luckehe v. Reclamation District No. 2054, 73 Cal. App. 361, 365, 238 P. 760; Tulare Irrigation District v. Shephard, 185 U. S. 1, 22 S. Ct. 531, 46 L. Ed. 773. In the employment of its agents, the authorization to incur operating expenses, the levying of taxes and assessments, and the determination of the reasonableness of the value and character of materials furnished and labor performed, the board of directors act in a quasi judicial capacity, and their discretion in these matters may not ordinarily be interfered with. Colusa County v. De Jarnett, 55 Cal. 373; Langdon v. Koster, 157 Cal. 39, 41, 106 P. 209; County of Yolo v. Joyce, 156 Cal. 429, 433, 105 P. 125. In the present case, however, this question has become moot for the reason that the aggregate sum of the warrants for engineer's services, which have been herein approved as valid, do not exceed the sum of $1,000.

[11, 12] The appellants contend that the court erred in not specifically adopting findings determining the validity of the obliga-

tions incurred and the warrants issued in payment thereof, and that for this reason the judgment was not supported by the findings. The court did, however, find that all of the allegations of plaintiffs' first and second causes of action were untrue, except as to the admissions thereof, contained in the defendants' answer. The present case was tried on a stipulation as to the facts, and more specific findings than those which were adopted were, therefore, unnecessary. In 24 California Jurisprudence, 953, § 192, the author says:

> "When a case is submitted on an agreed statement of facts, the statement takes the place of and has the force and effect of an unattacked finding of facts, from which it follows that findings are unnecessary, the only question being as to the law applicable."

This text is amply supported by a citation of California authorities. When an issue is admitted by stipulation, findings as to such fact become unnecessary. Wilson v. Mattei (Cal. App.) 258 P. 453; Alderson v. Cutting, 163 Cal. 503, 126 P. 157, Ann. Cas. 1914A, 1; Fernandez v. Watt, 26 Cal. App. 86, 146 P. 47. In the case last cited the court says:

> "It needs no citation of authority to support the proposition that findings upon admitted facts are not required, and that a judgment will not be disturbed because of a real or apparent conflict in such findings."

The judgment in this case is hereby modified by striking therefrom the amount of warrants Nos. 14, 16, 20, 32, 33, 34, 35, 36 and 37 and by enjoining the directors of the Tia Juana River irrigation district, their agents, employees, officers and representatives from paying the same. As so modified the judgment is affirmed, the appellants to recover their costs of appeal.

We concur: FINCH, P. J.; PLUMMER, J.

LOS ANGELES COUNTY FLOOD CONTROL DIST. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (CITY OF PASADENA, Intervener). (Civ. 6137.) ★

District Court of Appeal, Second District, Division 2. California. October 24, 1928.

Rehearing Denied Nov. 22, 1928. Hearing Granted by Supreme Court Dec. 20, 1928.

1. Pleading 🔑214(2)—Demurrer to complaint admits truth of matters well pleaded in complaint.

Demurrer to complaint admits that matters well pleaded in the complaint are true.

2. Levees and flood control 🔑25—Term "tax," as used in Los Angeles County Flood Control Act, means "assessment" (Los Angeles County Flood Control Act, as amended).

Term "tax," as used in Los Angeles County Flood Control Act (St. 1915, p. 1502, as amended), means "assessment," which, in matters of taxation, refers to the process of listing persons and property to be taxed, and of extending sums which are to be guide in apportionment of tax.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tax—Taxation; First, Second, and Third Series, Assessment (in Taxation).]

3. Statutes 🔑245—Authority to impose taxes must strictly comply with statute.

Authority to impose taxes for public purposes must be exercised strictly in manner laid down in statute, and taxing authorities must establish every fact necessary to maintenance of right to recovery of tax.

4. Statutes 🔑245—Taxing statute must be strictly construed in favor of taxpayer and against state.

Statute imposing taxes for public purposes must be strictly construed in favor of taxpayer and against the state.

5. Levees and flood control 🔑25—If flood control assessment does not strictly comply with statute, subsequent proceedings are nullities (Los Angeles County Flood Control Act, as amended).

If assessment, under Los Angeles County Flood Control Act (St. 1915, p. 1502, as amended), is not made in strict compliance with statute, no valid levy of tax may be imposed, and all subsequent proceedings are nullities.

6. Levees and flood control 🔑25—Assessment for flood control, made without notice to landowner, is void (Los Angeles County Flood Control Act; Const. art. 13, § 9; Pol. Code, §§ 3628, 3650, 3652, 3654, 3672–3677, 3681, 3714).

If board of county supervisors, acting as board of equalization, under Pol. Code, § 3681, do not give landowner notice of intention to make assessment against his property, under Los Angeles County Flood Control Act (St. 1915, p. 1502), as amended, assessment is void, under Const. art. 13, § 9, and Pol. Code, §§ 3628, 3650, 3652, 3654, 3672–3677, 3714.

7. Levees and flood control 🔑29—Suit to recover amount of invalid assessment for flood control, paid under protest, held not plain, speedy, and adequate remedy as respects right to injunction (Los Angeles County Flood Control Act, as amended; Pol. Code, §§ 3628, 3650, 3652, 3654, 3672–3677, 3681, 3714, 3804, 3819; Const. art. 13, § 9).

Where assessment, under Los Angeles County Flood Control Act (St. 1915, p. 1502, as amended), was invalid for failure to comply with requirements of such statute, and Pol. Code, §§ 3628, 3650, 3652, 3654, 3672–3677, 3681, 3714, and Const. art. 13, § 9, payment of tax under protest and suit to recover back amount so paid, under Pol. Code, §§ 3804, 3819, does not give a plain, speedy, and adequate

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★For opinion on rehearing, see 272 P. 359.

Hearing granted. 280 P. 366.

remedy, since taxpayer is not entitled to recover interest on amount so paid, and taxpayer is therefore entitled to injunction.

8. Levees and flood control 🔑26—City could not recover money paid on flood control assessments, on ground they were void, there being no compulsion to pay void assessments (Los Angeles County Flood Control Act, as amended; Pol. Code, §§ 3804, 3819; Const. art. 11, § 17).

If city officers paid out city money on void flood control assessments against city property, under Los Angeles County Flood Control Act (St. 1915, p. 1502, as amended), city could not recover money back, under Pol. Code, §§ 3804, 3819, on ground assessments were void, since city was not compelled to pay void assessments, and under Const. art. 11, § 17, city officers have no right to pay out city funds on void claims.

9. Injunction 🔑85(2)—Statute prohibiting injunction to prevent execution of statute for public benefit does not apply to void statute.

Civ. Code, § 3423, subd. 4, providing that injunction cannot be granted to prevent execution of a public statute by officers of the law for public benefit, has no application to enforcement of void statute.

10. Taxation 🔑608(1)—Statute prohibiting injunction against execution of public statute does not apply, with certain exception, to proceeding to enforce tax by officers who have failed to acquire jurisdiction.

Civ. Code, § 3423, subd. 4, providing that injunction cannot be granted to prevent execution of statute for public benefit, does not apply to proceeding by public officers under valid statute to enforce a tax, when they proceed in such manner that they fail to acquire jurisdiction to tax, unless it appears that deed which may be issued under tax sale will show on its face that proceedings are void.

11. Levees and flood control 🔑29—Injunction lies to prevent colorable lien of void special assessment attaching, where extrinsic evidence is necessary to defeat lien.

An injunction lies to prevent the colorable lien of a void special assessment attaching to lands in an assessment district, where it is necessary to resort to extrinsic evidence to defeat the lien of the assessment, otherwise, on its face and by virtue of presumption of regularity, valid.

12. Levees and flood control 🔑29—City held entitled to enjoin sale of its land for delinquent flood control assessment, where authorities failed to acquire jurisdiction to levy assessments (Los Angeles County Flood Control Act, as amended; Pol. Code, §§ 3628, 3650, 3652, 3654, 3672–3677, 3681, 3714, 3771).

Where assessor and supervisors proceeded irregularly to make assessment under Los Angeles County Flood Control Act (St. 1915, p. 1502, as amended), and Pol. Code §§ 3628, 3650, 3652, 3654, 3672–3677, 3681, 3714, and failed to acquire jurisdiction to levy assessments against city property, and further action on part of tax collector to sell city's property to state for the delinquent assessment, under Pol. Code, § 3771, would result in uselessly adding to cloud on city's title, by imposing thereon additional apparent burdens of penalties, interest, and costs of sale, and added threat of ultimate sale and deed by state, based on void foundation, city was entitled to injunctive relief.

Application for writ of prohibition by the Los Angeles County Flood Control District, to be directed to Superior Court of the State of California in and for the County of Los Angeles and others, in which the City of Pasadena intervenes. Writ denied.

Everett W. Mattoon, Co. Counsel, Roy W. Dowds, Flood Control Counsel, and W. Sumner Holbrook, Jr., Deputy Co. Counsel, all of Los Angeles, for petitioner.

R. C. McAllaster, City Atty., and Harold P. Huls, Deputy City Atty., both of Pasadena, for respondents and intervener.

Jess E. Stephens, City Atty., and Alan Patten, Deputy City Atty., both of Los Angeles, W. Turney Fox, City Atty., of Glendale, Chester L. Coffin, City Atty., of Santa Monica, and Nowland M. Reid, City Atty., and C. A. Windham, Chief Deputy City Atty., both of Long Beach, amici curiæ.

HAZLETT, Justice pro tem. This is an original application for a writ of prohibition to require respondent superior court of Los Angeles county to dissolve a restraining order issued pending an action commenced in that court on June 29, 1928, by the city of Pasadena against W. O. Welch, as tax collector of the county, and petitioner Los Angeles County flood control district, numbered 255803, and to prevent respondents from taking any further proceedings in the action.

From the act creating petitioner district and the allegations of the pleadings in this application admitted to be true, the following facts appear:

Petitioner Los Angeles County flood control district is a body corporate and politic, created by the act of the Legislature known as the "Los Angeles County Flood Control Act," approved June 12, 1915 (Stats. 1915, p. 1502), and operating under the act and the amendments thereto. The district comprises many thousands of acres of land in the county and territory of cities, to wit, that portion of Los Angeles county lying south of the north line of township 5 north, San Bernardino base, excepting therefrom the islands of the coast included in the county. Pursuant to the provisions of the act, bonds of the district were authorized in 1917 and in 1924, and on the first Monday in March, 1927, there were approximately $9,750,000 of the bonds issued and outstanding and in the hands of investors, and those bonds are liens upon the taxable lands of the district. The act provides that the board of supervisors of the county shall levy the taxes required to be imposed for the purposes of the district, that the officers of the county shall perform their various functions as officers ex officio of and for the district, and that the taxes shall be levied and collected at the same time and in the same manner and by the same officers as general taxes in the county.

On the first Tuesday after the first Monday in September, 1927, the board of supervisors levied an assessment upon all benefited taxable real property in the district to pay interest and installments of principal on the outstanding bonds, and an additional assessment to pay for maintaining, operating, extending and repairing the work or improvements of the district. The lands assessed include 242 parcels belonging to the city of Pasadena and used by the city for public purposes on and subsequent to the first day of March, 1927. The city did not pay the assessments, but permitted them to become delinquent, and the tax collector published the delinquent tax list, including a notice that the parcels would be sold to the state, as provided in section 3771 of the Political Code, if not paid, and prior to June 30, 1928, he mailed a like list and notice to the city.

Thereupon the city commenced the action in respondent court. In its complaint the city alleges that, notwithstanding protests made by the city, the officers of the county and district, more particularly the assessor, after August 1, 1927, and prior to December 1, 1927, the exact date being unknown to the city, proceeded to assess and to levy the assessments upon the lands of the city, and that by reason of their actions the city was deprived of the right to appear before the board of equalization and be heard as to the values of the parcels, but that the values were arbitrarily established by the assessor and the city was given no opportunity to have the values reviewed as provided by law; alleging the notice of delinquencies and proposed sales to the state for nonpayment of the taxes, penalties and costs; that if the sale is made the city will suffer irreparable loss, and will not have for five years after the sale an opportunity to contest the validity of the tax or sale, and that each year thereafter the county officers will impose additional taxes, and will claim and demand additional penalties and interest thereon; that the city has no plain, speedy, or adequate remedy at law, in that it may not pay the taxes for the reasons that they are invalid, that such payment would be a gift of public moneys of the city, and that application to the board of supervisors for cancellation of the assessment would be fruitless, as the board has refused to cancel any taxes or assessments upon any property in the same situation, basing its refusal upon the advice of the county counsel; and that, by the proposed sale, the city will be deprived of its property without due process of law. Wherefore the city prays that the purported assessments be declared null and void, that the defendants in the action be permanently enjoined from selling the parcels to the state, and from doing any other acts to collect the assessments, or to enforce the lien thereof, for an injunction pendente lite and for general relief.

On June 29, 1928, the superior court issued a temporary restraining order, prohibiting the tax collector from selling the parcels to the state, etc., until the further order of the court.

[1] The tax collector and the district filed a demurrer to the complaint on general grounds, as well as a motion to dissolve the restraining order, which motion the court heard and denied, but the demurrer has not been heard. The demurrer admits that the matters well pleaded in the complaint are true.

Petitioner contends that the sale restrained is a ministerial act to be performed by an officer of the law pursuant to public statute for public benefit; that injunctive relief is not open to impede the operation of revenue laws, unless the act sought to be restrained is of such a nature as to irreparably injure the property or throw a cloud upon it; that the assessments were validly levied upon the property of the city; that the city has an adequate remedy at law to determine the validity of assessments under the provisions of sections 3804 or 3819 or 3804a of the Political Code; and that petitioner district has no plain, speedy, or adequate remedy at law. Respondents demurred to the petition on general grounds, and also filed an answer thereto. They contend that the assessments and the levy thereof on the city's lands are void.

It fairly appears from the allegations of the complaint of the city that no assessment of the city's lands was made until some time between the 1st day of August and the 1st day of December, 1927. The petition of the district shows that the assessments were levied by the board of supervisors on the first Tuesday after the first Monday in September. The question is squarely presented whether the assessment and levy are valid and enforceable. The procedure required to be followed by the assessor and the board is laid down in sections 3628, 3650, 3652, 3654, 3672 to 3677, inclusive, 3681, and 3714 of the Political Code.

Section 3628 provides that the assessor must, between the first Monday in March and the first Monday in July of each year, "ascertain the names of all taxable inhabitants, and all the property in his county subject to taxation, except such as is required to be assessed by the state board of equalization and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was, at twelve o'clock meridian of the first Monday in March next preceding. * * *"

Section 3650 provides that the assessor must prepare an assessment book with appropriate headings, in which must be listed all property within the county, and must show the name, if known, of the person to whom the property is assessed, the descriptions of the lands assessed, the cash value of all real estate and the total value of all property.

Section 3652 provides that on or before the first Monday in July of each year the assessor must complete his assessment book, and section 3654 provides that as soon as the assessment book is completed it must be delivered to the clerk of the board of supervisors, who must give notice by publication thereof of the time the board will meet to equalize the assessments, and that after the board of equalization has completed its labors the book must be returned to the assessor's office.

Section 3672 provides that the board must meet on the first Monday of July in each year to examine the assessment book and equalize the assessment of property in the county, and must continue in session for that purpose from time to time until the business of equalizing is disposed of, but not later than the third Monday in July.

Section 3681 provides that:

> "During the session of the board, it may direct the assessor to assess any taxable property that has escaped assessment, or to add to the amount, number, or quantity of property, when a false or incomplete list has been rendered; and to make and enter new assessments * * *; but the clerk must notify all persons interested, by letter deposited in the post office or express, postpaid, and addressed to the person interested, at least five days before action taken, of the day fixed when the matter will be investigated."

Section 3714 (as in effect in 1927 [St. 1927, p. 721]) provides that:

> "The board of supervisors of each county must on the first Tuesday after the first Monday of September of each year, fix the rate of county taxes, designating the number of cents levied for each fund on each one hundred dollars of property, and must levy the state and county taxes upon the taxable property in the county. * * *"

[2] The term "tax," as used in the Los Angeles County Flood Control Act means "assessment." Los Angeles County Flood Control Dist. v. Hamilton, 177 Cal. 119, 128, 169 P. 1028. The word "assessment," in matters of taxation, refers to the process of listing the persons and property to be taxed, and of extending the sums which are to be the guide in an apportionment of the tax between them. Bruschi v. Cooper, 30 Cal. App. 682, 697, 159 P. 728, 734.

If the lands of the city were not exempt from the assessments, it was the duty of the assessor to assess them and to make the assessments prior to the first Monday in July, 1927; and, as the lands were not then assessed, the board of supervisors, acting as a board of equalization, had the right under section 3681, at any time between the first and third Mondays in July, to order the assessor to assess them as taxable property which had escaped assessment. From the facts pleaded and admitted, it appears that the board took no such action before the 1st day of August. We might assume that the board acted within 20 days after the third Monday in August, which extended time could have been granted the board by the state board of equalization under section 3705 of the Political Code, as under like circumstances was assumed in Buswell v. Supervisors, etc., 116 Cal. 351, 354, 48 P. 226, were it not for the fact that notice of the intended action by the board was a jurisdictional step in the matter.

It was the duty of the clerk of the board of supervisors, as provided in section 3681, to give the city, as the interested party, notice by letter at least five days before action taken by the board of the day fixed when the matter of ordering the assessments would be acted upon and the order to assess made. Huntley v. Board of Trustees, 165 Cal. 298, 304, 131 P. 859. From the facts well pleaded in the city's complaint it appears that no such notice was given, but nevertheless at some time after the 1st day of August the assessor assessed the lands and the board levied the assessments complained of. It does appear, however, that prior to the time when the assessments were made the city protested, presumably to the assessor, against *any* assessment of its lands, but the city was given no opportunity to be heard by the board *at a time fixed by the board for considering any proposed assessment of the city's lands*, or to make any showing or protest against the values that might be placed upon the lands for the purposes of the assessments, as the city had the right to do pursuant to the provisions of sections 3673 to 3677, inclusive, and 3681 of the Political Code. Therefore the city had no opportunity to have the values fixed reviewed.

[3-5] The authority to impose taxes upon persons or property for public purposes must be exercised strictly in the manner laid down in the statutes, and all laws having this object are to be strictly construed in favor of the taxpayer as against the state. The taxing authorities must establish every fact essential to the maintenance of the right of recovery of the tax. In this sense the jurisdiction of the board of supervisors and the assessor extends only to their right to act in the manner provided by law (Estate of Potter, 188 Cal. 55, 64, 204 P. 826; Imperial Land Co. v. Imperial Irrigation Dist., 173 Cal. 660, 664, 161 P. 113; Birch v. Board of Supervisors, 191 Cal. 235, 237, 215 P. 903), and if the assessment is not so made, no valid levy of the tax

may be imposed and all subsequent proceedings are nullities (Wright v. Fox, 150 Cal. 680, 89 P. 832; Carter v. Osborn, 150 Cal. 620, 623, 89 P. 608; Savings & Loan Soc. v. San Francisco, 146 Cal. 673, 676, 80 P. 1086; Dranga v. Rowe, 127 Cal. 506, 508, 59 P. 944).

[6] A taxpayer is entitled to notice of the meetings of the board of equalization at which his taxes may be increased, an assessment arbitrarily made by the assessor is void, and the taxpayer cannot be deprived of an opportunity of appearing before the board to contest the amount assessed against him and to have the value fixed reduced. His right to such notice is determined by section 9 of article 13 of the state Constitution, as well as by the statutes above referred to, and if the notice is not given him the attempt to tax his property is abortive, the assessment and tax are in violation of the mandate of the Constitution and are void. People v. Pittsburg R. R. Co., 67 Cal. 625, 626, 8 P. 381. See, also, section 3673, Pol. Code.

For the reasons stated, it appears from the admitted allegations of the city's complaint that the assessments and levy complained of were made arbitrarily and are void.

[7] Payment of the tax under protest and suit to recover back the amount as provided in sections 3804 and 3819 of the Political Code do not constitute a plain, speedy, or adequate remedy, for the reason that the taxpayer is not entitled to recover interest on the amount paid. Birch v. Board of Supervisors, supra; Hopkins, Assessor, v. Southern California Telephone Co., 275 U. S. 393, 48 S. Ct. 180, 72 L. Ed. 329. It certainly would be useless and unreasonable for the court to adjudge a tax invalid and then to remit the taxpayer plaintiff to the pursuit of statutory remedies, particularly when all subsequent proceedings of the taxing and tax collecting authorities would necessarily be based upon a foundation decreed to be void. No matter what remedies are allowed by statute, it would come back to the proposition that the taxpayers should be relieved from the payment of a void tax. Spring Valley Water Co. v. Planer, Tax Collector (Cal. App.) 263 P. 323. See, also, Hopkins v. Southern California Telephone Co., supra.

[8] City officers have no right to pay out moneys of the city upon a void claim (section 17, art. 11, Const.); and if in this matter the officers of the city of Pasadena had used the money of the city to pay the assessments as provided in sections 3804 and 3819 of the Political Code, the city could not have recovered the money back upon the ground that the assessments were void, for the reason that no compulsion to pay the void assessments existed. Spencer v. Los Angeles, 180 Cal. 103, 107, 179 P. 163.

[9, 10] The provision of subdivision 4 of section 3423 of the Civil Code, to wit, that "an injunction cannot be granted * * * (4) to prevent the execution of a public statute, by officers of the law, for the public benefit," rests on the premise that the statute in question is a valid exercise of legislative power; but, if the statute is void, subdivision 4 of section 3423 has no application, and does not prohibit the issuance of the injunction. Livermore v. Waite, 102 Cal. 113, 36 P. 424, 25 L. R. A. 312; Wheeler v. Herbert, 152 Cal. 224, 228, 92 P. 353; Reclamation Dist. v. Superior Court, 171 Cal. 672, 676, 154 P. 845. Neither do the provisions quoted from section 3423 have any application to a proceeding by public officers under a valid statute to impose or enforce a tax when they proceed in such manner that they fail to acquire jurisdiction to tax, unless it appears that the deed which may be issued pursuant to the tax sale will show on its face that the proceedings are void. In the latter case injunction to stay the hands of the officers does not lie, as the deed would not constitute a cloud upon the title. Las Animas, etc., Land Co. v. Preciado, Tax Collector, 167 Cal. 580, 584, 140 P. 239; Pierce v. City of Los Angeles, 159 Cal. 516, 519, 114 P. 818; Woollacott v. Meekin, 151 Cal. 701, 707, 91 P. 612; Pasadena Park Imp. Co. v. Lelande, 175 Cal. 511, 521, 166 P. 341; Title Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199.

[11] An injunction lies to prevent the colorable lien of a void special assessment attaching to lands in an assessment district (Pasadena Park Imp. Co. v. Lelande, supra; Las Animas, etc., Land Co. v. Preciado, supra), where it is necessary to resort to extrinsic evidence to defeat the lien of the assessment otherwise, on its face and by virtue of the presumption of its regularity, valid. (Owens v. Dudley, 162 Cal. 422, 427, 122 P. 1087).

Petitioner lays great stress upon the reasoning in the case of Crocker v. Scott, 149 Cal. 575, 87 P. 102, in which the court announced that to justify the remedy of injunction to stay the hands of the tax collector in selling the lands to the state on account of the delinquency of taxes already assessed and levied it must appear that injunction is necessary to protect the rights of the landowner, or *that the enforcement of the tax will throw a cloud upon the title of his lands*, or lead to a multiplicity of suits, and that he has no adequate remedy at law. The court further held in that case that none of the acts complained of could have any such effect for the reasons that the sale to the state, making the entry "sold to the state" and issuing a certificate of delinquent tax sale, added nothing to the validity of the tax lien, but only had the effect of preserving the rights of the state and of starting the running of the period of five years within which redemption might be effected, at the expiration of which a deed might be issued to the state; also, that the taxpayer has complete protection against the creation of a cloud upon his title by enjoining the issuance of the deed, and that equity will not interpose to the extent of preventing the performance of those preliminary acts by the tax collector, the failure to perform which may result in prejudice to the state in the enforcement of its revenue laws.

In the case of Pierce v. City of Los Angeles, supra, it appeared that the board of public works of the city of Los Angeles was enjoined from imposing any penalty or making any sale on account of the failure of property owners to pay certain assessments declared against their lands for public improvements. Upon appeal the Supreme Court held that such proceedings are in invitum, and the very essence of the litigation is whether or not the steps necessary to acquire jurisdiction were followed by the board, and that the court must alternately determine the sufficiency or insufficiency of the proceedings by virtue of which the city and the board claimed jurisdiction to assess the costs of the improvement and to do the other acts contemplated by them; also, that a court of equity, in such a case, may stay the hands of the officers until it is finally and judicially determined whether or not they are seeking to deprive citizens of property without due process of law.

The holding in Crocker v. Scott, supra, was construed in the case of Las Animas, etc., Land Co. v. Preciado, supra, in which the plaintiff sought to enjoin the defendant from declaring delinquent certain void school taxes and from selling the taxed lands to the state. The court held that the taxing officers acted beyond the scope of their jurisdiction, *that the tax lien was a cloud upon the plaintiff's title*, that the deed, if issued, would not show that the assessment was void, that equitable consideration of a disturbance of revenues was absent, in that the assessment was not made by a competent authority which had irregularly exercised its power, and that the holding in Crocker v. Scott upon the facts in that case was correct.

However, in Crocker v. Scott, the trial court issued an injunction pendente lite upon verified complaint, and on appeal from that action the Supreme Court held that the complaint showed that the taxing authorities had fully complied with the law, that the tax was legally assessed and that the facts alleged were insufficient to support the injunction, while in the Las Animas and Pierce Cases it was held that *the taxing officers acted without having acquired jurisdiction*, and the injunctions were properly issued.

[12] In the proceeding before us, it appearing that the assessor and the board of supervisors proceeded not merely in an irregular manner but that *they failed to acquire jurisdiction to assess or levy the assessments*, and that further action on the part of the tax collector to sell the lands of the city to the state would result in uselessly adding to the cloud upon the title to the lands by imposing thereon additional apparent burdens of penalties, interest, and costs of sale, and the added threat of ultimate sale and deed by the state, based upon a void foundation, and that the city should not be compelled to suffer the cloud to remain on the title to its lands for five years (Spring Valley Water Co. v. Planer, supra; Hopkins v. Southern Calif. Telephone Co., supra; Pasadena Park Imp. Co. v. Lelande, supra; Pierce v. Los Angeles, supra; Las Animas, etc., Land Co. v. Preciado, supra), there is no reason why the court should not now exercise its equitable power.

Other contentions are made by the parties, but as the points above discussed arise only upon demurrer, and dispose of petitioner's application, we do not feel it necessary to consider them, but leave them for determination in the first instance by the trial court, should the district answer the complaint and raise appropriate issues of facts.

The writ is denied.

We concur: WORKS, P. J.; THOMPSON, J.

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94 Cal. App. 589

Guardianship of BRUEGGER.

PATTERSON v. BRUEGGER.

(Civ. 6095.)

District Court of Appeal, Second District, Division 2, California. Oct. 30, 1928.

1. Guardian and ward ⟹13(4)—Evidence held to support judgment dismissing maternal grandmother's petition for appointment as guardian, on ground that child's father had abandoned her, and was not fit to have her custody.

Evidence *held* sufficient to support judgment denying and dismissing maternal grandmother's petition for appointment as general guardian of minor child, on ground that father had legally abandoned her, and was not fit and proper person to have her custody.

2. Parent and child ⟹17(2)—To "abandon" child, father must manifest intent to sever parental relationship.

In order to constitute "abandonment" of minor child by father, there must be an actual intent manifested to sever the parental relationship.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second and Third Series, Abandon; Abandonment.]

3. Parent and child ⟹3(1)—Parent need not compensate relative for voluntary support of minor child, in absence of agreement.

A parent is not obliged to compensate a relative for voluntary support of his minor child, in absence of an agreement for compensation.

4. Parent and child ⚷2(3)—Parent's fitness for child's custody is controlling factor in guardianship proceeding by another, in view of policy to promote parental love and responsibility.

It being the policy of the law to awaken, encourage, and promote parental love and responsibility, rather than to interfere with, or discourage, love of offspring, fitness of parent for custody of minor child at time of guardianship proceeding by another is controlling factor.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Petition by Ida Jane Patterson for appointment as general guardian of Agnes Patterson Bruegger, a minor, contested by Clinton Bruegger. From a judgment denying and dismissing the petition, petitioner appeals. Affirmed.

See, also, 267 P. 101.

A. T. Folsom, of Los Angeles, for appellant.

Rollin L. McNitt, of Los Angeles, for respondent.

THOMPSON, J. This is an appeal from a judgment denying and dismissing a petition for the appointment of appellant as general guardian of Agnes Patterson Bruegger, a minor, and the daughter of Clinton Bruegger, the respondent. There were three proceedings pending in the trial court all having to do with the custody of this child, who at the time of trial was about seven years of age. One was a petition on the part of the appellant here to have it declared that her grandchild was abandoned by her father, and free from his care and control; another was a habeas corpus proceeding instituted by the father against the maternal grandparents; and the third was the proceeding which gives rise to this appeal. The three proceedings were tried at the same time; it having been stipulated that all of the testimony might be considered as testimony in the guardianship proceeding. By reason of the failure of counsel to agree to all the facts or to direct our attention to those portions of the transcript where we might find the testimony referred to by them in their briefs, we have assumed the burden of reading the entire testimony, a burden which counsel ought not to expect us to undertake, and which, except for the appealing character of this case, we might not have been willing to shoulder. This observation is inserted, not only as a warning, but also with the hope that counsel in the future will have regard for the number of cases with which the appellate tribunals are inundated, and endeavor to perform those tasks with which they are properly chargeable in such a way as to lighten the labors and save the time of those whose duty it is to review the records.

[1] The appellant advances two reasons why the judgment should be reversed, the first of which is that the testimony introduced in the trial court was sufficient to prove a legal abandonment, and the other that the testimony was sufficient to prove that the father was not a fit and proper person to have the custody of the child. Acting upon the assumption that appellant intended to state that the evidence was insufficient to support the opposite conclusions, we have culled from the record testimony which amply supports the result arrived at by the trial court.

Mrs. Bruegger is the second wife of the respondent. At the time of the death of his first wife, some time in 1920, the respondent and his daughter were living with the appellant and her husband. They continued to live there until June, 1921. Respondent married the present Mrs. Bruegger July 3, 1921, and built himself a modest yet substantial home in Eagle Rock, which has been very nicely furnished, and where the respondent has continued to reside. Agnes, being of very tender years, was allowed to temporarily remain with her maternal grandparents, but, when the respondent attempted to obtain the custody and control of his child, he was obliged, by reason of the refusal of the grandparents to surrender her, to secure his relief through a proceeding in habeas corpus, the petition for which writ was filed on December 30, 1922. Apparently affairs moved along well enough until October 29, 1925, at which time friction developed between Mr. and Mrs. Bruegger, and they both sought a divorce. During this temporary separation, which was healed by a reconciliation about five weeks later, since which time the parties themselves and neighbors testify they have lived together very happily, and on November 2, 1925, without the knowledge or consent of respondent, Mrs. Bruegger redelivered the child, as she says, for "just a little while," to the appellant. However, after the reconciliation, and on December 26, 1925, the respondent and his wife went to the home of appellant, and, when they attempted to secure possession of the daughter, the appellant resisted, and respondent was arrested by police officers of El Segundo called for that purpose, and charged with attempted kidnapping. Mr. and Mrs. Bruegger testify that they were warned by the city recorder and officers to stay out of El Segundo. They also testify that on several occasions when they drove to El Segundo, for the purpose of catching a glimpse of respondent's child, their automobile would be followed by one or two motorcycle officers until they were out of town; that at one time they drove by and saw the girl tied by a rope to the back porch. They also testify that they attempted on several occasions to telephone to Mrs. Patterson, but that she would invariably hang up the telephone as soon as she recognized the voice of either Mr. or Mrs. Bruegger. Testimony also appears in the record to the effect that, when Agnes was placed in the school at El Segundo by the appellant, she warned the principal not to permit any one to see the child except the grandparents. Shortly after one year from December 26, 1925, had elapsed, the appellant here sought the permission of respondent to the adoption of Agnes by herself and her husband, she confessing on the stand to some knowledge of the law concerning abandonment during the time she retained possession of the child. The father refused his permission, and the various proceedings were instituted. It should also be added that Mr. and Mrs. Bruegger are financially able to care for the child, and there appears no present reason why they are unfit.

[2-4] It cannot be doubted from the foregoing résumé of testimony supporting the judgment that it is amply sufficient, especially when we bear in mind that, in order to constitute abandonment there must be an actual intent manifest to sever the parental relationship (In re Snowball, 156 Cal. 240, 104 P. 444), and also that a parent is not obliged to compensate a relative for the voluntary support of his child, in the absence of an agreement for compensation (Matter of Forrester, 162 Cal. 493, 123 P. 283). It should also be noted that it is not the policy of the law to interfere with, or discourage, the love of offspring, but rather to awaken, encourage, and promote parental love and responsibility. Guardianship of Michels, 170 Cal. 339, 149 P. 587. With such object in view, it is apparent that the fitness of the parent at the time of the proceeding is, and should be, the controlling factor.

Having before us these principles of law and humanity, it is obvious that the judgment should not be disturbed.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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94 Cal. App. 533

CONWAY v. CITRUS BELT LAND CO. et al. (two cases). (Civ. 5821.)★

District Court of Appeal. Second District, Division 1, California. Oct. 27, 1928.

Rehearing Denied Nov. 19, 1928. Hearing Denied by Supreme Court Dec. 24, 1928.

1. Appeal and error 🔑1010(1)—Trial court's finding, if supported by any substantial evidence, cannot be disturbed on appeal.

If finding of trial court is supported by any substantial evidence, it cannot be disturbed on appeal.

2. Corporations 🔑1—Generally, each corporation must be considered a separate entity, but equity may treat corporation as one or more corporations or as private individuals.

It is a general rule that each corporation must be considered as a separate entity, but equity has power to, and in the administration of justice it may, decree that situation of interested parties demands that fictitious and assumed corporate personalties of such corporation be regarded as one or more corporations, or even as private individuals of which such corporations may be composed.

3. Corporations 🔑575—Neither corporation nor stockholder who voted for refinancing were entitled to relief against distribution of stock of new corporation in carrying out refinancing.

Where assets of corporation were transferred to new corporation in order that its assets might be saved for stockholders, and part of stock of new corporation was distributed pro rata among shareholders of old corporation, part sold for cash to pay debts, and part given to one for his services in carrying out transaction, *held* that neither old corporation nor its stockholder who had notice of facts and who voted for resolutions authorizing directors to refinance corporation were entitled to relief therefrom in actions commenced long after transaction was completed.

4. Appeal and error 🔑169—Appellate court will not consider issue not presented by pleadings.

Issue not presented by pleadings cannot be considered on appeal.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Two separate actions by Adrian C. Conway against the Citrus Belt Land Company and others, which were consolidated for trial. From the judgment, plaintiff appeals. Affirmed.

E. C. Pyle and John M. Thomas, Jr., both of Los Angeles, for appellant.

Scarborough & Bowen, of Los Angeles, for respondents.

HOUSER, J. Broadly stated, the underlying and outstanding facts appertaining to the litigation upon which the appeal herein is predicated are as follows: The Citrus Belt Land Company, a corporation with an authorized capital stock of $250,000, was the owner of a tract of land approximating 5,000 acres which it proposed to improve, subdivide, and sell. In attempting to carry out such program the corporation became financially involved to the extent of about $293,000 in unpaid and overdue debts—the greater part of which being represented by bonded indebtedness and mortgages. While if given plenty of time to work out of its difficulties the corporation probably was financially sound and responsible, in the sense that it was unable to meet its obligations as they became due the corporation was insolvent. Section 3450, Civ. Code. Its various creditors were pressing for payment of the respective sums of money due them and were threatening foreclosure proceedings. After the corporation had exhausted all its credit, means and sources of

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★Rehearing denied. Hearing denied by Supreme Court.

raising money for the discharge of its obligations, and after each of the directors of the corporation had likewise exhausted his personal ability to refinance the corporation, through the efforts of one Rex B. Clark a proposition was presented by a bond company to the corporation to the effect that if the corporation would change its corporate name, increase its authorized capital stock to the sum of $300,000, and issue bonds to the amount of its new capitalization, or, as an alternative, organize a new corporation with the identical capitalization of $300,000, which would take over the assets of the old corporation, for which stock in the new corporation would be issued in payment, and have the new corporation issue bonds in the sum of $300,000, the bond company would buy the bonds at a discount, and thus funds would be made available for the immediate relief of the financial difficulties of the corporation. For reasons which seemed sufficient, and especially for the purpose of expediting the desired ultimate result, the latter course was selected, with the result that a corporation known as the North Corona Land Company was organized, which, with the active assistance and co-operation of the old company (Citrus Belt Land Company), proceeded to and did carry out the plan hereinbefore outlined. In so doing, 1225 shares of the capital stock of the North Corona Company were issued to the Citrus Belt Land Company in payment of its assets, and which shares of stock in the North Corona Company, in turn, were distributed by the Citrus Belt Land Company to its stockholders in the proportion which the shares of stock owned by each stockholder therein bore to the total number of outstanding shares of the Citrus Belt Land Company.

Shortly prior to the time when the negotiations were concluded, looking to the accomplishment of the refinancing of the affairs of the Citrus Belt Land Company, an agreement had been entered into between it and Clark by which the latter was to become the purchaser from the former of 1204½ shares of the unissued and treasury stock of the Citrus Belt Land Company at a price of $50 per share. By reason of the foregoing facts, so far as the Citrus Belt Land Company was concerned, the execution of that agreement became impracticable; but, as a solution of the situation, the North Corona Company was substituted in the place of the Citrus Belt Land Company and issued to Clark its certificate of stock for the 1204½ shares of its capital stock in the place and stead of that number of shares which, according to the aforesaid agreement, should have been issued by the Citrus Belt Land Company. In addition thereto, as compensation for services performed by Clark in refinancing the Citrus Belt Land Company as aforesaid, the North Corona Company issued to Clark 70½ shares of its capital stock. Thereupon each of the two actions which are the foundation for this appeal was commenced. The main ultimate purpose of each of the actions was to have declared the illegality of the distribution of the shares of the capital stock of the North Corona Company among the stockholders of the Citrus Belt Land Company, to the end that the latter company and each of its directors would be held liable for such assumed illegal act in accordance with the provisions of section 309 of the Civil Code. In the second action, however, additional damages were sought as against the corporations and each of their directors for their alleged unauthorized and illegal acts in selling the 1204½ shares of the capital stock of the North Corona Company at $50 per share, as well as for transferring the 70½ shares thereof to Clark for services performed by him. By stipulation entered into by the respective parties, and on order made by the trial court, the two actions were consolidated.

Based upon voluminous findings of fact, the lower court ordered judgment for the defendants. On the appeal therefrom appellant presents numerous specifications of error, which, among other things, include attacks upon various findings of fact upon the ground that the evidence was insufficient to support the same. To herein set forth the several findings to which objection is made, as well as the evidence bearing thereon introduced at the trial of the action, would entail no inconsiderable labor and occupy a space not to be justified by any novelty of legal principle involved.

[1] It is a well-settled rule that on appeal, if an attacked finding be supported by any substantial evidence, it cannot be disturbed. As to those findings to which appellant has directed attention, it may suffice to state that, with such rule in mind, after a careful examination of each of the findings of which complaint is made, together with the transcript of the evidence, this court is convinced that the contention of appellant with reference to the lack of substantial evidence in its support cannot be sustained.

The contention on the part of the appellant to the effect that the distribution by the Citrus Belt Land Company among its stockholders of the 1225 shares of the stock of the North Corona Company was in violation of the provisions of section 309 of the Civil Code, is based upon the assumption that the two corporations were separate and distinct entities, and that the transfer by the Citrus Belt Land Company of its assets to the North Corona Company amounted to a sale between the two corporations, each of which was wholly disconnected from the other and dealing at arm's length one toward the other. With reference to the relations existing between the two corporations, the general findings by the trial court in substance were that the plan hereinbefore outlined was adopted solely for the purpose of refinancing the affairs of the Citrus Belt Land Company in order that its assets might be saved for the benefit of its stockholders. Specifically, the trial court found:

> "That thereafter it was deemed by the parties best to carry out said plan through a corporation under a new name, instead of through the old corporation, and thereupon the Citrus Belt Land Company, for the purpose of performing and carrying out said accepted plan of refinancing its affairs and saving its assets, and for no other purpose, caused to be incorporated and organized in January, 1921, the defendant North Corona Land Company, and in February, 1921, the Citrus Belt Land Company transferred and delivered to the North Corona Land Company all its lands, personal property and other assets, including its office, books, etc., and thereafter all business was transacted in the name of the North Corona Land Company who had the same directors and officers as the old company, except defendant Rex B. Clark became a director and its president. * * *
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> "That the North Corona Land Company was not so organized as a new, independent, or outside corporation, nor was the transfer to it by the Citrus Belt Land Company of its assets a sale of such assets, nor was the distribution of the North Corona Land Company stock by the Citrus Belt Land Company among its stockholders an unlawful distribution of corporate assets among its stockholders in violation of section 309, Civil Code.
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> "But the court finds that the North Corona Land Company was only a reorganization and continuation of the Citrus Belt Land Company under a new name, and that it was so organized, the assets transferred to it, and its stock distributed to the stockholders of the Citrus Belt Land Company for the sole purpose of effecting and carrying out the plan of refinancing the affairs of the Citrus Belt Land Company in accordance with its agreement with William R. Staats Company, to pay its debt, and save its assets for the benefit of its creditors and stockholders, and that all of said proceedings and acts did result in saving said assets from loss by foreclosure and sale, and in preserving them for the benefit of the creditors and stockholders of Citrus Belt Land Company and no one was injured thereby.
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> "That all said proceedings were authorized by the resolutions adopted at meetings of stockholders of Citrus Belt Land Company held May 26, 1919, and January 15, 1920, referred to above in finding 'Fourth,' and by those resolutions plaintiff authorized, consented to and approved all said acts and proceedings of the board of directors and refinancing said corporation."

[2] Considered broadly and without reference to conditions surrounding the organization of any two or more corporations, it is a general rule that each of such bodies must be considered as a separate entity. But equity has the power to, and in the administration of justice it may, decree that the situation of interested parties demands that the fictitious and assumed corporate personalties of such corporations be regarded either as one or more corporations, or even as private individuals of which such corporations may be composed. Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 696, 697, 227 P. 723. And the rule has had its application not only in cases where the rights of creditors were involved, but as well in other cases where the rights of stockholders among themselves were presented for the consideration of the court. Chater v. San Francisco Sugar Refining Co., 19 Cal. 220; Shorb v. Beaudry, 56 Cal. 446; Cornell v. Corbin, 64 Cal. 197, 30 P. 629; Kohl v. Lilienthal, 81 Cal. 378, 20 P. 401, 22 P. 689, 6 L. R. A. 520; Hunt v. Davis, 135 Cal. 31, 66 P. 957; Wise Realty Co. v. Stewart, 169 Cal. 176, 146 P. 534.

In the course of the several opinions in the authorities to which attention has been directed such expressions as the following may be found:

> "The truth is, the corporation, under our system, following such an agreement would be the mere agency of the associates created for the sake of convenience in carrying out the agreement, as between those who made the bargain—the different characters or forms in which or by which the bargain was made, and the order in which the several parts of it were executed, makes no substantial difference in the obligation." Chater v. San Francisco Sugar Refining Co., 19 Cal. 220, 247.
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> "Substantial justice can be administered in this case by treating the parties in the light of their agreements between themselves, independently of their incorporation, and in no other way that we have been able to discover can this be done." Shorb v. Beaudry, 56 Cal. 446, 450.
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> "'The corporation was formed as a mere agency for more conveniently carrying out the agreements' of the parties; and the relation sustained by it to them is 'substantially, if not technically, that of a trustee.' And, as in the case cited, it must be held that 'substantial justice can be administered in this case by treating the parties in the light of the agreements between themselves, independently of their incorporation, and in no other way.'" Hunt v. Davis, 135 Cal. 31, 34, 66 P. 957, 958.
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> "The complete answer to all of these matters is found in the familiar principle that equity will look through form to substance, and so looking, it is beyond controversy that these corporations were but the mere instrumentalities through which the associates acted. If the transactions between the associates themselves were fair, then, as there are no rights of independent and nonparticipating stockholders involved, the corporate irregularities, however serious, mean nothing. If it were necessary equity indeed would compel the corporations themselves so to adjust, remodel, and reform their transactions as to give them a legal validity commensurate with their equitable validity." Wise Realty Co. v. Stewart, 169 Cal. 176, 185, 146 P. 534, 538.

[3] In the instant case, it is obvious that the course adopted and pursued throughout the transaction and which saw its culmination in the allotment and distribution by the Citrus Belt Land Company of the 1225 shares

of stock of the North Corona Company was nothing other than the original plan of the stockholders and directors of the Citrus Belt Land Company. If the entire assets of that company were to be taken over by the North Corona Company, in the circumstances, the only way by which the respective stockholders of the Citrus Belt Land Company could be compensated would be by distributing to them shares of stock in the North Corona Company in the proportion which their shares in the Citrus Belt Land Company bore to its outstanding stock. Neither the Citrus Belt Land Company as a corporation, nor any of its stockholders (other than plaintiff), appears to be in anywise dissatisfied with the manner in which the refinancing of the Citrus Belt Land Company was accomplished; indeed, each of them has accepted his shares of stock in the new corporation and ratified the entire transaction. That plaintiff received his full and proper allowance is undisputed, and on that score he has no just cause of complaint. Furthermore, the evidence conclusively shows that at the outset, at a stockholders' meeting of the Citrus Belt Land Company, on which occasion the financial distress of the corporation was the principal subject of discussion, plaintiff personally voted in favor of a resolution adopted at such meeting whereby the board of directors of the corporation was authorized to "refinance the corporation upon such terms and in such manner as they may in their best judgment see fit, and to sell the property in whole or in part at such prices and on such terms as they may be able to make." And again, at a later date, under similar conditions, plaintiff himself offered and moved the adoption of the following resolution, which was unanimously adopted, to wit:

> "Resolved that the directors of this company be authorized and instructed to take such action as they deem best to raise the necessary moneys to pay the interest on the bonds and other current indebtedness by assessment of the stock or such other manner as they may deem expedient."

Considering the facts (among others) that long before either of the actions herein was commenced, the transaction of which complaint is made was entirely completed; that, as found by the trial court, plaintiff had either actual or constructive notice of each of the several steps leading up to the distribution of the shares of stock of which he complains; that plaintiff voted in favor of the several resolutions authorizing the board of directors of the Citrus Belt Land Company to "refinance the corporation upon such terms and in such manner as they may in their best judgment see fit"—it is clear that neither the Citrus Belt Land Company as a corporation, nor plaintiff, either as a stockholder, or in his individual capacity, is entitled to any relief.

With respect to the sale to Clark of the 1204½ shares of stock, it appears from the evidence, and is so found by the trial court, that several months before the Citrus Belt Land Company was reorganized and refinanced, at a stockholders' meeting at which 1127½ shares of the 1295½ shares then outstanding were represented, "a resolution was adopted by the vote of all stock present, except plaintiff voted 'no,' and 104 shares not voting, authorizing the board of directors to sell or otherwise dispose of all the unissued shares of stock in the treasury of the company at such price and on such terms as may seem best to said board." "That thereafter, as above found, it was determined to reorganize the company by the organization of a new corporation, which should take over the assets and issue the new bonded indebtedness, and after said North Corona Land Company had been formed and issued its bonded indebtedness, it was agreed that said Clark would take 1204½ shares of said North Corona Land Company in place of the shares of the Citrus Belt Land Company which had become of no avail; that said Clark did pay, as agreed, the sum of $50 per share, aggregating $60,225, which was applied on the debts of said Citrus Belt Land Company, and said Clark advanced said money before it became due to prevent the creditors from enforcing their claims by foreclosure of their liens, and to preserve the assets from loss."

As to the 70½ shares which were transferred to Clark in payment of his services, the trial court found:

> "That the Citrus Belt Land Company, out of the shares of North Corona Land Company stock received by it, transferred to Rex B. Clark 70½ shares in payment of his services in aiding its officers to induce its creditors to defer enforcement of their claims, and to refinance the corporation by a plan which saved its assets from sale and loss. The court finds that said Clark did render such services, and that said stock was not an unreasonble compensation therefor."

[4] Plaintiff's contention that no consideration was paid by Clark for the 1204½ shares is completely answered by the finding of the trial court to which reference has been had. Regarding the claim now made by appellant that the evidence was insufficient to support the finding in effect that the services rendered by Clark were of the reasonable value of the 70½ shares of stock which were transferred by the corporation in payment of such services, it is sufficient to say that no such issue was presented by the pleadings.

While many other points are suggested by appellant in his brief as a reason for a reversal of the judgment herein, on consideration thereof it appears that each of them is subsidiary to and dependent upon a decision in favor of the contentions made by him as affecting the several points which hereinbefore have received the attention of this court. It would follow that none of such suggestions requires consideration at this time.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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94 Cal. App. 549

LIST v. REPUBLIC BOND & MORTGAGE CO. (Civ. 6400.)

District Court of Appeal, First District, Division 2, California. Oct. 29, 1928.

1. Brokers 🔑58—Broker held not entitled to commission for procuring purchaser of stock on terms violating corporation's permit though he acted in good faith (Corporate Securities Act, § 14, as amended by St. 1925, p. 970, § 9).

Licensed broker employed by corporation to sell its stock on commission *held* not entitled to commission for procuring purchaser on terms prohibited by permit under which corporation was permitted to sell its stock in state, and which under Corporate Securities Act (St. 1917, p. 680) § 14, as amended by St. 1925, p. 970, § 9, constituted a felony, even though he was not aware of this fact when he brought suit for commissions.

2. Brokers 🔑86(4)—Evidence held not to sustain finding purchase of stock resulted from broker's efforts, so as to entitle broker to commission (Corporate Securities Act, § 12, and section 14, as amended by St. 1925, p. 970, § 9).

Evidence *held* insufficient to sustain any presumed finding that purchase of stock resulted from broker's efforts for which broker was entitled to commission, but showed that transaction was consummated by purchaser solely to recover property which he had deeded to corporation in making prior purchase which was illegal under Corporate Securities Act (St. 1917, p. 680) § 14, as amended by St. 1925, p. 970, § 9, and which property he feared he could not recover if he sued for return of property because of participation in unlawful transaction under section 12.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by K. H. List against the Republic Bond & Mortgage Company. Judgment for plaintiff, and defendant appeals. Reversed.

Treat, Bush & Ogden, of San Francisco, for appellant.

Louis Oneal and Maurice J. Rankin, both of San José, for respondent.

BUCK, Presiding Justice pro tem. Action by plaintiff, a licensed broker's agent, to recover from defendant corporation the sum of $16,000 claimed as commissions due plaintiff for services rendered defendant in sale of some of defendant's capital stock.

The trial was by the court without a jury and the court found that:

> "Within two years last past plaintiff performed and rendered services for defendant at the instance and request of defendant, which services were and are of the aggregate and reasonable value of $2,250, no part of which has been paid."

Judgment accordingly was rendered for plaintiff, and defendant appealed.

Defendant was incorporated under the laws of the state of Delaware, with an authorized capital stock of $5,000,000, for the "particular purpose of engaging in the brokerage business, handling bond and first mortgage issues particularly, operating at Santa Barbara and vicinity." Upon application to the state corporation department of the state of California, defendant, for the purpose of acquiring a working capital, was granted permission to sell and issue 25,000 shares of its preferred and 25,000 shares of its common stock in units of one of preferred and one of common, at and for the price of $125 per unit, "cash, lawful money of the United States," for the foregoing purposes "or in exchange for 40 per cent. in cash and the promissory note or notes of the purchaser payable on or before one year." For the purpose of facilitating these sales in 1924, one Mr. D. Binkhorst was appointed fiscal agent with power to sell stock and appoint agents for that purpose and receive as his compensation a commission of 20 per cent. on the sales. Later Mr. Binkhorst was elected president of the company, and Dr. J. Underwood Hall was appointed managing director, with offices in San Francisco. In January of 1925 the plaintiff was appointed to act as a sales broker for the company, and upon proper application was granted a license by the state corporation commission to act as such sales broker. In February of 1925, as the result of the services of the plaintiff as sales broker, Mr. Thomas H. B. Varney was induced to buy $5,000 worth of defendant's stock, and plaintiff received from the defendant the sum of $500, being the amount of his agreed commission for effecting such sale. Thereafter the plaintiff, with the knowledge and at the request of defendant, continued to solicit Varney to purchase more stock, and in the latter part of March plaintiff was informed that Varney had purchased $160,000 worth of defendant's stock and that the sale had been consummated at the offices of the company through the activities of the president, Binkhorst, and the managing director, Dr. Hall. Whereupon plaintiff made demand both upon Binkhorst and Dr. Hall for the amount of commissions which the company agreed to pay him in the event of his procuring purchasers of the company's stock. Plaintiff, however, failed to receive any satisfactory answer from either of these par-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

ties, and on May 11, 1925, commenced this action.

The evidence given by plaintiff shows that he had a clear understanding with the company that he was to receive 10 per cent. upon sales of stock effected by him, and his testimony further shows that it was he and he alone who first interested Varney in the purchase of stock, and that "but for" the plaintiff, Varney would never have become interested in the company. And the testimony further shows that up to the latter part of March plaintiff was constant in his efforts to sell to Varney stock in addition to the $5,000 worth that he had already sold him; furthermore, that plaintiff was, without doubt, acting in good faith in believing that Binkhorst and Dr. Hall had on behalf of the company, on or about March 19, 1925, effected a sale to Varney of $160,000 worth of stock, upon which he, the plaintiff, would be entitled to receive his commission of 10 per cent. But the evidence further shows that, as a matter of fact, no lawful sale of stock was at that time made. At the trial of the case it was conclusively shown that the terms upon which the sale was attempted to be made by Binkhorst and Dr. Hall were in violation of a penal statute of the state, enacted for the protection of corporations and the investing public. As already noted, the permit under which the corporation was permitted to sell its stock explicitly provided that the sales should be for cash or for 40 per cent. in cash and the balance in notes, secured by the purchased stock, and the permit further provided that the total commissions and all other expenses incurred in connection with the sale of shares "shall not exceed 20 per cent. of the amount of the selling price of each unit, provided that no part thereof shall be paid until 40 per cent. of the purchase price shall have been received by the company." And section 14 of the Corporate Securities Act of the state of California, as amended in 1925 (Stats. 1925, c. 447, p. 970), provides as follows:

> "Every officer, agent, or employee of any company, and every other person, who knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in nonconformity with a permit of the commissioner then in effect authorizing such issue, or contrary to the provisions of this act, * * * or who, directly or indirectly, knowingly applies, or causes or assists in causing to be applied, the proceeds, or any part thereof, from the sale of any security to any purpose contrary to the provisions of the permit authorizing the issue of such security, * * * in violation of any of the provisions of this act, sells or offers the same for sale, * * * or who, in any other respect, willfully violates or fails, omits, or neglects to obey, observe or comply with any order, permit, decision, demand, or requirement, or any part or provision thereof, of the commissioner under the provisions of this act, * * * is guilty of a public offense and shall be punished by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding two years, or by a fine not exceeding $5,000, or by both such fine and imprisonment."

[1] The evidence at the trial further shows that on or about March 19, 1925, there was issued and transferred to Varney 1,280 units of stock of the value of $160,000, but that the only consideration therefor received by the company, or intended at the time of the sale to be received by the company, was the sum of $10,000 in cash, and three pieces of real estate lying respectively in the counties of Santa Clara, Marin, and San Francisco, of the estimated value of $142,500, and the verbal promise on the part of Varney to pay $7,500. The transfer of the real estate was evidenced by deeds duly executed and recorded, and the cash was represented by the conversion of a loan in that amount to the company by Varney, which was applied on the purchase price. As stated by the trial judge at the trial:

> "The note for $10,000 was part payment on the $160,000 stock purchase, the balance by the original agreement was in real estate. That is all there is to that * * * the court is not going to hold that the stock was paid for in cash; I cannot do that; it is not the fact."

It is true that for reasons best known to themselves the subscription for the stock as signed by Varney and the officers of the company, Mr. Binkhorst and Dr. Hall, did recite that the consideration of the stock was cash. But, as already noted, the evidence showed that no cash, except the sum of $10,000, was paid or intended at the time to be paid by Varney for the stock. Consequently the plaintiff cannot be permitted to collect a commission for procuring a purchaser to purchase upon terms which are, by statute, denounced as the commission of a felony. But, as already indicated, the plaintiff was not aware of this fact at the time he brought his suit, but, on the contrary, had no reason to believe that the officers of the company were attempting to sell the stock of the company in violation of the permit issued by the state corporation commission. This is the more evident because shortly before taking up his duties as sales agent of the company he was assured by the managing director of the company in his serial letter:

> "To all members of sales staff: The most valuable thing that we possess is our good name. We are intrusting it to your care in the belief that you will guard it well. It would be easy to destroy it. We do not believe, however, that you in whom we place full confidence will be guilty of compromising that name in the least. It is our chief asset, and without it we would be poor indeed; * * * in other words, we do not want and will not have anything but clean business."

Notwithstanding, then, the good faith of the plaintiff in demanding his share of the commissions on what he believed was a legitimate sale, he cannot be permitted to recover for any services he may have rendered in even unconsciously aiding the officers of the company in consummating an unlawful or void sale, denounced by the statute as the commission of a felony. Atwater v. A. G. Edwards, etc., Co., 147 Mo. App. 436, 126 S. W. 823, 826; Volker v. Fisk, 75 N. J. Eq. 497, 72 A. 1011; Cone v. Keil, 18 Cal. App. 675, 679, 124 P. 548; Domenigoni v. Imperial Live Stock, etc., Co., 189 Cal. 467, 209 P. 36; Smith v. Bach, 183 Cal. 259, 191 P. 14.

[2] But it is the contention of the respondent that the judgment of the court awarding to the plaintiff the sum of $2,250 should be sustained by reason of certain transactions had by Varney with the company after the commencement of the action, which resulted in July of 1925 in Varney subscribing to stock of the company to the extent of $45,000. It is respondent's contention that the procuring causes of the foregoing subscription were the services rendered by the plaintiff in soliciting Varney up to the time of the foregoing transaction of March 19th. And in this behalf learned counsel contend that the services of plaintiff were "the cause originating a series of events that without break in their continuity result in the accomplishment of the prime object of the employment of the agent." 4 Cal. Jur. 584. But as regards this contention the testimony clearly shows that there was a potent and sufficient cause entirely independent of the activities of plaintiff which of itself and without any assistance from plaintiff was the proximate cause of Varney's purchase of the $45,000 of stock in July, 1925. For the evidence shows that shortly after the illegal and felonious transaction of March 19th, that Varney became advised of the fact that he had no legal title to the 1,280 shares of stock. And this was not unwarranted advice, for section 12 of the Corporate Securities Act (Stats. 1917, c. 532, p. 679) provides that:

> "Every security issued by any company, without a permit of the commissioner authorizing the same then in effect, shall be void, and every security issued by any company, with the authorization of the commissioner but not conforming in its provisions to the provisions, if any, which it is required by the permit of the commissioner to contain, shall be void."

And, as already noted, Varney had divested himself of the legal title to his real estate of the presumable value of $142,500 and $10,000 in cash as the result of transactions in which it might be held he himself was in pari delicto. So that, had he brought suit for the return of his property after his stock certificate had been canceled he would be in danger of being left where he had placed himself by his participation in an unlawful transaction. Domenigoni v. Imperial Live Stock, etc., Co., supra; Tatterson v. Kehrlein (Cal. App.) 263 P. 285; Parrish v. American Ry., etc. (Cal. App.) 256 P. 590.

The attitude of Mr. Varney is shown by his testimony as follows:

> "What started the investigation or the inquiry in regard to the irregularity of this deal? A. When I was at the directors' meetings or at the stockholders' meetings, or either, some very promiscuous talks were made there at the meetings which did not meet with my ideas. I became doubtful as to the standing of the company. I went to my attorney with the matter. Q. After you have made, after the stock had been issued to you, you became rather dissatisfied with it? A. More than rather. Q. In particular, with Mr. Binkhorst? A. Yes. Q. It was because of that dissatisfaction with Mr. Binkhorst that you rescinded or changed this agreement? A. It was because of the way the company was run. Q. You then went to your lawyers to see some way for you to get out of it? A. I went to my lawyer to see, to question him as to the transaction, and learn from him which was illegal, and naturally I wanted to make it legal, if I could. Q. You used that method; you used the claimed illegality of the sale or transaction to force a compromise? A. I act with my attorney; I don't know what to answer to that question, hardly. * * * Q. When you say you were dissatisfied, why were you dissatisfied; when you say you were dissatisfied by the way in which the company was run, why were you dissatisfied? A. From what I could see, the company was run for the sake of making commissions on the sale of stock; it was not run to build up the business."

As the result of negotiations between the attorneys for Varney and the attorneys for the company, the company accepted the proposal by way of compromise from Varney, that "with reference to the controversy as to the purchase of stock by me" the Republic Bond & Mortgage Company should cancel such subscription and should execute deeds to Varney of the three parcels of real estate deeded by Varney to the company, and that the company should issue to Varney a certificate for 360 units of stock in the company, and that Varney should pay to the company in cash the sum of $35,000 and that the company should retain the $10,000 formerly paid by Varney to the company.

Further testifying in regard to the transaction, Varney states:

> "Q. Was the real estate to which I have referred, the Marin County property, the San Francisco property and the Santa Clara County property, ever returned to you? A. Yes. Q. Under what circumstances? A. It was returned to me because the sale of their stock to me for cash and the property was considered illegal. My attorneys told me that it was illegal, the sale. And the Republic Bond & Mortgage Company's attorneys also told me the sale was illegal, and another attorney told me the sale was illegal, and I wanted to get the matter straightened out. Q. Did you go to Los Angeles for that purpose? A. Yes. Q. There did you have conferences with the officers of the Republic Bond & Mortgage Company? A. Yes. Q. As a result of the conferences, was there any agreement reached?

A. Yes. Q. With reference to the transfer of your property, or the retransfer back to you of your property? A. Yes. Q. Was that expressed in writing? A. Yes."

Aside from the fact that this transaction was consummated more than two months after the commencement of the action, and at a time when Varney, so far from being a willing purchaser of the stock, was entirely distrustful of and dissatisfied with the company, and had apparently lost any enthusiasm for it that may have been engendered through his conversations with the plaintiff, and when his sole apparent motive was to recover the property which he had deeded without consideration to the company, it is sufficiently apparent that there is no evidence sufficient to sustain any presumed finding that the plaintiff, by any unbroken chain of circumstances, was the procuring cause of the acquisition by Varney in July, 1925, of the $45,000 of stock. Furthermore, there is no supplemental pleading upon which to base any such a finding.

Judgment will therefore be reversed.

We concur: STURTEVANT, J.; NOURSE, J.

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94 Cal. App. 562

ENGLAND v. LYON FIREPROOF STORAGE CO. (Civ. 3527).

District Court of Appeal, Third District, California. Oct. 29, 1928.

1. Warehousemen 🔑34(7)—In action for damages for theft of goods in storage, evidence held sufficient to justify jury's finding theft occurred.

In action for damages for theft of goods in storage, evidence *held* sufficient to justify jury's finding that boxes were not received empty and that theft occurred.

2. Warehousemen 🔑24(4)—In absence of specific agreement, warehouseman does not become insurer of property against theft, and need only exercise ordinary care (Warehouse Receipt Act, § 21).

Under Warehouse Receipt Act (St. 1909, p. 441), § 21, in absence of specific agreement to contrary, bailee or proprietor of general warehouse does not become an insurer of property against theft, but he need only exercise ordinary care for protection of owner's property, such as would be used by owner himself under similar circumstances.

3. Warehousemen 🔑24(4)—What constitutes reasonable care on part of warehouseman against theft depends on circumstances and character of property (Warehouse Receipt Act, § 21).

What constitutes reasonable care on part of warehouseman against theft, under Warehouse Receipt Act (St. 1909, p. 441), § 21, depends largely on circumstances of case and upon value and character of property.

4. Warehousemen 🔑34(5)—Owner has burden of proving warehouseman was guilty of negligence, where goods were stolen.

Where goods in warehouse were stolen, owner has burden of proving negligence of warehouseman either in employment of servants or management of business, which negligence proximately contributed to loss of goods.

5. Warehousemen 🔑34(5)—Where owner has proved prima facie case against warehouseman where goods were stolen, burden is not on owner to establish warehouseman failed to operate business according to usual custom of warehousemen.

In action for damages for theft of goods in storage, where owner has proved prima facie case of negligence against warehouseman, burden is not on owner to establish fact that warehouseman failed to operate his business according to usual custom of warehousemen.

6. Warehousemen 🔑24(4)—Warehouseman must exercise ordinary care commensurate with value of goods stored and circumstances to protect property from theft from within and without.

Warehouseman must exercise due diligence and ordinary care commensurate with value of goods stored and circumstances of case to protect bailor's property from damage or theft from both within and without storehouse.

7. Warehousemen 🔑34(7)—Evidence supported finding that stored goods were stolen through warehouseman's negligence.

In action for damages for theft of goods in storage, evidence supported jury's findings that goods were stolen and that warehouseman was guilty of negligence in hiring and retaining employees and in conducting business which proximately contributed to theft.

8. Appeal and error 🔑1001(1)—Where evidence supports jury's verdict regarding warehouseman's negligence, its findings will not be disturbed on appeal.

In actions involving negligence of warehouseman, where there is substantial evidence supporting verdict of jury, its findings will not be disturbed on appeal.

9. Warehousemen 🔑24(7)—Warehouseman cannot limit liability for loss or damage so as to exempt itself from damages resulting from its negligence.

Warehouseman may not limit its liability for damage to or for loss of goods stored with them for hire so as to exempt itself from damages resulting from its own negligence nor to relieve itself from exercise of ordinary care, since effort on bailee's part to exempt itself from negligence is contrary to public policy.

10. Warehousemen 🔑24(7)—Where warehouseman was guilty of negligence resulting in loss of goods by theft, contract designed to limit its liability to $25 per package was unavailing (Warehouse Receipt Act, § 21).

Where warehouseman was guilty of negligence which proximately resulted in loss of goods by theft, contract designed to limit its liability to $25 per package was unavailing under Warehouse Receipt Act (St. 1909, p. 441) § 21.

11. Warehousemen 🔑34(8)—Where warehouseman knew crates, later stolen through its negligence, contained liquor, warehouseman was liable for value thereof.

Where warehouseman knew that crates, later stolen as result of warehouseman's negligence, contained liquor, warehouseman was liable to owner for value of liquor.

12. Warehousemen 🔑34(8)—Where warehouseman did not know crates, later stolen through its negligence, contained valuable art goods, warehouseman was liable only for amount it had reason to suppose they were worth (Civ. Code, § 1840).

Where warehouseman did not know that boxes contained valuable art goods and boxes were stolen as result of warehouseman's negligence, warehouseman was liable only for $25 for each box, where contract provided that responsibility was limited to $25 unless value was made known, under Civ. Code, § 1840, providing that liability of depositary for negligence cannot exceed amount he is informed by depositor, or has reason to believe, thing deposited is worth.

13. Trial 🔑260(7)—In action for theft of goods, refusing instruction covered by instructions given held not error.

In action for damages for theft of goods in storage, refusal of instruction that burden was on plaintiff to show defendant failed to exercise due care in choice of employees and that fact that employee might prove to be dishonest was no evidence of negligence on employer's part, *held* not error, where it was fully covered by other instructions given.

14. Trial 🔑253(5)—Instruction that bailor, receiving warehouse receipt listing delivery of some packages, together with notice of limited liability, acquiesced in limitation of value as to subsequent boxes delivered, held properly refused because omitting element of negligence.

In action for damages for theft of goods in storage, instruction that bailor, receiving warehouse receipt on which was listed delivery of first packages, together with printed notice of $25 limitation of liability attached thereto, acquiesced in such limitation of value as to all subsequent boxes delivered because all goods were stored in same room, *held* properly refused because omitting element of negligence.

15. Trial 🔑194(11), 240—Instruction that bailor receiving warehouse receipt listing delivery of some packages, together with notice of limited liability, acquiesced in limitation of value as to subsequent boxes, held properly refused as argumentative and invading jury's province.

In action for damages for theft of goods in storage, instruction that bailor receiving warehouse receipt on which was listed delivery of several packages, together with printed notice of $25 limitation of liability attached thereto, acquiesced in such limitation of value as to all subsequent boxes delivered because all goods were stored in same room, *held* properly refused as argumentative and as invading province of jury.

16. Warehousemen 🔑34(10)—Instruction that warehouseman cannot limit its liability against its own negligence by contract held proper.

In action for damages for theft of goods in storage, instruction that warehouseman could not limit its liability against its own negligence by contract, and any contract to that effect would be void, *held* proper.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Action for damages for theft of goods in storage by George H. England against the Lyon Fireproof Storage Company. From a judgment for plaintiff, defendant appeals. Judgment modified and, as modified, affirmed.

Superseding 269 P. 459.

Howard S. Clewett, of Los Angeles, for appellant.

Ben F. Gray and Geo. S. Hupp, both of Los Angeles, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment and verdict of $4,000 damages on account of the theft of goods while stored in the defendant's warehouse at Los Angeles. The defendant was engaged in warehouse business at that city. The plaintiff and his family were about to leave their residence in Los Angeles to travel abroad, and on December 10, 1920, he packed their household goods in various boxes and containers and hauled them to the warehouse of defendant for storage during their absence. These goods were received by the defendant, and the packages were consecutively numbered from 1 to 57, inclusive, and listed upon duplicate warehouse receipts, one of which was retained by the defendant and the other was delivered to the plaintiff. A few days later other boxes and packages of household goods and effects were also delivered to the defendant. This second consignment included seven cases of whisky, the contents of which were made known to the defendant. These goods were also numbered and listed on the back of defendant's original warehouse receipt, but a duplicate of this last list was not given to the plaintiff. The entire consignment of goods was stored in a separate room in defendant's warehouse, and the door to the room was securely locked. No other person's goods were placed in this same storeroom. Several employees of the defendant held pass-keys to all the rooms of the warehouse, including the room in which plaintiff's goods were stored. When the pass-keys became worn and failed to operate in the locks, new ones were procured and the old ones were carelessly thrown into the wastebaskets or rubbish. Upon other occasions liquor had been stolen from the warehouse, and once another storeroom had been burglarized. The president of the defendant corporation had been warned that a certain one of his employees was a bootlegger, and, while the president admitted that he had secured a detective to investigate the charge, he retained this man in his employ.

Upon plaintiff's return after three years' absence, he called upon the defendant to reclaim his property. On going to his storeroom, the employee who accompanied him fumbled with the lock and complained about the difficulty of opening it. Upon unlocking and entering the storeroom, however, he found three boxes opened, empty, and the contents missing, including a number of valuable pictures, hand-painted china porcelain and Dresden ware, bronze and ivory statues, bric-a-brac, rugs and laces of rare value, together with the entire stock of liquor. The liquor was stipulated to be worth $400. Suit was brought against the defendant for negligently suffering the theft of the goods, and a verdict of $4,000 was rendered against the defendant.

The defendant seeks a reversal of the judgment on the ground that (1) the boxes in question were received empty, and asserts that the theft never occurred; that (2) the judgment is not supported by the evidence, for the reason that there is a total lack of proof of negligence proximately contributing to the theft; that (3) the liability of the defendant was specifically limited by the provisions of section 1840, Civil Code, and the language of the warehouse receipt to $25 per package; and that (4) the trial court erred in giving and refusing certain instructions.

[1] Defendant's contention that the boxes in question were empty when they were delivered for storage, and that the theft did not occur, are without merit. The plaintiff himself testified to the packing and specific contents of these boxes, each item of which is mentioned in the complaint. He accompanied the van which hauled them to the warehouse, and went with them to the sixth floor and saw them packed in the storeroom. Defendant's manager accepted and listed on the warehouse receipt each of these boxes. The liquor was first brought to the warehouse wrapped in heavy paper and without the necessary government permit for removal. The defendant refused to accept it for storage in this condition, and it was returned and repacked in one of the boxes in question, and then brought back to the warehouse with the government permit, which was exhibited to the foreman. These three boxes, weighing about 200 pounds each, were then marked by the foreman Nos. 62, 63, and 65, respectively, and were listed by him on the warehouse receipt, in each instance as "box & con." This clearly implies that the boxes, when received by the defendant, were not empty. Upon the contrary, the indorsement on the receipt is an acknowledgment of the existence of "contents" of some sort, in the boxes. Plaintiff was present when the storeroom was first opened at the time when he went to reclaim his property, and immediately observed the broken and empty boxes and commented upon the theft to the employee. This furnishes ample evidence to support the loss of the goods.

[2-5] In the absence of a specific agreement to the contrary, a bailee or proprietor of a general warehouse does not become an insurer of property against theft. All that is required of him is the exercise of ordinary care for the protection of the owner's property such as would be used by the owner himself under similar circumstances. The question as to what constitutes reasonable care on the part of a bailee for hire depends largely upon the circumstances of the particular case and upon the value and character of the property intrusted to him. California Warehouse Receipts Act, Stats. 1909, c. 290, § 21; 25 Cal. Jur. 957, § 15; 27 R. C. L. 992, § 51; 6 C. J. 1121, § 61; 3 R. C. L. 96, § 23; Runkle v. Southern Pac. Milling Co., 184 Cal. 714, 195 P. 398, 16 A. L. R. 275; Webber v. Bank of Tracy, 66 Cal. App. 29, 33, 225 P. 41; Firestone Tire & Rubber Co. v. Pacific Transfer Co., 120 Wash. 665, 208 P. 55, 26 A. L. R. 217, and note. Mere evidence of the theft of goods left in the custody of a bailee, even though they were stolen by his servant or employee, is insufficient to charge him with negligence and liability for their loss, and the burden is upon the owner to supply evidence from which it may be reasonably inferred that the bailee was guilty of negligence either in the employment of his servants or the management of his business, which negligence proximately contributed to the loss of the goods. 27 R. C. L. 993, § 51; 40 Cyc. 472, § 6; Firestone Tire & Rubber Co. v. Pacific Transfer Co., supra, 120 Wash. 665, 208 P. 58, 26 A. L. R. 217; Exporters' & Traders' C. & W. Co. v. Schulze (Tex. Com. App.) 265 S. W. 133; Balice v. Erie Ry. Co., 208 App. Div. 427, 203 N. Y. S. 636. Where, however, the owner of the goods has proved a prima facie case of negligence against the warehouseman, the burden is not on the bailor to establish the fact that the bailee failed to operate his business according to the usual custom of warehousemen. In order that an owner may recover damages from a bailee for hire for the theft of his goods, it is necessary that the bailor should sustain the burden of showing acts, conduct, or omissions on the part of the warehouseman amounting to a lack of ordinary care of the property left in his custody, but this burden does not require the bailor to affirmatively prove the usual custom among warehousemen with relation to the operation of their business, as this is a matter of defense, the

burden of which rests upon the bailee. Runkle v. Southern Pac. Milling Co., 184 Cal. 714, 721, 195 P. 398, 16 A. L. R. 275.

In 27 Ruling Case Law, 992, it is said:

> "A warehouseman is bound to exercise reasonable care to avoid the theft of the stored goods. * * * Such a company is required to use that degree of care in the safe-keeping of property which is demanded from a bailee for hire in the keeping of valuable property. He must use such care in the protection of the property from thieves without and thieves within, in the selection of its employees, and in the supervision of their conduct." Cussen v. Southern California Savings Bank, 133 Cal. 534, 65 P. 1099, 85 Am. St. Rep. 221.

In the case last cited it was held that a bank was liable to the owner for a theft of valuable articles taken from a safe-deposit box, where it was shown that one of the duplicate keys to the box was left accessible to the employees of the bank, and where the vault had been placed in the custody of a 17-year old lad, employed without previous inquiry as to his honesty, and who was paid but $30 per month for his services, and remained in the service of the bank but three months. In sustaining a verdict of a jury in that case, it was said:

> "The jury might well say that proper care was not exercised in the selection" or rejection "of this employee."

In that case Justice Garoutte quoted with approval from the case of Preston v. Prather, 137 U. S. 604, 11 S. Ct. 162, 34 L. Ed. 788, as follows:

> "Persons, therefore, depositing valuable articles with them expect that such measures will be taken as will ordinarily secure the property from burglars outside and from thieves within, * * * and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of such measures would in most cases be deemed culpable negligence so gross as to amount to a breach of good faith, and constitute a fraud upon the depositor."

[6] It will thus be seen that a bailee for hire, who conducts a regular business of storing goods for hire, must exercise due diligence and ordinary care commensurate with the value of the goods stored and the circumstances of the case, to protect the bailor's property from damage or theft from both without and within the storehouse. He must provide buildings, storage apartments, and facilities for locking the doors and windows adequate to safeguard the goods with ordinary care against the depredations of thieves, and he must exercise due care in the employment and retaining of men about the storehouse of known honesty and ability.

[7, 8] In the present case it may be inferred from the verdict that the jury of necessity found, not only that the plaintiff's goods were stolen, but that the defendant was guilty of negligence in the hiring and retaining of employees and the conduct of his warehouse business which proximately contributed to the theft. These findings are supported by substantial evidence. Among the goods which were stored and stolen were seven cases of liquor. The defendant had previously lost by theft other consignments of liquor. It had been warned that a certain employee who worked about the storehouse was a bootlegger, which charge imputed dishonesty to the employee. The president of the corporation defendant was suspicious of this employee, and hired a detective to watch him, yet he was not discharged. The plaintiff's goods were stored in a separate room apart from all other goods, and the door to this room was securely locked. There was no occasion for any employee to visit this room or to have access thereto during the absence of the plaintiff, yet master keys which fitted all the rooms of this warehouse, were supplied to several employees. When these keys became worn so that they would operate in the locks with difficulty, new ones replaced them, and the old ones were carelessly thrown into a waste-basket or in the débris, where they were accessible to the employees or loafers about the place. We are of the opinion that this evidence furnishes substantial proof of negligence. In actions involving the negligence of a warehouseman, the usual rule applies with respect to what constitutes ordinary diligence for the protection of the owner's goods, and, where there is substantial evidence, in this regard to support the verdict of a jury, its findings will not be disturbed on appeal. 27 R. C. L. 1004, § 65; 40 Cyc. 482, § 8; Garrette v. Grangers' Business Ass'n, 58 Cal. App. 396, 208 P. 1010.

The case of Firestone Tire & Rubber Co. v. Pacific Transfer Co., supra, is relied upon by appellant in support of its contention that the evidence in the present case does not uphold the findings of negligence on its part. The facts of that case, however, were radically different from those of the present case. The record discloses the fact that plaintiff rented a space in the defendant's warehouse in which to store a large quantity of automobile tires. This space was inclosed with a lattice partition which extended only to within three feet of the ceiling, thus leaving an aperture over which one could easily climb. The plaintiff was furnished keys to this inclosure and to the warehouse, and always had free access to both. It was not assumed by the parties that this inclosure was burglar proof. It was constructed and maintained as a mere convenience by means of which to keep plaintiff's tires separate from other goods which were stored in the warehouse. No goods had been previously stolen from the warehouse, and there was neither suspicion on the part of the defendant nor warning received regarding the dishonesty of its employees. Two of the defendant's servants did, however, steal the tires. The evidence was deemed to be insufficient to uphold a finding of negligence on the part of the defendant. The foregoing recital of facts readily distinguishes that case from the present one without the necessity of comment. It is therefore not authority for the reversal of this case.

The appellant claims that the damages for loss of the goods in question was limited by contract to the sum of $25 per package. It is true that when the first 57 packages were received and listed a duplicate warehouse receipt signed by respondent was given to him, and contained the following provision:

> "It is agreed that said goods shall be stored at owner's risk of damage by moth, vermin, rust, fire, heat, leakage or injury to fragile articles that are not packed. * * * The responsibility of this warehouse for any piece or package, or its contents, is limited to the sum of $25, unless the value thereof is made known at the time of the storing, and receipted for in the schedule, and an additional charge made for the higher valuation. * * *"

[9, 10] In the absence of negligence on the part of a bailee, the owner of goods who signs a warehouse receipt for their custody will ordinarily be bound by the express terms and conditions of his contract. 25 Cal. Jur. 962, § 18; 27 R. C. L. 997, § 57; Taussig v. Bode, 134 Cal. 260, 66 P. 259, 54 L. R. A. 774, 86 Am. St. Rep. 250; McMullin v. Lyon Fireproof Storage Co., 74 Cal. App. 87, 95, 239 P. 422; Cunningham v. International Comm. of Y. M. C. A., 51 Cal. App. 487, 197 P. 140; Wilson v. Transfer & Storage Co., 201 Cal. 701, 258 P. 596. But a warehouseman may not limit his liability for damage or loss of goods stored with him for hire, so as to exempt himself from damages resulting from his own negligence, nor to relieve himself from the exercise of ordinary care. The trend of modern authorities holds that such an effort on the part of a bailee to exempt himself from negligence is contrary to public policy. Dieterle v. Bekin, 143 Cal. 683, 688, 77 P. 664; Northwestern M. F. Ass'n v Pacific W. & S. Co., 187 Cal. 38, 41, 200 P. 934; Taussig v. Bode, supra; Morse v. Imperial Grain & Warehouse Co., 40 Cal. App. 574, 181 P. 815; Langford v. Nevin (Tex. Com. App.) 298 S. W. 536; Carley v. Offutt, 136 Ky. 212, 124 S. W. 280, 26 L. R. A. (N. S.) 1114, 136 Am. St. Rep. 207, 248, note; 40 Cyc. 437; 27 R. C. L. 997, § 57. Section 21 of the California Warehouse Act (Stats. 1909, p. 437) provides:

> "A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise."

From the verdict in the present case it must be presumed that the jury found the appellant guilty of negligence which proximately resulted in the loss of the goods by theft. There is substantial evidence to support this finding, and the contract designed to limit appellant's liability to $25 per package is therefore unavailing in that regard. Section 1840 of the Civil Code, however, provides:

> "The liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth."

Upon rehearing of the present case we are convinced that the record indicates clearly that the respondent failed to disclose to the bailee at the time of depositing his goods for storage, either the value or character of the contents of the three boxes involved in this suit, except the liquor therein contained, which upon the trial was stipulated to be worth $400. It appears that upon delivery of the first consignment of goods for storage the appellant refused to accept the liquor for the reason that it was not properly crated and because the respondent held no government permit to move the liquor. It was therefore taken away and subsequently returned crated with the art goods heretofore mentioned and accompanied with a proper permit for removal. The respondent testified in this regard:

> "Q. You didn't tell anybody what was in those three boxes, did you? A. It wasn't necessary; they knew, * * * the foreman and the men that were——"

The court, interrupting, said:

> "He asked you a question. A. Yes, I did. Q. Whom did you tell? A. I think it was the foreman. * * * Q. That was when you brought the three boxes in? A. Yes, I did as he suggested—I packed these cases and these boxes. * * * Q. But did you tell him when you came back, that you had packed these cases in these boxes? A. Yes. Q. You did? A. Yes, sir; I told him the same goods only boxed up. * * * Q. You don't know what position this man occupied with the company? * * * A. I judged at the time and have always been under the impression that he was the foreman; he seemed to have authority. Q. Now, just what did you say to him? A. Well, I brought back those goods, boxed up as he advised me. Q. You didn't tell him what there was in those boxes, except whisky? A. No, I did not. Q. You didn't tell anybody about the value (of what) you said was in those boxes? A. No, sir, I did not. * * * Q. You did not indicate by marks on the outside, that they contained treasure articles? A. No. * * * Q. Did any of the employees ask you what was in those boxes? A. Yes—No, they asked me if I had a license to move what was in them. * * * I told them I had sent to San Francisco to procure the license; I took it out and showed it to them; I told them I had sent for it because they suggested my doing so. * * * Q. Now, other

than the conversation about whisky, at the time that you made the original deposit of the goods, was there any inquiry made by the defendant or any of its employees there, as to the character or the value of the goods you were then depositing? A. No."

[11, 12] It is apparent from the foregoing testimony that the appellant knew that these crates contained the liquor. He had frequently had liquor stored with him before, and had ample reason to know of its approximate value. At the trial it was stipulated to be worth $400. To this extent, at least, the appellant was bound to recompense the owner for the loss through its negligence. Concerning the contents of these boxes, other than the liquor, the evidence fails to show that the appellant had either knowledge of their identity or value. While the evidence does show that the respondent at first replied in response to the question: "You didn't tell anybody what was in those boxes, did you? A. It wasn't necessary, they knew. The Court: He asked you a question? A. Yes (I did tell them)," had reference only to the liquor contained in the boxes. From a fair construction of the testimony it must be conceded that the entire conversation was regarding the liquor, and that the remaining contents of these boxes was not disclosed. For this reason the limitation of liability fixed by section 1840, Civil Code, should prevail, and the judgment must therefore be reduced to the amount of the stipulated value of the liquor, plus the additional sum of $25 for each of the three boxes in question.

[13] Finally, the appellant assigns as error the giving and refusing of certain instructions by the court. Defendant's instruction No. 17, which was refused, charged the jury that:

> "* * * An employer is presumed to have exercised due care in the choice of his employees, and the burden of proof is on the plaintiff to show that the defendant failed to exercise such care, and the mere fact that an employee may prove to be dishonest is no evidence of negligence on the part of the employer, or of failure to exercise due care in the choice of such employee."

The refusal of this instruction was not error, since it was fully covered by other instructions which were given. The court charged the jury that a bailee for hire was not an insurer of the safety of property intrusted to him, but was required to use only ordinary care to protect it from damage or loss such as a prudent man would exercise for the preservation of his own property. And the jury was further instructed:

> That the defendant "was required to use such (ordinary) care in the selection of its employees and in the supervision of their conduct after they were employed."
>
> And further that, "if it is established that the property was stolen * * * by the servants of the bailee, * * * it is then incumbent upon the bailor to introduce evidence from which the jury might legitimately infer that the loss or theft was due to lack of ordinary care on the part of the bailee."
>
> And also that "the burden * * * is on the plaintiff to show that the defendant failed to exercise due care in the choice of its employees, and the mere fact that an employee may prove to be dishonest, is no evidence of neglect on the part of the employer, or of failure to exercise due care in the choice of such employee."

These and other instructions along this line fully advised the jury that the burden was upon the plaintiff to prove the negligence of the defendant in the employment of dishonest servants before it could be held liable on that score.

[14, 15] The court also refused to give defendant's instructions numbered 2D, 13, 13A, and 15, to the effect that, by delivering to respondent the duplicate warehouse receipt upon which was listed the first delivery of packages numbered from 1 to 57, inclusive, together with the printed notice of a $25 limitation of liability thereto attached, he acquiesced in such limitation of value as to all subsequent boxes delivered, for the reason that all the goods were stored in the same room, and the plaintiff failed to disclose to the defendant the actual value of the property. The refusal to so instruct the jury was not error. The jury was specifically instructed, in the language of section 1840, Civil Code, that the amount of damages recoverable for the loss of goods through the negligence of a bailee was limited to the value thereof as disclosed by the owner, unless the bailee had reason to otherwise know of its value. The jury was also fully instructed that the right to recover depended entirely upon proof of the negligence of the bailee. These instructions were erroneous for the reason that they omitted the element of negligence and sought to limit the liability to $25 per package, regardless of the exercise of reasonable care on the part of the bailee. These instructions were also argumentative and invaded the province of the jury, which had the exclusive right to determine whether it was the intent of the parties that this contract, attempting to limit the liability of the bailee, should apply to the second consignment of goods, for the storing of which no receipt was issued or delivered.

[16] The court correctly instructed the jury that—

> "The defendant cannot limit its liability against its own negligence by contract, and any contract to that effect would be void."

Moreover, the jury was fully, fairly, and correctly instructed regarding the measure of damages for the loss of goods resulting from the negligence of a bailee, as follows:

> "It is an express provision of the law that the liability of a depositary for negligence cannot exceed the amount which he is informed by the

depositor, or has reason to suppose the thing deposited to be worth." Section 1840, Civil Code.

And further that:

"If you believe from the evidence that the plaintiff did not inform the defendant of the value of the contents of the boxes in question, its liability cannot exceed the amount which it had reason to suppose the contents of the boxes to be worth."

The jury was also further instructed that:

"If you believe from the evidence that the plaintiff did inform the defendant that said boxes contained whisky, but did not inform the defendant that they contained any other valuable articles, and that the defendant did not have reason to suppose that they contained other valuable articles, then, even if you find the defendant was negligent, nevertheless, the liability cannot exceed the value of the whisky which was stipulated to be $400."

For the foregoing reasons the judgment is modified to allow damages only for the loss of the stipulated value of the liquor, plus the added liability of $25 per package limited by the provisions of section 1840, Civil Code, aggregating the sum of $475. As so modified, the judgment is affirmed. The appellant will recover its costs.

We concur: HART, Acting P. J.; PLUMMER, J.

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94 Cal. App. 660

SCHLIMPER v. DOYLE et al. (Civ. 6131.)

District Court of Appeal, Second District, Division 1, California. Nov. 2, 1928.

1. Appeal and error ⚷771—Mere ignorance of rules requiring filing of briefs within 30 days of transcript is not alone sufficient to relieve appellant of default (Supreme Court and District Court of Appeal Rule 1, § 4; Rule 5, § 1).

Appellant's ignorance of Supreme Court and District Court of Appeal, Rule 1, § 4, and Rule 5, § 1, requiring appellant to file printed points and authorities within 30 days after filing of transcript on penalty of having appeal dismissed, is not of itself sufficient to relieve appellant from his failure to comply with rules, but such excuse may be available to one in default if sufficient mitigating circumstances in addition thereto are made to appear.

2. Appeal and error ⚷771—Alleged lack of employment and inability to pay costs of appeal held insufficient to relieve appellant of failure to timely file briefs (Supreme Court and District Court of Appeal Rule 1, § 4; Rule 5, § 1).

Appellant's alleged lack of employment and consequent inability to pay costs of appeal *held* not a valid excuse for his failure to comply with Supreme Court and District Court of Appeal Rule 1, § 4, and Rule 5, § 1, requiring appellant to file printed brief within 30 days after filing of transcript on penalty of dismissal of appeal, where employer's affidavit showed appellant had been continuously employed for several months immediately following filing of transcript, and in view of fact that appellant's brief when filed consisted of but four printed pages.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Paul Schlimper against Mary Doyle and others. From the judgment, plaintiff appeals. On motion to dismiss appeal. Motion granted.

Arsen Yeretzian, of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for respondent.

HOUSER, J. Motion to dismiss an appeal on the ground that appellant's brief was not filed "within the time prescribed by law."

The record shows that the clerk's transcript and the reporter's transcript of the proceedings in the lower court were each filed with the clerk of this court on June 27, 1928, and that the notice of motion to dismiss the appeal was served on appellant and filed in the office of the clerk of this court on September 14, 1928, at which latter date no brief on behalf of appellant had been filed in the office of said clerk.

Section 4 of rule 1 of the Supreme Court and of the District Court of Appeal provides in effect that—

"Within thirty days after the filing of the transcript, the appellant shall file with the clerk his printed points and authorities. * * *"

And by section 1 of rule 5 it is provided that:

"If the transcript of the record or appellant's points and authorities be not filed within the time prescribed, the appeal may be dismissed upon notice given, either on motion of the respondent or of the court in which the appeal is pending. If the transcript, or the points and authorities, though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion. * * *"

[1] Appellant's answer to the motion to dismiss the appeal is by way of affidavit to the effect that he "did not know that it was essential that said brief should be filed within certain period of time," in addition to which fact he had "lost his employment and has not been able to pay the costs of this appeal, except by borrowing small sums periodically, from friends. * * *" The reply to such defense consists of an affidavit from the employer of appellant to the effect that, for a period of eight months next preceding the date of the affidavit, appellant had been constantly

employed by affiant at a salary ranging between $26 and $30 per week—to which statement of fact appellant has made no denial.

As to the first reason advanced by appellant as an excuse for his failure to file his brief within the time prescribed by the rules of this court, to wit, that he "did not know that it was essential," it may be noted that, aside from the bald statement of appellant's ignorance of the rule, the affidavit is silent concerning any facts which might tend to account for his being unaware of the legal requirements as to the time when his brief should be filed. In matters of this sort it is a principle of long standing that in itself ignorance of a rule will not suffice as a reason for relieving a party from his failure to comply with it. Before such excuse may be available to one in default, some sufficient mitigating circumstances, in addition to mere lack of knowledge, must be made to appear.

[2] Nor, in the circumstances here presented, may the asserted lack of employment of the appellant and his consequent inability to pay the costs of appeal be considered as a valid excuse for his failure to comply with the rule of court. In the first place, the affidavit by the employer of appellant shows beyond question that appellant was continuously employed for at least several months immediately following the date when the transcript of the record was filed with the clerk of this court. In addition thereto, since the date when the notice to dismiss the appeal was filed, appellant has filed his long-delayed opening brief. As it consists of but four printed pages, even if his statement were true with reference to his having been out of employment, it would seem unlikely that the cost of printing the brief would have been so great as to prevent him from complying with the rule of court.

The motion to dismiss the appeal is granted.

We concur: CONREY, P. J.; YORK, J.

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94 Cal. App. 614

ROBINSON v. POTTER. (Civ. 5239.)

District Court of Appeal, Second District, Division 1, California. Oct. 31, 1928.

1. Brokers 🔑86(1)—Broker's letter, over month after oral contract to divide commission, held not conclusive or exclusive evidence of contract terms.

In action between real estate brokers for half of commission, letter from plaintiff to defendant, more than month after alleged oral contract to divide commissions was made, was evidence of terms of contract, but not conclusive or exclusive evidence; it being trial court's duty to weigh it along with plaintiff's oral testimony and all facts and circumstances in evidence.

2. Appeal and error 🔑1010(1)—Appellate court cannot weigh evidence nor set aside trial court's fact finding sustained by substantial evidence.

It is not the province of the District Court of Appeal to weigh evidence, and it would not be justified in setting aside trial court's finding, sustained by substantial evidence, that facts were as alleged in complaint.

3. Appeal and error 🔑1008(1)—Appellant's contention that respondent knew of property before contracting to divide commission held immaterial, where trial court found that respondent was not required to acquaint appellant with property unknown to him.

Defendant's contention, on appeal from judgment for plaintiff in action between real estate brokers for half of commission under verbal agreement, which trial court found did not require plaintiff to acquaint defendant with property not already known to latter, that court should have found for defendant because of three witnesses' uncontradicted testimony that defendant knew of property involved before contracting with plaintiff, need not be considered; such question being immaterial.

4. Brokers 🔑86(1)—Admission that property was sold to broker and two others held not to sustain contention that he received no commission.

Plaintiff's admission, in action between real estate brokers for half of commission under verbal agreement, that sale was made to defendant and two others, defendant getting quarter of property, *held* not to sustain contention that defendant received no commission, in view of vendor's testimony that he was to pay defendant regular commission, and that such commission was deducted from purchase price.

5. Brokers 🔑66—That broker purchased only fourth of property held not to limit his liability to fourth of commission agreed to be divided with another broker.

That real estate broker, sued for half of commission agreed to be divided with plaintiff, purchased only fourth of property, which was sold to him and two others, who were not brokers nor entitled to any commission, did not limit his liability to fourth of amount of judgment for plaintiff; defendant being real estate broker as to all of property and his regular commission deducted from purchase price.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by J. Robinson against A. H. Potter. Judgment for plaintiff, and defendant appeals. Affirmed.

S. T. Hankey and Wood, Janeway & Pratt, all of Los Angeles, for appellant.

Thomas J. Pitts, of Los Angeles, for respondent.

CRAIL, Justice pro tem. This is an action between two real estate brokers in which the plaintiff recovered judgment for one-half the commission under an alleged verbal agreement to divide it.

Appellant puts forward four contentions upon which he relies for reversal, and which are stated in his own language, as follows:

> "(1) That the agreement is set out in the respondent's letter of June 22, 1923. (2) That the meaning of the agreement is that respondent was to share in any commission received by appellant if respondent made appellant acquainted with some property not already known to appellant. (3) That the appellant did not receive any commission. (4) That if appellant received any commission, he only received one quarter of the amount stated in the findings."

[1, 2] The respondent wrote a letter to the appellant on June 22, 1923, about a month after the alleged oral agreement was made, demanding his share of the commission, in which he set out his recollection of the agreement somewhat differently than as he testified orally in court. It is not contended that the oral testimony of the plaintiff did not substantiate the allegations of the complaint. It is contended that this letter is "much more likely to be the true version of the agreement," and "therefore it must be taken that this letter sets out the true agreement." The contract was oral, and was made more than a month previous to the writing of the letter. While the letter was evidence bearing upon the question of the terms of the contract, it was not conclusive nor exclusive, but was to be weighed by the trial court along with the oral testimony and all the facts and circumstances in evidence bearing upon the question. There was substantial evidence to sustain the allegations of the complaint; and the trial judge, out of his long experience on the bench, weighed the evidence, and resolved it in favor of the plaintiff, finding the facts to be as alleged in the complaint. It is not the province of this court to weigh evidence, and it would not be justified in setting aside the finding of the trial court in this regard.

[3] Appellant's second contention falls with the first, for the agreement as found by the trial court did not require the plaintiff to acquaint the defendant with property not already known to him. This also disposes of the contention made by appellant in his closing brief that the trial court should have found for him, because the uncontradicted testimony of three witnesses was to the effect that the defendant already knew of the property in question before he made his contract with the plaintiff. Whether or not the property was already known to defendant was a question which it was unnecessary for the trial court to determine.

[4] It is next contended that appellant did not receive any commission, and, further, that "it is admitted that no commission was ever paid to appellant." We are referred to no such admission in the record. The admission to which we are referred is only an admission that the sale was made to the appellant and two others; the appellant getting a quarter of the property. On the other hand, there is the testimony of the owner and vendor that his talk with the appellant was to the effect that appellant came to him as a real estate broker; that he was to pay appellant the regular commission; and that his said commission was deducted from the purchase price.

[5] It is the final contention of appellant that, in any event, he should be held for only one-fourth of the amount of the judgment because he was a buyer of the property to the extent of only one-fourth thereof. We are unable to follow appellant in this contention. While it is true that he was a buyer to the extent of one-fourth of the property, he was a real estate broker as to all of it, and his regular commission was deducted from the purchase price. Neither of the other buyers was a real estate broker, and neither was entitled to any of the commission. It is a reasonable inference from the evidence that appellant received all of it. And the finding of the trial court in this regard will not be disturbed.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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94 Cal. App. 557

NATIONAL CITY FINANCE CO. et al. v. LYNCH. (Civ. 3585.)

District Court of Appeal, Third District, California. Oct. 29, 1928.

1. Pleading 🔑18—Complaint, alleging assignor's wrongful acts depriving assignee of use of stock sold to another, held demurrable for uncertainty.

Complaint alleging that defendant caused corporation officers' refusal to transfer on books stock sold by plaintiff, to whom assigned by defendant as security for note, with intent to injure plaintiff in its business and unlawfully recover possession of stock, thereby causing purchaser to stop payment of check, and, in collusion with purchaser, caused him to deliver stock to defendant without plaintiff's knowledge, thereby depriving plaintiff of its use and requiring him to devote much time to ascertainment of facts, employ counsel, and go to large expense, all to plaintiff's damage in stated sum, *held* demurrable for uncertainty as to theory of recovery.

2. Courts 🔑212—Right to recover merely $30 damages in superior court for loss of interest on stock need not be considered on appeal.

Contention that plaintiffs are entitled to damages in sum of $30 for loss of interest on corporation stock wrongfully obtained by defendant need not be considered on appeal from judgment of superior court dismissing action, if no other right of recovery is stated, as complaint in such case does not state cause of action of which such court has jurisdiction.

3. Damages ⇨142—Damages, other than lost interest, though deprivation of use of corporation stock assigned to plaintiff, held not natural consequences recoverable without special pleading.

Damages to assignee of corporation stock as security for note by injury to business, stoppage of payment of check by one purchasing stock from assignee, deprivation of use thereof as collateral, or for sale under power in note, and time devoted to ascertainment of facts, employment of counsel, and expenses incurred therein, in addition to loss of interest, *held* not natural, necessary consequences of assignor's alleged wrongful acts in causing corporation officers to refuse to transfer stock on books, causing purchaser to deliver it to assignor without assignee's knowledge or consent, and withholding it from assignee, and hence not recoverable under general allegations of damages, but required to be specially pleaded.

4. Trover and conversion ⇨16—Assignee's action against assignor for wrongfully obtaining corporation stock from plaintiff's vendee cannot be treated as for conversion.

Where complaint alleged that plaintiff sold and delivered stock, assigned to it as security for note, without indicating that it had taken or contemplated any steps to rescind sale or recover stock from purchaser, action against assignor for damages for causing corporation officers to refuse to transfer stock on books and obtaining it from purchaser by collusion cannot be treated as one in conversion, as purchaser acquired entire title to stock, and plaintiff, having no interest therein, could not maintain such action.

5. Replevin ⇨80—Trover and conversion ⇨54—Expenditures in ascertaining facts and employing counsel cannot be recovered, where facts alleged constitute no cause of action in replevin or conversion.

Where facts alleged in complaint are insufficient to constitute a cause of action in replevin or conversion, alleged expenditures in ascertainment of facts and employment of counsel to ascertain and protect plaintiff's rights cannot be recovered, though allegations thereof indicate intent to state such a cause of action.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Action by the National City Finance Company, a trust, and the trustees, doing business under such name and style, against J. G. Lynch. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Wm. A. Conover, of Los Angeles, for appellants.

Kemp, Partridge & Kemp, of Los Angeles, for respondent.

FINCH, P. J. The trial court sustained the defendant's demurrer to the amended complaint of the plaintiffs without leave to amend, and about two months thereafter, no request for leave to amend being made, judgment was entered dismissing the action. The plaintiffs have appealed from the judgment.

[1] The complaint alleges:

> That on or about January 20, 1926, the defendant executed and delivered to the plaintiff finance company his promissory note for $2,030, payable three months after the date mentioned and "as security for the payment of said note assigned in blank by his indorsement in writing and delivered to said National City Finance Company, 75 shares of preferred stock and 75 shares of common stock in the Credit Finance Company, * * * and agreed in said note that the said National City Finance Company may * * * sell, or assign the shares and securities or any part thereof, its only obligation in respect thereto being to return to said defendant on payment of the above note on the date of maturity thereof, an equal number of shares of stock of the same class in said company. * * * That said note or any part thereof has not been paid, and will be due on or about the 19th day of April, 1926. That on or about the 21st day of January, 1926, the plaintiff under and by virtue of the authority given in said note sold and delivered to Bob Feinstein * * * 50 shares of said preferred stock and 50 shares of said common stock, in consideration of which the said Bob Feinstein * * * made and delivered to the plaintiff his check for the sum of $4,498. * * * The said defendant ordered, caused and procured the officers of said Credit Finance Corporation to refuse to transfer the said 50 shares of preferred and 50 shares of common stock upon the books of the corporation to the purchaser thereof * * * with the intent to injure the plaintiff in its business, and * * * with the intent and purpose of unlawfully repossessing himself of said * * * stock. * * * On account of said unlawful acts on the part of the defendant the said Bob Feinstein * * * did then and there stop the payment of said check, * * * by reason of which said check has not yet been paid and the price for which said stock was sold has not been received by the plaintiff." The defendant "unlawfully, wrongfully and in collusion" with Feinstein caused the latter to deliver the 50 shares of preferred stock and 50 shares of common stock to the defendant, "without the knowledge or consent of the plaintiff thereto, and that said defendant has since that time unlawfully retained the full possession and control of said preferred and common stock * * * and has unlawfully withheld the same from the plaintiff and has thereby wrongfully deprived the plaintiff of the use of said * * * stock * * * and has unlawfully deprived the plaintiff of the use of the money and the interest and profits thereon, for which said * * * shares * * * of stock were sold as aforesaid, to the damage of the plaintiff in the sum hereinafter mentioned. * * * The said defendant by reason of said unlawful acts above mentioned, has caused and required the plaintiff to devote a large amount of time to the ascertainment of the facts above alleged * * * and to employ counsel to ascertain and protect his rights and to go to large expense therein, to

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⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes wit, the sum of $500. All to the damage of said plaintiff in the sum $5,000.

"Wherefore, plaintiff prays judgment against said defendant for the sum of $5,000 and for his costs in this action incurred and for such other and further relief as to the court may seem just and equitable in the premises."

The original complaint was filed April 16, 1926, and the amended complaint May 7, 1926.

The defendant demurred to the complaint on general and on many special grounds of uncertainty.

The complaint is uncertain as to the theory upon which the plaintiffs claim the right to recover. In the brief of appellants, their theory of the case is stated as follows:

> "The intermeddling of the defendant in the transaction of the said securities on the books of the corporation and his collusion with said Bob Feinstein, in obtaining the same and withholding them from the plaintiff * * * has deprived the said plaintiff of the use of either said securities or the money for which they were sold * * * during the period elapsing between the date when the sale of said securities was made * * * and the date of maturity of said note. The least amount of damages that might be collected for the use of said money would be interest thereon at the rate of 7%, amounting to the sum of $30. * * * A greater element of damages, however, than the nominal monetary damages, is the interference with the contract obligation and duty which the defendant owes the plaintiff under the terms of said note and the annoyance and inconvenience caused by such violation of the rights of the defendant (plaintiffs?) thereunder. * * * The rights of the plaintiff were interfered with by the defendant, causing him the loss of the stock for its alternative use either (1) as collateral or (2) to sell under the power of sale given in the note. Since the power of sale in the note was exercised and the stock sold, the plaintiff was deprived of the purchase price and/or its use as collateral through the unlawful acts of the defendant."

[2, 3] The contention that the plaintiffs are entitled to damages in the sum of $30 on account of loss of interest may be dismissed from consideration because, if no other right of recovery is stated, the complaint does not state a cause of action of which the superior court has jurisdiction. Consolidated Adjustment Co. v. Superior Court, 189 Cal. 92, 94, 207 P. 552. Other elements of damage stated in the complaint or referred to in appellants' brief are not the natural and necessary consequences of the alleged wrongful acts, and cannot be recovered under general allegations of damages, but must be specially pleaded. Yoakam v. Hogan, 198 Cal. 16, 20, 243 P. 21; Judson Manufacturing Co. v. Lutge, 174 Cal. 566, 163 P. 1017; Zibbell v. Southern Pacific Co., 160 Cal. 237, 251, 116 P. 513; Shaw v. Southern Pacific Co., 157 Cal. 240, 242, 107 P. 108; Mallory v. Thomas, 98 Cal. 644, 647, 33 P. 757; Mitchell v. Clarke, 71 Cal. 163, 11 P. 882, 60 Am. Rep. 529; McCready v. Bullis, 59 Cal. App. 286, 290, 210 P. 638. Appellants seem to admit that the profits which they might have made by the use of the money for which shares of stock were sold to Feinstein "are too uncertain and remote to be susceptible of expression in monetary damages."

[4] The action cannot be treated as one in conversion, because the complaint alleges that the finance company sold and delivered the shares of stock to Feinstein. By this transaction Feinstein acquired the entire title to the stock. Fowles v. National Bank of California, 167 Cal. 653, 140 P. 271. There is nothing in the complaint to indicate that the finance company has taken, or contemplates taking, any steps to rescind the sale to Feinstein or to recover the stock from him. Having no interest in the stock, it has no standing to maintain an action for the conversion thereof.

[5] The allegation that the finance company has expended $500 in the "ascertainment of the facts," alleged in parts of the complaint, and the employment of "counsel to ascertain and protect" its rights, indicates that the intention was to state a cause of action in replevin or conversion, but, since the facts alleged are insufficient to constitute either of such causes of action, no grounds appear for the recovery of such expenditures.

The appellants having pointed out no logical theory upon which the complaint can be held sufficient, it is not deemed incumbent on the court to search further for such a theory.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

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94 Cal. App. 453

In re CLARK'S ESTATE.★

CLARK v. CLARK et al.

(Civ. 6096.)

District Court of Appeal, Second District, Division 1, California. Oct. 24, 1928.

Rehearing Denied Nov. 11, 1928. Hearing Denied by Supreme Court Dec. 20, 1928.

1. Assignments ©=8—Heir may transfer his inheritance, though there is will or purported will in existence.

Heir has right to transfer his inheritance, even though there is will or purported will in existence.

2. Descent and distribution ©=74, 86—Wills ©=229—Father who was son's sole heir had property right, at instant of son's death, assignable for consideration, and right to contest son's will (Civ. Code, §§ 654, 655).

Father who was sole heir of son's property had property right in son's estate, at instant

★Rehearing denied. Hearing denied by Supreme Court.

of son's death, which he could assign or transfer or surrender for consideration acceptable to him, and statutory right, which is property right, to contest will under Civ. Code, §§ 654, 655.

3. Husband and wife 🔑248½—Father's right as sole heir in son's property, vested in him prior to second marriage, held his separate property (Civ. Code, §§ 163, 164).

Under Civ. Code, §§ 163, 164, right of father to inherit son's property, vested in father prior to second marriage, *held* separate property of father.

4. Husband and wife 🔑248½—Property acquired by testator, who was sole heir of predeceased son, in compromise settlement of contest of son's will, held separate property of testator, though settlement was made after remarriage.

Where testator, who was sole heir of estate of his predeceased son, contested in good faith purported will left by son and after remarriage entered into compromise whereby testator received one-half of son's estate and permitted son's will to be probated, property acquired by testator as result of compromise was separate property of testator, though compromise was made and money received after remarriage.

5. Descent and distribution 🔑74—Expectancy of heir is changed into vested interest in property on death of ancestor.

Though mere expectancy of heir is not usually regarded as property, expectancy is changed into vested interest in property on death of ancestor.

6. Wills 🔑225, 229—Contest of will goes to establish violation of contestant's right to property, and right to contest is transferable (Civ. Code, § 954; Code Civ. Proc. § 1307).

Contest of will goes to establish on part of contestant that his right to property has been violated, and right of action to contest will may be transferred by owner under Civ. Code, § 954; Code Civ. Proc. § 1307.

7. Wills 🔑82—Will excluding only person who was natural object of decedent's bounty is unnatural will.

Will excluding, by its provisions, the only person who was the natural object of bounty of decedent, is unnatural will.

8. Wills 🔑205—Will, until admitted to probate, is of no value as evidence of title.

Will, though valid, is of no value as evidence of title until it is admitted to probate.

9. Wills 🔑225—Contestant's good faith in bringing will contest should be determined by circumstances existing when stipulation settling contest was entered into, and not by subsequent record.

In determining good faith and probable cause of will contest, contestant should be bound by facts and circumstances existing when stipulation for settlement of controversy was entered into, and not by record subsequently made as contemplated in stipulation.

10. Contracts 🔑68—Promise to compromise suit brought bona fide on probable cause is valuable consideration, though suit should be held unfounded.

When suit is brought bona fide on probable cause, promise to compromise is valuable consideration, even though suit should be held to be unfounded.

11. Husband and wife 🔑249—Property acquired by compromise is separate property if right compromised, which is consideration for property obtained, is separate.

Property acquired by compromise is separate property if right compromised, which is consideration for property obtained by compromise, is separate.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Petition by Dillard H. Clark, Jr., and others against Eliza S. Winn Clark for partition of the estate of Dillard H. Clark, deceased. From the judgment, defendant appeals. Affirmed.

Crouch & Sanders and John W. Willmott, all of San Diego, for appellant.

Wright & McKee, of San Diego, for respondents.

CRAIL, Justice pro tem. This is an appeal from a judgment of the superior court of San Diego county, rendered on the 26th day of October, 1927, by which a large part of the estate of the decedent, Dillard H. Clark, was distributed under the terms of his will, as separate property, to his two children, Dillard H. Clark, Jr., and Alice Clark Myers, petitioners there and respondents herein. The appeal is upon the judgment roll and presents to this court the question whether the said judgment is supported and warranted by the findings.

The question for decision is whether certain moneys and property in the estate were community property, or were the separate property of the decedent. The question arose in the trial court upon the petition of the children for partial distribution of the estate under the will, and the answer or response of the widow; the latter alleging that a large part of the estate belonged to the community, and that she was entitled to one-half of all such community property.

The findings of fact were substantially as follows: The decedent, Dillard H. Clark, a major on the retired list of the United States Army, was by his first marriage the father of three children, Edwin Howard Clark, Dillard H. Clark, Jr., and Alice Clark Myers. On July 29, 1923, his son, Edwin Howard Clark, died, but his other two children survived him. On August 11, 1923, or about two weeks after the death of Edwin Howard Clark, Major Clark was married to Eliza Simpson Clark; and thereafter, on February 12, 1926, he died, a resident of San Diego county, Cal., leaving her as his widow. Said decedent left no other heirs at law except his said two children and his widow.

During or about the year 1922 oil was discovered on a tract of land in Noble county, Okl., then belonging to Major Clark. After enjoying the revenue for a time, he conveyed his mineral right in said land to his three children, all of whom were then living, so that each became the owner of one-third of such rights. These mineral rights continued to yield large revenues and, to a considerable though diminishing degree, still do so.

Major Clark would have inherited the entire estate of his son, Edwin Howard Clark, had the latter died intestate. Said estate consisted chiefly of such mineral rights as Major Clark had conveyed to his son, and the revenues from the same, which were and are of large value. Edwin Howard Clark, however, left a document, purporting to be a will, which was offered for probate as an original proceeding both in Noble county, Okl., and in San Diego, Cal. In this document nothing of consequence was left by the decedent to his father, Major Clark; the entire estate, excepting only a few articles of personalty of inconsequential value, being bequeathed to other persons. Probate of this writing was contested by Major Clark, both in the county court of Noble county, Okl., and in the superior court of San Diego county, Cal. It was denied probate in the county court of Noble county, Okl., and an appeal was taken by the proponents to the district court of said county, where the law provides for trial de novo in such cases. In the superior court at San Diego, Cal., on the other hand, said will was, over the protest of Major Clark, admitted to probate, from which action Major Clark took an appeal to the Supreme Court, which appeal has never been formally determined.

Such proceedings were in due time had in the district court of Noble county, Okl., that the contest there was about to be tried by the district court, or was in fact partially tried, when a compromise was reached between Major Clark and the proponents of his son's will, the terms of which compromise were embodied in a contract of settlement dated April 17, 1925, which, in so far as it affects this case, follows:

> "The contestant shall and does now hereby dismiss his contest with prejudice to the institution of any other contest. * * *
>
> "The executor of this will, subject to the approval of the court, hereby and now agrees that of the present cash assets of said estate he shall pay a full and just one-half (½) portion (to) Dillard H. Clark, Sr., and in such manner as shall be by the court approved, shall make over and transfer, convey and assign to Dillard H. Clark, Sr., a full one-half (½) portion of the entire interest of the deceased, Edwin Howard Clark, in certain royalty and oil, gas mineral rights, and in an oil lease covering land in Noble county, Oklahoma (describing it).
>
> "The said contestant, Dillard H. Clark, Sr., shall, out of his portion hereby given him from said estate pay all just, legal, valid taxes assessable, to be levied, or collected on that portion of the estate by this compromise to him assigned and transferred, including inheritance taxes. * * *
>
> "Said will, sought to be probated by the proponent, shall be probated in this court as of this date, said contest having been withdrawn as above stated."

Upon the filing of said contract of settlement in said cause in the district court of Noble county, Okl., that court, on the 23d day of May, 1925, entered its final judgment and decree in said cause, which, in so far as it is pertinent, follows:

> "And thereupon in pursuance of said stipulation, the contestant now withdraws and dismisses his said contest.
>
> "And thereupon the court, upon a full examination in open court, finds that there was a bona fide controversy between the parties to said probate and contest, and that the said settlement and compromise of the same is free from fraud or duress, and in the opinion of the court to the best interests of all of the persons in interest, and all beneficiaries under the will * * * and hereby now approves the same. * * *
>
> "And thereupon the court finds that the sole heir at law of said deceased is and was Dillard H. Clark, Sr., of San Diego, California, * * *
>
> "That at the time of the death of the deceased he was a single and unmarried man, never having had any lineal descendants, was over eighteen years of age, and of sound mind, and by said will disposed of all his estate, both real and personal. That the will proposed for probate was subscribed at the end thereof by the testator himself, and that said subscription was made in the presence of the attesting witnesses, that the testator at the time of subscribing the same declared to the attesting witnesses that the instrument was his will, and that there was two attesting witnesses each of whom did sign his name as a witness at the end of the will, at the testator's request, and in his presence, and in the presence of each other.
>
> "Said will is hereby admitted to probate, and is hereby probated as the last will and testament of Edwin Howard Clark, deceased; and now Geroge M. Gillet, Jr., is hereby appointed to be sole executor thereof, and is hereby ordered to immediately recognize, distribute and pay to Dillard H. Clark, Sr., as sole heir at law of the deceased, the exact one-half of all the estate reduced to money, and also to assign to Dillard H. Clark, Sr., a full one-half interest in all of the said mineral rights; and duly and fully perform all the other things by him agreed to be done in the said compromise; and the benefits therein named are hereby accepted by Dillard H. Clark, Sr., upon each and all of the conditions of said compromise, which are hereby accepted by him in all of its parts in open court."

Pursuant to said compromise, and during the year 1925, and up to the time of his death, February 12, 1926, Major Clark received in excess of $150,000 after the payment of all expenses in connection with said compromise, which said sum constituted a part of his estate which at his death passed into the hands of his executor.

Major Clark himself left a will which, by decree which is now final, has been admitted to probate by the superior court of San Diego county in this proceeding, the terms of which make provision for his wife, as follows: A trust fund for her benefit, whereby she is to receive during her life the income from securities of the approximate value of $40,000, leaving the bulk of his property to his surviving children.

By proper instruments Mrs. Eliza S. Winn Clark waived and relinquished all rights under the will of her husband, and elected to take that portion of his estate to which under the law she might be entitled.

All of the property of the estate, except that received by Major Clark as the result of the compromise of the will contest, as hereinbefore explained, was property or the proceeds of property owned by him prior to his marriage with appellant, and was his separate property.

Thereupon the court rendered the judgment appealed from, finding the property to be separate and distributing it to the two children under the will.

It is the contention of appellant that, as a matter of law, the facts found do not justify the conclusion that the property thus acquired is separate property. This is the sole question for the determination of the court.

Separate property and community property are defined in the Civil Code as follows:

> Sec. 163. "All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property."
>
> Sec. 164. "All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, * * * is community property. * * *"

The Supreme Court has construed the definition of separate property contained in section 163, Civil Code, to include "property taken in exchange for, or in the investment, or as the price of the property so originally owned or acquired." Meyer v. Kinzer, 12 Cal. 247, 73 Am. Dec. 538; Smith v. Smith, 12 Cal. 216, 73 Am. Dec. 533.

In case the will was held to be invalid, Major Clark was the sole heir of his son, and his right to contest the will was cast upon him immediately upon the death of his son. He claimed that his son's will was not a valid will. In this contention he had been sustained by the county court of Noble county, Okl. By way of compromise, however, he consented to the dismissal of his contest and to the admission of the will to probate. The terms of the compromise contemplated, however, that in consideration of withdrawing his contest, Major Clark should receive the half of his son's estate. It is this property and the profits thereof which are involved in this litigation. Had the will been rejected, he would have received all of his son's estate, and beyond doubt it would have been his separate property. The question is whether what he did receive is any the less his separate property because it came to him through the compromise that was effected. It would not be questioned that if, instead of acquiring a clear title to half of his son's estate by withdrawing his contest to the will, Major Clark had adopted the method of having the appeal dismissed and the will denied probate, and then transferring to the legatees and devisees one-half of the property, this property would be his separate property.

Did Major Clark transfer to the devisee under the will a property interest in return for that which was received by him under the terms of the compromise?

Property is defined by our Civil Code as follows:

> Section 654: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code, the thing of which there may be ownership is called property."
>
> Section 655: "There may be ownership * * * of rights created or granted by statute."

[1-4] The right of an heir to transfer his inheritance, even though there is a will or purported will in existence, is recognized by our courts. At the instant of his son's death Major Clark had a property right which he could assign or transfer or surrender for a consideration acceptable to him, and also the statutory right, which of itself is a property right, to contest his son's will. In re Baker, 170 Cal. 578, 150 P. 989. This right was a right vested in him prior to his marriage, and therefore was his separate property. The property involved in this litigation came to Major Clark in exchange or in payment for such property, and was likewise his separate property.

[5, 6] It is the contention of appellant that the right of action to contest a will is not assignable, nor the subject of conveyance, and that it is not property. Such is not the law of California. Our law specifically provides that "any person interested" may appear and contest a will and includes "heirs" as among these interested. Code Civ. Proc. § 1307.

> "Broadly speaking, a contest of a will is in its essence an action for the recovery of property unlawfully taken or about to be taken from the ownership of the contestant." In re Baker, supra.

While the mere expectancy of an heir is not usually regarded as property, the moment the ancestor has died, that expectancy is changed into a vested interest in property. It becomes thus vested by virtue of the death.

The contest of a will therefore goes to establish upon the part of the contestant that his right to property has been violated. This right is such as the Civil Code, § 954, declares upon:

> "A thing in action, arising out of the violation of a right of property, * * * may be transferred by the owner." Estate of Baker, 170 Cal. 578, 150 P. 989.

Much reliance is placed by appellant upon the case of Pancoast v. Pancoast, 57 Cal. 320. This case involved a situation where a man before his marriage intruded, without any right, on certain land, and after his marriage made a deed and gave up possession of a portion of the same to the rightful owner, in consideration whereof the owner conveyed to the trespasser the rest of the tract in fee. In this case the court held that as the trespasser had nothing before marriage except the mere ability to give trouble and cause expense to the true owners, the title which the latter conveyed to him after his marriage was something wholly new and did not fall within any of the classes of new acquisitions enumerated in the statute as being separate property, and was in law community property. There are some features of the case which are similar to the instant case; but there is this difference: That in the Pancoast Case the occupation does not appear to have been founded on any claim of right at all, but was a naked trespass, and the court refused to recognize a mere trespass as property; whereas Major Clark's claim to his son's estate was made in good faith on a bona fide contention that his son's will was invalid, and the Oklahoma court approved the settlement and found that it was free from fraud and duress and was for the best interest of the proponents of the will. In other words, that the contest was brought on probable cause. But above the good faith and above the probable cause, as steadfast as the rock of Gibralter, stands out this element of differentiation—that his contest was the assertion of a statutory right amounting to property.

[7, 8] It is the contention of appellant that the will was declared to be a valid will by the Oklahoma court, and that it was therefore a valid will ab initio. The facts are that at the time of the settlement the will had not yet been declared to be a valid will; that it was the subject of a contest brought by Major Clark, a contest which the statute specifically authorized him to bring; that the will was an unnatural will in that it excluded by its provisions the only person who was the natural object of the bounty of the decedent; that the contest had been successful in the county court, and it was only by the prosecution of an appeal that the executors and legatees would have been able to obtain anything out of the estate; that no order of a probate court of Oklahoma had yet been entered admitting the will to probate; and that a will may be ever so valid, but until it is admitted to probate it is of no value as evidence of title. Roberts v. Roberts, 168 Cal. 307, 142 P. 1080; Estate of Patterson, 155 Cal. 626, 102 P. 941; Estate of Christensen, 135 Cal. 674, 68 P. 112. Thereafter the will was admitted to probate after the only person who was adversely interested had withdrawn his contest.

[9] As regards the good faith and probable cause of his contest, Major Clark should be bound by the facts and circumstances as they existed when the stipulation was entered into, not by the record as it was afterwards made as contemplated in the stipulation.

[10] When a suit is brought bona fide on probable cause, a promise to compromise it is a valuable consideration, even though the suit should be held to be unfounded. Union Collection Co. v. Buckman, 150 Cal. 159, 88 P. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609.

[11] It is true that the property in litigation was acquired by Major Clark during the time he was married to appellant, but it was acquired by way of the compromise of a statutory right which was in itself property and which he owned prior to his marriage. Property acquired by compromise is separate property if the right compromised is separate. The right compromised is the consideration for the property obtained by the compromise, and the principle is the same as where property is purchased with separate funds. 31 Cor. Jur. 24, § 1099.

Judgment affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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94 Cal. App. 527

PRATT et ux. v. BERETTA. (Civ. 6304.)

District Court of Appeal, First District, Division 2, California. Oct. 27, 1928.

1. Contracts 🔑40—Separate writings constitute single contract, where minds of parties meet and terms are identical.

Separate writings, each signed by one of the parties, constitute single contract, which should be considered and construed together, where the minds of the parties meet and the writings are identical as to subject-matter, terms, and conditions.

2. Exchange of property 🔑3(1)—Separate contracts by which principals employed common agent to exchange properties, with promise to convey on acceptance of agreement, held not binding contract between principals, where neither offer was accepted.

Separate agency contracts identical in form, by which the principals separately authorized and employed common agent to exchange their property with promise to convey on acceptance of agreement, *held* not to constitute a binding contract between the principals for an exchange of real properties, but merely separate offers, where there was no formal act of acceptance on part of either party of the offer of the other.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by William T. Pratt and wife against Mary A. Beretta. Judgment for defendant, and plaintiffs appeal. Affirmed.

Dozier, Kimball & Dozier, of San Francisco, for appellants.

J. B. Feehan and Joseph Farry, both of San Francisco, for respondent.

NOURSE, J. Plaintiffs sued for the specific performance of an alleged contract for the exchange of real properties. The cause was tried before the court, sitting without a jury, and resulted in a judgment for the defendant, from which the plaintiffs have appealed on a typewritten record.

The alleged contract upon which the cause of action is founded consists of two written documents, each executed separately by the respective parties at different times of the same day and without the presence of the other party. Each document is in form and substance a contract between the signer and a common real estate agent employing such agent to effect the exchange of real property owned by the signer for other designated real property upon specified terms. The action was defended upon the grounds that the contract executed by defendant was obtained through misrepresentation and fraud upon the part of the real estate agent, and that the two contracts did not constitute an enforceable agreement between the plaintiff and the defendant. The trial court found against defendant upon her charge of misrepresentation and fraud, and found that there was no contract between the parties to this suit. It is this question alone which arises on this appeal—whether the two contracts with the common agent constitute an enforceable contract between the parties to the suit.

The two agency contracts were practically identical in form. They both "authorize and employ Trevor & Co., a corporation, as our agent in our behalf, to exchange" property, and authorize said agents "to enter into an agreement or agreements of exchange of said property in our name and in our behalf." Both contracts give to these agents the exclusive right for a period of six days to effect the exchange, and both provide that "upon the acceptance of this agreement we further agree to convey said property," etc. The contract signed by the defendant contained stipulations not found in the other, reserving to the seller definite time within which to vacate, and providing a condition that if she found a cash buyer for her property during the period the contract should be null and void. Neither contract was accepted by the other party in express terms, and, so far as appears from the record, knowledge of the signing of either was not conveyed to the other party.

The contention of the appellants is that the two contracts express all the terms and conditions necessary to effect the exchange, and that they should be deemed to constitute one contract of exchange, within the rule of Tuso v. Green, 194 Cal. 574, 229 P. 327, and other cases citing and following that rule. The respondent contends that the minds of the parties never met, that all she agreed to was the employment of a common agent who was authorized to make the exchange and to enter into a contract for that purpose.

[1] The question to be determined in cases of this kind is whether the minds of the parties met upon the essential terms and conditions of the undertaking. "When the minds of the parties meet, that is to say, when the respective writings match one another as to subject matter, terms, and conditions, a contract comes into existence between the parties, and when such terms and conditions are stated in writings which are signed by the respective parties the contract is none the less a contract in writing merely because each of the respective writings is signed by but one of the parties. Such a contract in writing fully satisfies the statute of frauds. Frost v. Alward, 176 Cal. 691, 169 P. 379; Merkeley v. Fisk, 179 Cal. 748, 178 P. 945; 12 Cal. Jur. 904, and cases cited. In construing such a contract the separately executed instruments are to be considered and construed together as one contract." Tuso v. Green, 194 Cal. 574, 581, 229 P. 327, 329.

[2] In the Tuso case the parties had met and had orally agreed upon the terms of sale. They had then gone to the escrow holder and had signed identical escrow instructions containing all these terms and conditions. These papers constituted the memorandum of the oral agreement within the statute of frauds. Here the papers signed by the respective parties were in the nature of an offer to exchange—not a memorandum of a prior oral contract to exchange. They both contemplated a formal acceptance before either party should be bound. Such acceptance could have been made by either party, but neither party executed an acceptance of the offer of the other. On August 18, 1922, Trevor & Co., purporting to act under Exhibit A, executed a written acceptance for the first owner. But neither Exhibit A nor Exhibit B expressly gave Trevor & Co. such authority. On the contrary, each exhibit contains words indicating that the right to execute "an acceptance" remained vested in each owner. It is written that "notice of such acceptance" would fix the date on which the acceptor should com-

mence to search the title of the other owner. It is also written that the right of Trevor & Co. to demand compensation arose only "upon acceptance." Without some formal act on the part of the respective owners indicating an acceptance of the offer of the other the trial court correctly found that the minds of the parties had not met, and that, accordingly, no contract had been made between them.

Judgment affirmed.

We concur: BUCK, Presiding Justice pro tem.; STURTEVANT, J.

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94 Cal. App. 593

SPARLING v. SPARLING. (Civ. 6184.)

District Court of Appeal, Second District, Division 2, California. Oct. 30, 1928.

1. Divorce ⟹284—Defendant's appeals from orders directing payment of alimony, where accompanied by undertakings to stay execution, deprived superior court of jurisdiction to enforce payment, or punish defendant for contempt.

Where defendant appealed from orders directing payment of alimony and counsel fees, and gave undertakings to stay execution, superior court was deprived of jurisdiction to require payment under the orders, or to punish defendant for contempt, and defendant was entitled to writ of supersedeas to restrain superior court's enforcement of the orders.

2. Appeal and error ⟹986—Trial court's determination of sufficiency of appellant's undertaking is conclusive on reviewing court.

Trial court's determination of question of sufficiency of appellant's undertaking to stay execution, in direct issue in which right to stay is involved, will not be reviewed by appellate court.

Application by Raymond Walter Sparling for writ of supersedeas to be directed to the Superior Court of Los Angeles County to restrain, pending appeal, the enforcement of decrees in favor of Marguerite Sparling for payment of alimony and counsel fees. Writ granted.

Maurice C. Sparling and Courtney A. Teel, both of Los Angeles, for petitioner.

W. I. Gilbert, of Los Angeles, for respondent.

CRAIG, J. An interlocutory decree of divorce was granted in favor of the respondent, directing that the petitioner pay forthwith a specified amount of money, alimony each month thereafter, and attorney's fees, from which decree the petitioner appealed on December 22, 1927, and filed an undertaking in the sum of $8,800, as fixed by the trial court, to stay execution. On February 8, 1928, pursuant to an order to show cause why the petitioner should not pay the alimony formerly ordered, or be held in contempt of court, and also $200 per month pending appeal, and attorney's fees for services in connection with said motion, an order was entered directing that he pay these latter moneys. From this order petitioner also appealed and filed an undertaking in the sum of $5,000 to stay execution thereof. Thereafter, and on April 18, 1928, pursuant to a similar order to show cause, a hearing was held, and on July 20, 1928, a like order was made requiring payment of $200 per month to respondent, commencing as of April 3, 1928, and attorney's fees for services rendered in connection with the motion last mentioned. Petitioner appealed from that order, filing an undertaking in the sum of $5,000 to stay its execution. On August 13, 1928, petitioner was again ordered to show cause why he should not be punished for contempt of court for failure to comply with the prior orders, and why he should not pay the respondent $200 per month pending appeal, and fees of her attorney for services rendered in connection with this third order to show cause.

[1] The petitioner herein, defendant below, prays a writ of supersedeas restraining enforcement of the decree and orders appealed from, asserting that said appeals and undertakings deprived the superior court of jurisdiction to require payment of either of said amounts, or to punish him for failure to comply with the mandates from which he appealed. Respondent avers that she is without income, and has not sufficient funds with which to maintain herself in the station of life to which she has been accustomed, or to pay her counsel and defend her action upon appeal. It is also alleged that the defendant, petitioner herein, is in possession and control of the community property, which he threatens to sequester and waste, and that the undertakings upon appeal are insufficient to protect her interests therein.

The question here presented was decided by the Supreme Court in the recent case of Smith v. Smith, 201 Cal. 217, 256 P. 419, wherein it was said:

> "The defendant's right to stay execution of an order such as we are considering here, pending the determination of the appeal involving the main issue, has been settled in this state since the elaborate consideration given to the subject in the case of Sharon v. Sharon, 67 Cal. 199, 7 P. 456, 635, 8 P. 709."

[2] The facts there presented were identical with those of the instant case, except that but one order subsequent to the decree was under consideration. The only remaining point argued by respondent in opposition to the issuance of a writ herein is that of the sufficiency of petitioner's various undertakings in the respective appeals. Such ques-

tions are determined by the trial court upon a direct issue in which the right to a stay of proceedings is involved (Gutierrez v. Hebbard, 104 Cal. 103, 37 P. 749), and appellate courts will not review the conclusion of the lower tribunal in this particular (Jameson v. Chanslor-Canfield Midway Oil Co., 173 Cal. 612, 160 P. 1066).

It is ordered that the superior court of the state of California, in and for the county of Los Angeles, desist and refrain from enforcing, or attempting to enforce, the said decree or either of said orders of February 8, 1928, July 20, 1928, or August 13, 1928, or any of the terms or provisions of either of them, and that all proceedings of the said superior court on said decree and upon each of said orders be, and the same hereby are, stayed until the further order of this court.

We concur: WORKS, P. J.; THOMPSON, J.

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94 Cal. App. 520

PEOPLE v. McGRATH. (Cr. 1485.)

District Court of Appeal, First District, Division 1, California. Oct. 27, 1928.

1. Indictment and information 🔑189(1)—To be "necessarily included" in offense charged, lesser offense must be part of greater in fact (Pen. Code, § 1159).

Under Pen. Code, § 1159, authorizing jury to find defendant guilty of any offense the commission of which is necessarily included in offense with which he is charged, to be "necessarily included" in offense charged, lesser offense must not only be part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Necessarily Included.]

2. Indictment and information 🔑189(1)—Defendant charged with driving while under influence of intoxicating liquor could not be convicted of reckless driving (Vehicle Act 1927, § 112; Vehicle Act 1923, § 121; Pen. Code, § 1159).

Under information charging defendant with driving automobile along public highway while under influence of intoxicating liquor, in violation of Vehicle Act, § 112 (St. 1927, p. 1436), defendant could not be convicted of reckless driving under section 121 (St. 1923, p. 557), on theory that latter offense was included within crime of driving while under the influence of intoxicating liquor within Pen. Code, § 1159.

3. Indictment and information 🔑189(1)—Test in determining whether one crime is necessarily included within another is whether conviction or acquittal of one bars prosecution for other (Pen. Code, § 1159).

One of legal tests to be applied in determining whether one crime is necessarily included within another, within Pen. Code, § 1159, is whether a conviction or acquittal of one crime operates as a bar to prosecution for the other.

4. Criminal law 🔑902—Court having erroneously given instruction, over objection, authorizing conviction for reckless driving under information charging driving while intoxicated, defendant's counsel, in subsequently proposing two forms of verdict, did not waive objection (Vehicle Act 1927, § 112; Vehicle Act 1923, § 121).

Where court, over defendant's objection, erroneously instructed that jury might find defendant, charged with driving automobile while under influence of intoxicating liquor in violation of Vehicle Act, § 112 (St. 1927, p. 1436), guilty of reckless driving in violation of section 121 (St. 1923, p. 557), defendant's counsel, in subsequently requesting instruction that jury must base verdict on charge in information, and proposing two forms of verdict based on question whether defendant was driving while under influence of intoxicating liquor, and whether he was driving in reckless manner, did not waive defendant's right to take advantage of erroneous instruction, even if such error could be waived.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

James F. McGrath was convicted of reckless driving of an automobile, and he appeals. Reversed.

W. S. Robenson, of Richmond, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted in the superior court of a misdemeanor and has appealed from the judgment of conviction, urging as ground for reversal that he was found guilty of an offense with which he was not charged and upon which he was not tried.

The charge set forth in the information was that he drove an automobile over and along the public highway "while then and there under the influence of intoxicating liquor." He entered a plea of not guilty thereto and was subsequently placed on trial before a jury. After deliberating upon its verdict for some time, the jury returned into court for further instructions, and one of the questions propounded to the court by the foreman was whether it was permissible for the jury "to bring in a verdict of reckless driving." The court referred the question to the attorneys, but they were unable to agree upon the proposition; the district attorney contending that such a verdict could be legally rendered, and counsel for appellant insisting to the contrary. After considerable discussion, the court of its own motion instructed the jury as follows:

"* * * That the crime of reckless driving is included in the information in this case and that when a charge embraces two or more degrees of crime and there is reasonable doubt in the minds of the jurors as to which degree he is guilty, it is the duty of the jury to convict the defendant of the lesser of the two degrees."

Whereupon counsel for appellant requested the court to instruct the jury also "that if they convict of the lesser they must acquit of the higher crime," and that there be submitted to the jury two separate forms of verdict based upon the following questions:

First, "Was the defendant at the time of the happening of the offense—of the accident charged—driving and operating a motor vehicle upon a public highway within this state under the influence of intoxicating liquor?" And, secondly, "Was the defendant driving and operating a motor vehicle upon a public highway in this state in a reckless manner so as to endanger the life and the limb and the safety of person or property?"

The court granted the requests, and thereafter the jury agreed upon and returned two verdicts, the first finding appellant "not guilty of driving an automobile * * * while under the influence of intoxicating liquor," and the second finding him "guilty of the crime of driving an automobile upon a public highway without precaution and in such a manner as to endanger the life and property of other persons."

[1] Section 1159 of the Penal Code provides that the "jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense"; and this section has been construed to mean that "to be 'necessarily included' in the offense charged, the lesser offense must not only be part of the greater in fact, but it must be embraced within the legal definition of the greater as a part thereof." People v. Kerrick, 144 Cal. 46, 77 P. 711. Therefore, the question presented for determination is whether the crime of reckless driving is necessarily included within the crime of driving while under the influence of intoxicating liquor and is embraced within the legal definition of the latter.

[2] The California Vehicle Act contains a number of penal provisions, but only two of them are pertinent here. Section 112, which is evidently the section upon which the charge set forth in the information is grounded, reads as follows:

"It shall be unlawful for any person * * * who is under the influence of intoxicating liquor * * * to drive a vehicle on any public highway within this state"—the penalty fixed for violation thereof being imprisonment in the county jail or in the state prison, at the discretion of the jury, or a fine. Stats. 1927, p. 1436.

And section 121, which is the section upon which the verdict and the judgment of conviction are based, provides:

"Any person who knowingly and willfully drives any vehicle upon a public highway, either without due caution and circumspection or in such manner as to endanger the life, limb, or property of any person, shall be guilty of reckless driving and upon conviction shall be punished by imprisonment in the county jail * * * or by a fine * * * or by both such fine and imprisonment." Stats. 1923, p. 557.

The Penal Code also contains a section providing that any person operating or driving a motor vehicle who becomes or is intoxicated, and by reason of such intoxication does any act or neglects any duty imposed by law which results in the death of, or bodily injury to, any person, is guilty of an offense for which he may be punished by imprisonment in the state prison or the county jail, or a fine, or by both fine and imprisonment (section 367e, Pen. Code); but manifestly this Code section has no bearing upon the question at issue here, because nowhere in the information was it alleged that appellant injured or caused the death of any person as a result of driving while intoxicated, the charge being confined strictly to the language employed in section 112 of said act. The Penal Code contains another section (section 367d) which in substance declares that any person operating or driving an automobile, who becomes or is "intoxicated" while so engaged in operating or driving such automobile, shall be guilty of a misdemeanor; but, as above suggested, the wording of the information indicates that the charge therein was based upon section 112 of the Vehicle Act.

Therefore, directing our attention to the two sections of the Vehicle Act above mentioned, it will be observed that the single act denounced as a crime by section 112 consists of driving an automobile upon a public highway while under the influence of intoxicating liquor. It is not essential, therefore, to the existence of such an offense that the driver be so intoxicated that he cannot drive safely, nor is it any defense to such crime that he may have exercised due care to avoid injuring other travelers. The expression "under the influence of intoxicating liquor" has been held to cover not only all well-known and easily recognized conditions and degrees of intoxication, but any abnormal mental or physical condition caused by the indulgence in any degree in intoxicating liquor which impairs, to an appreciable degree, the ability of the driver to operate his car in the manner that an ordinarily prudent and cautious person, in full possession of his faculties, would operate a similar vehicle, under like conditions. People v. Dingle, 56 Cal. App. 445, 205 P. 705; Berry on Automobiles (4th Ed.) § 1750; Needham v. State, 107 Neb. 389, 186 N. W. 336; State v. Rodgers, 91 N. J. Law, 212, 102 A. 433; People v. Ekstromer, 71 Cal. App. 239, 235 P. 69. The determining factor in the trial of a case prosecuted under section 112 of said act relates, therefore, to the mental and physical condition of the driver, that is, his ability to operate his car, and not to the manner in which the car is being actually driven, nor the result of its operation. The commission of the crime is complete when such person engages in the act of driving an automobile upon the public highway while under the influence of intoxicating liquor as that term is defined by the decisions of this state (People v. Dingle, supra), even though there are no other travelers on the highway at that time (State v. Rodgers, supra), or, if there are, that he has driven his car in such manner as did not in fact endanger their safety. The section was designed, said this court in People v. Ekstromer, supra, "to protect the public from the menace of automobiles operated upon the public highway with inadequate or no efficient control, in a world of traffic difficult of management under normal conditions. * * *"

On the other hand, evidence of indulgence in intoxicating liquor is wholly unessential to the establishment of the crime of reckless driving, as it is defined by section 121 of said act; that is, a person may be guilty of driving without due caution and circumspection, or in such manner as to endanger the safety of others, even though he has not indulged at all in intoxicating liquors. The two crimes are therefore not only distinct in law but in fact, for each crime pertains to a separate state of facts.

[3] One of the legal tests to be applied in determining whether one crime is necessarily included within another is whether a conviction or an acquittal of one crime operates as a bar to a prosecution for the other. People v. Majors, 65 Cal. 138, 3 P. 597, 52 Am. Rep. 295. If the pleas of autrefois convict or autrefois acquit may be successfully interposed as a bar to the second prosecution, then the two offenses are considered part of each other (People v. Ny Sam Chung, 94 Cal. 304, 29 P. 642, 28 Am. St. Rep. 129; People v. McDaniels, 137 Cal. 192, 69 P. 1006, 59 L. R. A. 578, 92 Am. St. Rep. 81); but if such pleas are not available, then the offenses are distinct (People v. Kerrick, supra; People v. Helbing, 61 Cal. 620; People v. McDaniels, supra). As pointed out, each of the crimes under consideration relates to a separate state of facts; consequently it is possible for a person to commit, and therefore be legally charged with, and if found guilty be punished for, both crimes. That being so, a plea of autrefois convict would not lie in bar of a prosecution for the second crime. Moreover, a comparison of the wording of the two sections is sufficient to show that the elements constituting one of these crimes are not embraced within the legal definition of the other. For the reason above assigned it would seem obvious that the crime of reckless driving is in no sense included within the crime of driving while under the influence of intoxicating liquor. Consequently the situation presented is one which did not fall within the purview of section 1159 of the Penal Code, and, accordingly, the verdict finding appellant guilty of reckless driving and the judgment pronounced thereon are void.

In order to prove a case under one of the sections above mentioned, it may be necessary, and doubtless is at all times permissible, to introduce evidence which may tend to establish guilt of the other offense; that is, where a person is charged with driving an automobile while under the influence of intoxicating liquor and it is shown that he has been indulging in such liquor, evidence that he was driving recklessly may in itself constitute proof of his inability to operate his car in the manner that an ordinarily prudent and cautious person, in full possession of his faculties and under like conditions, would operate it; or if he be charged with reckless driving, evidence that he was at the time under the influence of intoxicating liquor may be proof of the fact that the reckless acts were not committed as a result of an emergency with which he was suddenly confronted and for which he would be legally excusable, but were attributed wholly to a lack of self-control caused by intoxicants. But these are considerations relating to evidentiary matters and have nothing to do with the question of the elements constituting the respective offenses under discussion. Whether or not a person charged, under section 367e of the Penal Code, with having operated or driven a motor vehicle while intoxicated which has resulted in the death or injury to any person, may be found guilty of the offense declared by section 112 of said act, that is, driving while under the influence of intoxicating liquor, is a question not involved on this appeal, and consequently we do not presume to pass upon it.

[4] Respondent contends in support of the judgment that appellant acquiesced in the proceedings which resulted in the rendition of the two verdicts, and that therefore he is not in a position to complain of their effect. We are unable to sustain the point. The assignment of error is based upon an erroneous instruction given to the jury by the court of its own motion to the effect that the crime of reckless driving was necessarily included in the charge set forth in the information and that the jury might find appellant guilty of that crime; and the record shows that prior to the giving of the aforesaid instruction counsel for appellant earnestly contended that such was not the law and that an instruction to that effect should not be given. The error committed in giving the instruction and the prejudicial effect thereof are therefore matters about which appellant may rightfully complain. Moreover, even though it be assumed, as respondent seems to con-

tend, that counsel for a defendant may stipulate that the jury has the power to bring in a verdict against his client for the commission of an offense with which the latter was not charged, and upon which he had not been tried, we are of the opinion that in the present case, since the court had already erroneously instructed that the jury might find appellant guilty of reckless driving, the action of counsel for appellant thereafter in requesting the court to instruct the jury that nevertheless it must find a verdict based upon the charge set forth in the information, and in proposing the forms of the two verdicts for such purpose, did not amount to a stipulation to that effect nor operate as a waiver of appellant's right to take advantage of the erroneous instruction already given.

The judgment is reversed.

94 Cal. App. 543

PEOPLE v. MEDALGI. (Cr. 1502.)★

District Court of Appeal, First District, Division 1, California. Oct. 29, 1928.

As Modified on Denial of Rehearing Nov. 28, 1928.

1. Intoxicating liquors 🔑236(6½)—Evidence held to sustain conviction of possessing intoxicating liquor.

Evidence *held* sufficient to sustain conviction of unlawful possession of intoxicating liquor.

2. Intoxicating liquors 🔑238(2)—Whether defendant placed liquor under floor of dog house in his yard was fact question for jury.

Whether intoxicating liquor found under floor of dog house in defendant's yard had been placed there by him was a question of fact for the jury, in trial for unlawful possession thereof.

3. Criminal law 🔑1134(1)—That inference of innocence might reasonably be drawn from circumstances also justifying inference of guilt does not present law question for appellate court.

Where circumstances are such as to reasonably justify an inference of guilt as found by jury, fact that inference of innocence might likewise be reasonably drawn therefrom does not present a question of law for review by appellate court, which will interfere only where evidence obviously does not warrant inference of guilt.

4. Criminal law 🔑1036(2)—Defendant, not assigning misconduct below to witness' answers to certain questions on cross-examination, cannot complain of prejudicial effect on appeal.

Defendant not objecting or excepting to, moving to strike, nor assigning as misconduct, police officer's answers to questions on cross-examination as to when he had visited defendant's premises before raid resulting in discovery of intoxicating liquor for possession of which defendant was convicted, cannot complain on appeal of prejudicial effect of answers stricken on his motion, in absence of assignment of misconduct therein, as, to warrant reversal for misconduct, record must show that proper assignments of error were made at the time.

5. Criminal law 🔑789(2)—Giving of additional instruction amplifying statutory definition of reasonable doubt is not error (Pen. Code, § 1096 as amended, and § 1096a as added by St. 1927, p. 1039).

Pen. Code, § 1096a, as added by St. 1927, p. 1039, providing that court may read to jury section 1096 as amended by St. 1927, p. 1039, and that no further instruction on presumption of innocence or defining reasonable doubt "need be given," does not restrict court to reading of definition in section 1096, and giving of correct additional instruction amplifying such definition is not error.

On Application for Rehearing.

6. Intoxicating liquors 🔑236(6½)—Mere proof of possession of intoxicating liquor does not establish offense of unlawful possession.

Mere proof of possession of intoxicating liquor is not sufficient to constitute offense of unlawful possession thereof, without further proof that it was possessed for unlawful purposes.

7. Criminal law 🔑1172(1)—Instruction that mere doing of act is sufficient to constitute offense held not prejudicial, where evidence showed conclusively that defendant's possession of intoxicating liquor was unlawful.

Where there was no pretense that defendant had intoxicating liquor lawfully or for lawful purpose, his sole defense being that he did not have possession thereof, and circumstances proved showed conclusively that his possession was unlawful, instruction that mere doing of act is sufficient to constitute offense was not prejudicial, if erroneous as meaning that mere proof of possession was sufficient to constitute offense of unlawful possession.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Tony Medalgi was convicted of unlawful possession of intoxicating liquor, and he appeals. Affirmed.

Lindsay & Gearhart and Carl E. Lindsay, all of Fresno, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

KNIGHT, J. Appellant was charged with having unlawfully possessed intoxicating liquor and with having been previously convicted twice of like offenses. He entered a plea of not guilty to the present charge, but admitted the prior convictions, and upon trial the jury found him guilty. He has appealed from the judgment of conviction, and the first point urged for reversal is that the evidence is insufficient to sustain the verdict.

[1] The main facts upon which the verdict is grounded are as follows: On the afternoon of April 4, 1928, two police officers of the city of Fresno, accompanied by a private detective, and acting under the authority of a search warrant, visited appellant's premises in Fresno for the purpose of searching the same for illicit liquor. After knocking at the front door and receiving no response, they forcibly entered the house wherein they found

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★Rehearing denied.

three women, two men, and some children. Appellant was not there at that time. Upon searching the premises the officers found a pint flask partly filled with liquor, under the steps attached to the rear of the house. One of the women present in the house at the time, but who resided next door, asserted that the liquor belonged to her. Continuing their search, the officers discovered a gallon demijohn and a pint flask filled with an intoxicating liquor called "jackass brandy," hidden underneath a movable floor of a dog house to which a dog was tied, located in the yard about ten feet to the rear of the dwelling. Before the officers left the premises, appellant drove up in his automobile, but he denied ownership of the liquor or that he knew that it was there. At the trial he admitted owning and occupying the premises, also that he parked his car in the yard thereof, but denied ownership of the dog or the dog house, stating that they belonged to "somebody else." Evidence was adduced to show, however, that appellant, assisted by a man named Helmuth, built the dog house less than two weeks prior to the discovery of the liquor underneath the floor thereof; and other evidence was introduced tending to prove that appellant owned the dog. It appears also from the testimony that prior to the discovery of the liquor under the dog house appellant was arrested on several occasions, and Helmuth once, for "bootlegging" on these same premises. The foregoing evidence, when considered with the other incidental circumstances disclosed by the record, is legally sufficient, in our opinion, to sustain the verdict.

[2, 3] Appellant cites the rule announced by several federal cases to the effect that possession of liquor, as of other instruments and fruits of crime, involves the elements of knowledge, dominion, and control, with plenary power of dispossession in the alleged possessor; and in this connection he contends that none of those elements were established, it being argued with respect thereto that anybody, including any one of the five adults found in the house at the time of the "raid," might have placed the liquor under the floor of the dog house. But as said in People v. Buttulia, 70 Cal. App. 444, 233 P. 401, "Whether or not the liquor had been placed there by the defendant was a question" of fact "for the jury, * * * " and as stated in People v. Martinez, 20 Cal. App. 343, 128 P. 952, afterwards quoted approvingly in People v. Mitsunaga (Cal. App.) 266 P. 1020:

> "Where the circumstances are such as to reasonably justify an inference of guilt, as found by the jury, the fact that an inference of innocence might likewise be reasonably drawn therefrom does not present a question of law for review by an appellate court any more than does a verdict based upon direct conflicting evidence; * * * and it is only where the evidence obviously does not warrant the inference of guilt that the court will interfere."

Conceding, therefore, that appellant's denial of the ownership of the liquor, if believed and accepted by the jury, would have been enough to exonerate him, still the facts and circumstances above related, upon which the jury's verdict was mainly grounded, are not, in our opinion, so wanting in persuasive force nor so inherently weak as to justify this court in declaring, as a matter of law, that the conclusion reached by the jury as to appellant's guilt is devoid of any reasonable support. People v. Hay, 74 Cal. App. 464, 241 P. 275. The facts of the present case are not only similar to but even stronger than those of People v. Buttulia, supra, wherein the defendant was charged with the illegal possession of illicit liquor and the judgment of conviction was affirmed, for there the liquor was not found upon the defendant's premises but was found buried on a vacant lot adjoining his house; whereas here the liquor was found on premises admittedly owned and occupied by appellant, hidden under the movable floor of a dog house which appellant had personally constructed a short time prior to the finding of the liquor. In the case last cited, "the prosecution introduced evidence of numerous sales, some of them on the day charged in the information, from which the jury was asked to infer that defendant possessed the liquor, exercised control over it and did so for an illegal purpose." And with reference to the admissibility of such evidence, the court said:

> "It is clear that if the defendant was making a practice of selling liquor, that fact would tend to show that he was responsible for placing the liquor where it was found, adjoining his home, and would also tend to prove that his constructive possession of such liquor was for an illegal purpose."

It would appear, therefore, that the evidence in the present case to the effect that appellant had been arrested more than once for "bootlegging" on these same premises would tend to prove the criminal ingredients above mentioned.

[4] The testimony establishing the fact that appellant had been arrested before for like offenses committed on the same premises, and that the place had been previously "raided," was developed on the cross-examination of one of the police officers, in response to questions propounded by counsel for appellant in an endeavor to ascertain when prior to the present "raid" the officer had visited the premises, and appellant contends that the answers thus given were not only inadmissible, but that the giving of the same constituted prejudicial misconduct. Under the ruling in People v. Buttulia, it would seem that the testimony was proper, but aside from the question of its admissibility, the record discloses that with but few exceptions appellant allowed the answers to stand without objecting or excepting thereto, or without asking that the answers be stricken out or assigning the giving of the same as

misconduct; and that in a few instances where motions were made to strike out objectionable answers no assignment of misconduct was made, and the court promptly granted the motions and ordered the testimony stricken out. Even though it be assumed, therefore, that the answers to which appellant at the time did object were improper, appellant is not allowed to complain of the prejudicial effect thereof for the first time on appeal, because it has been repeatedly held that to warrant a reversal for misconduct the record must show that proper assignments of error were made at the time the asserted misconduct occurs, so as to enable the trial court to remedy the matter by appropriate instructions. People v. Buttulia, supra, and cases therein cited.

[5] At respondent's request the court gave to the jury an instruction amplifying the definition of reasonable doubt as set forth in section 1096 of the Penal Code as amended in 1927 (St. 1927, p. 1039); and appellant contends that the effect of said amendment and of the new section, 1096(a), enacted at the same time, was to preclude the trial court from giving any instruction upon the subject of reasonable doubt or presumption of innocence other than to read the definition embraced in said section 1096. It is doubtless true, as appellant asserts, that prior to the changes in the Code above mentioned it had been the usual practice for the trial court to give elaborate instructions upon the doctrine of reasonable doubt and presumption of innocence, which often resulted in confusion and error; and that it was to relieve such burdensome situation that the Legislature in 1927 defined reasonable doubt and enacted section 1096(a), which provides that in "charging a jury, the court may read to the jury section 1096 of this Code, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt *need be given*" (italics ours). But it will be observed that the provisions of the section last above quoted do not declare that no further instructions "shall be given," merely that no further instructions "need be given"; and consequently said section does not restrict the trial court to a reading of the definition given in section 1096. In other words, it is optional with the trial court whether or not it will give further instructions. Therefore, since appellant does not question the correctness of the amplifying instruction given herein, the fact that it was given in addition to the definition set forth in said section 1096 did not constitute error.

[6, 7] Appellant assigns as error the giving of the following instruction:

> "You are instructed that in this class of offenses the intent is presumed from the doing of the act, that is, the mere doing of the act is sufficient to constitute the offense."

If by said instruction the court meant that mere proof of possession of intoxicating liquor was sufficient to constitute the offense, without further proof that it was possessed for unlawful purposes, the instruction was erroneous. People v. Silva, 67 Cal. App. 351, 227 P. 976; People v. Mattos, 67 Cal. App. 346, 227 P. 974; People v. Arnarez, 68 Cal. App. 645, 230 P. 193; People v. Mullaly, 77 Cal. App. 60, 245 P. 811. However, as in People v. Mullaly, supra, there was no pretense at the trial that the appellant had the liquor lawfully or for a lawful purpose. His sole defense was that he did not have possession of the liquor at all, and the circumstances proved were such as to show conclusively that, if he did have the liquor, his possession thereof was unlawful. The instruction, therefore, could not have affected the result of the trial.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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94 Cal. App. 530

CALIFORNIA BOND & MORTGAGE CO. v. WASHBURN et al. (Civ. 6305.)

District Court of Appeal, First District, Division 2, California. Oct. 27, 1928.

1. Appeal and error 🔑842(1)—Laches is question of fact to be determined in trial court on all circumstances of case.

Laches is question of fact to be determined in trial court on all facts and circumstances of case.

2. Appeal and error 🔑901, 948—Question of laches barring recovery, to be raised on appeal, requires showing that trial court's finding was unsupported by evidence and that it abused discretion.

To raise on appeal question of laches barring right to recover, it is necessary to show that finding of trial court that party was not guilty of laches was not supported by evidence and that there has been abuse of discretion.

3. Novation 🔑1, 12—Novation is new contract which must be proved like any other contract (Civ. Code, § 1530).

Under Civ. Code, § 1530, novation is new contract which must be proved like any other contract.

4. Novation 🔑7—Substitution of new vendor and new vendee under contract to sell land without intention to substitute new debtor did not affect novation releasing original purchaser (Civ. Code, § 1531).

Where new vendor and new vendee were substituted under contract for sale of land, but there was no intention to substitute new debtor in place of original purchaser, with intent to release original purchaser, as required by Civ. Code, § 1531, there was no novation releasing original purchaser.

5. Licenses 🔑39—Contention that corporation purchasing contract for sale of land could not enforce contract because paying stock and not cash therefor in violation of Corporate Securities Act held not sustained under evidence.

In action to recover balance of purchase price of real property, contention that plaintiff corporation acquiring contract of sale from original vendor did not come into court with clean hands because it acquired contract contrary to permit from corporation commissioner by paying stock and not cash therefor could not be sustained, where findings to contrary were supported by evidence that corporation purchased contract as investment and sold stock to its assignor through broker for cash, and since contention stated crime under Corporate Securities Act (St. 1917, p. 673) and court presumes crime was not committed.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by the California Bond & Mortgage Company against W. K. Washburn and another. Judgment for plaintiff, and defendant named appeals. Affirmed.

Edward R. Eliassen and C. Leonard Rosenberg, both of Oakland, and Sheridan Downey, of Sacramento, for appellant.

Strother P. Walton, of Fresno, for respondent.

NOURSE, J. Plaintiff sued to recover the balance of the purchase price of certain real property, for a lien for the amount of the judgment, and for a deficiency judgment against the two defendants. The cause was tried before the court without a jury and resulted in a decree in favor of plaintiff for the relief prayed. From this judgment the defendant Washburn alone has appealed on a typewritten transcript.

On February 20, 1920, one Schougaard sold the property in suit to the defendant Washburn under a conditional sale agreement, which he assigned to his codefendant, Pipig, on February 23, 1921. On November 2, 1923, Schougaard deeded all his interest in the premises to the plaintiff and at the same time assigned to plaintiff the contract of sale in which Pipig appeared as assignee of the Washburn interests. On July 23, 1925, after notices of default had been given to both defendants, this action was commenced.

[1, 2] On this appeal it is argued that the respondent was guilty of laches and should not recover from the appellant for that reason. The argument is based upon the statement that the respondent looked solely to Pipig for the performance of the condition of the contract, treated appellant as being out of the transaction because of his assignment to Pipig, and failed to give appellant any notice of default by Pipig in the payments called for by the contract. The trial court found that none of these facts was true, and then concluded that the plaintiff was not guilty of laches. The evidence fully supports the findings and the appellant does not show so much as a conflict. Laches is a question of fact to be determined in the trial court upon all the facts and circumstances of the case (10 Cal. Jur. p. 526), and to raise the point on appeal it is necessary to show from the evidence that the finding of the trial court is not supported by the evidence and that there has been an abuse of the discretion reposed in that court.

[3, 4] The appellant argues that, by the substitution of a new vendor and a new vendee, a novation resulted which released him from further obligation under the contract. The argument is that, because the respondent recognized Pipig as the vendee after the assignment, the court should imply on the part of respondent a consent to release appellant from his obligations. But novation is a new contract (section 1530, Civ. Code), which must be proved like any other contract. Here there was no evidence of any intention to substitute a new debtor in place of the old one with intent to release the latter. Section 1531, Civ. Code. The evidence is all to the contrary and the trial court so found.

[5] The point is made that the respondent does not come into court with clean hands because it acquired the interest of Schougaard contrary to the terms of its permit from the state commissioner of corporations. The whole argument is based upon the assumption that the respondent delivered to Schougaard shares of its corporate stock in consideration of the deed and assignment alone, whereas the permit issued by the corporation commissioner called for payment in cash of at least 40 per cent. of the purchase price of stock issued. Here again the trial court found adversely to the appellant and the finding is attacked by printing the portions of the testimony most favorable to appellant. The respondent has printed evidence to show that it purchased the sales contract as an investment and sold the stock to Schougaard through a broker for cash. The transaction which appellant claims might have taken place would have been a crime under the Corporate Securities Act (St. 1917, p. 673), and, when we employ the presumption that crime was not committed, and consider this with the testimony outlined by the respondent, we find sufficient evidence to support the finding.

Judgment affirmed.

We concur: BUCK, Presiding Justice pro tem.; STURTEVANT, J.

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94 Cal. App. 498

NITTLER et al. v. CONTINENTAL CASUALTY CO. et al. (Civ. 6375.)★

District Court of Appeal, First District, Division 2, California. Oct. 26, 1928.

Rehearing Denied Nov. 23, 1928. Hearing Denied by Supreme Court Dec. 24, 1928.

1. Brokers ⟹4—Complaint alleging broker received price of gasoline station which he refused to pay over held not demurrable, in action on bond, for failure to show real estate transaction (Real Estate Brokers' Act, §§ 2, 9a, as amended).

In action on real estate broker's bond under Real Estate Brokers' Act (St. 1919, p. 1252),

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★For opinion on rehearing, see 272 P. 309. Hearing denied by Supreme Court.

§ 9a, as amended by St. 1923, p. 93, complaint alleging that defendant, acting as licensed real estate broker, received sum of money paid as purchase price of gasoline station sold by plaintiffs which he refused to pay over, *held* not demurrable for failure to show that transaction involved real estate within terms of section 2 as amended in 1925 (Deering's Gen. Laws Supp. 1925, Act 112) defining "real estate broker."

2. Brokers 🔑4—Complaint on broker's bond, alleging that broker acted as licensed real estate broker, held not demurrable for failure to charge broker acted for compensation (Real Estate Brokers' Act, §§ 2, 9a, as amended).

In action on bond of real estate broker under Real Estate Brokers' Act (St. 1919, p. 1252) § 9a, as amended by St. 1923, p. 93, complaint based on broker's refusal to account for moneys paid him for purchase price of property *held* not demurrable for failure to show that broker was acting for compensation, where it was alleged that defendant was acting as licensed real estate broker, since section 2, as amended in 1925 (Deering's Gen. Laws Supp. 1925, Act 112), defines "real estate broker" as one buying or selling real estate for compensation.

3. Brokers 🔑4—Broker's sale of gasoline station and lease covering land on which station was located held within statute, "transaction" (Real Estate Brokers' Act, §§ 2, 9a as amended).

Sale of gasoline filling station under bill of sale, and sale of lease to realty on which station was located, *held* to constitute transaction within Real Estate Brokers' Act (St. 1919, p. 1252), § 2, as amended in 1925 (Deering's Gen. Laws Supp. 1925, Act 112), defining "real estate broker" as one who "leases or offers to lease, or negotiates the sale, purchase or exchange of leases," thus creating liability on broker's bond under section 9a of act as amended by St. 1923, p. 93, where broker refused to account for proceeds.

4. Appeal and error 🔑907(2)—Where appellant fails to print evidence or findings attacked, reviewing court must assume findings were based upon competent evidence (Code Civ. Proc. § 953a).

Where appeal is taken under Code Civ. Proc. § 953a, relative to ordering and preparation of transcript, reviewing court, on appellant's failure to print any of the evidence or findings attacked, must presume in support of trial court's judgment that its findings are based upon competent evidence, and will not search typewritten record to discover error.

5. Brokers 🔑4—Liability of real estate broker for nonpayment of moneys received, came within bond, where moneys were misappropriated after bond became effective (Real Estate Brokers' Act, § 9a, as amended by St. 1923, p. 93).

In action on real estate broker's bond under Real Estate Brokers' Act (St. 1919, p. 1252) § 9a, as amended by St. 1923, p. 93, liability of broker for refusal to account for moneys received on sale of principal's property came within terms of bond, where court found that broker's misappropriation and conversion of money occurred after bond became effective.

6. Brokers 🔑4—Loss sustained, due to broker's refusal to turn over moneys collected on sale of principal's property, held within real estate broker's bond (Real Estate Brokers' Act, § 9a, as amended by St. 1923, p. 93).

Refusal of licensed broker to account for proceeds of sale of gasoline station and lease for his principal constituted failure to perform duty incumbent upon him as broker, creating liability under bond under Real Estate Brokers' Act (St. 1919, p. 1252) § 9a, as amended by St. 1923, p. 93, permitting recovery on bond by any person injured by failure of broker to perform his duties or comply with provisions of act.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by J. T. Nittler and another against the Continental Casualty Company and another. Judgment for plaintiffs, and defendant named appeals. Affirmed.

Redman & Alexander, of San Francisco, for appellant.

Stanley Sterne, of Oakland, for respondents.

NOURSE, J. Plaintiffs sued to recover damages for the breach of R. C. McKinney, a licensed real estate broker, and joined as a party defenadnt the Continental Casualty Company, the surety upon the bond of McKinney under the Real Estate Brokers' Act (St. 1919, p. 1252). The cause was consolidated for trial with that of Carroll v. McKinney et al., an action brought to recover for a similar breach, and which upon the submission of this cause upon the appeal was dismissed upon the stipulation of the parties. The cause was tried before the court without a jury and judgment was rendered in favor of the Nittlers and against the defendant McKinney and the Continental Casualty Company in the sum of $1,058 and against the defendant McKinney in the additional sum of $262. From this judgment the defendant Continental Casualty Company has appealed upon a typewritten record.

The complaint alleged that on the 19th day of March, 1927, the defendant McKinney, while acting as a licensed real estate broker, received for plaintiffs the sum of $1,320 paid to him as the purchase price of a gasoline service station sold by plaintiffs to the purchasers by and through the defendant McKinney acting as a real estate broker; that on the 28th day of March, 1927, plaintiffs made demand upon McKinney to pay over to them the said sum of $1,320, but that McKinney refused to pay over the same or any portion thereof and appropriated the whole sum to his own use; that on the 14th day of March, 1927, McKinney and the Continental Casualty Company executed a certain broker's bond under the terms of the Real Estate Brokers' Act, the obligation of which was that the broker would faithfully perform every undertaking entered into by him as a licensed real estate broker; that said bond expressly inured to the benefit of any person injured by the failure of the broker to perform his duties and gave a right of action to such person against the surety for the recovery of damages sustained by the failure or omission of the broker to perform his duties or any of them, or to comply with the provisions of the act; that the said bond was filed with the real estate commissioner, and in pursuance thereof McKinney received his license as a real estate broker under said act.

[1] The Continental Casualty Company demurred generally upon the ground that the complaint was insufficient because the sale alleged to have been made by McKinney was not a real estate transaction requiring a real estate broker's license, and because the complaint did not allege that McKinney was acting for compensation in that transaction. On the first point the argument is that because the complaint alleges that the transaction consisted of the sale of a gasoline service station, we must assume that it did not include any of the transactions referred to in section 2 of the Real Estate Brokers' Act as amended in 1925 (Deering's Gen. Laws, Act 112), and which defines a real estate broker as:

> "A person * * * who, for a compensation, sells, or offers for sale, buys, or offers to buy, or negotiates the purchase or sale or exchange of real estate, or who, for compensation, negotiates loans on real estate, leases, or offers to lease, or negotiates the sale, purchase, or exchange of leases, rents, or places for rent, or collects rent from real estate, or improvements thereon, for others as a whole or partial vocation."

There is nothing on the face of the complaint to show that this particular gasoline service station was held under a title separate from the title to the land upon which it was situated, and the court could well assume that the usual course of business had been followed and that the transaction included either a transfer of the real property upon which the station was situated, or a lease upon such real property.

[2] The argument that the complaint is insufficient because it fails to show that in this particular transaction the broker was acting for a compensation is without force, because the allegation that the defendant was a licensed real estate broker under the state statute, and that while acting as such real estate broker he made the sale and received the purchase price, is sufficient to bring him within the terms of the act, which itself defines a "real estate broker" as one who acts for a compensation.

[3] Upon the trial it developed that the plaintiffs owned a gasoline service station, a small chicken ranch, a store, and sandwich shop, which they operated upon leased premises, and which they placed in the hands of defendant McKinney for sale. Acting under this authority, McKinney on May 26, 1926, sold the property to Martinez, from whom he collected the purchase price. The property was turned over to the purchasers under escrow instructions through which McKinney was authorized to retain the purchase price in the event of a controversy arising until an adjudication of the controversy by a court. With these escrow instructions McKinney received from the plaintiffs a bill of sale of the personal property and a lease to the real property assigned by them to the purchasers, and these two documents were authorized to be delivered to the purchasers by the escrow holder upon the expiration of the notice of sale if no controversy arose. The trial court found that at the time these documents were delivered to McKinney he was acting as a real estate broker for a compensation and commission agreed to be paid to him by the plaintiffs; that he retained possession of the money under the escrow instructions until the controversy which arose over the right of the plaintiffs herein to assign their lease to the property had been determined; that in an action brought for that purpose in the superior court it was judicially determined that these plaintiffs were entitled to assign all their right to the said lease to the purchasers; that they had executed such an assignment and delivered it to McKinney; and that the plaintiffs herein were entitled to receive from McKinney the sum of $1,320, which was the balance left in his hands after deducting his commission and other expenses, and as a part of the same transaction the purchasers were entitled to have delivered to them the bill of sale of the personal property, together with the assigned lease covering the real property.

From the facts in the record and the findings of the trial court it appears that the transaction in dispute consisted of the sale of personal property located upon real estate and of the negotiation for and exchange of the lease of the real property upon which such personalty was located. The transaction, therefore, under the facts and findings comes directly within the terms of section 2 of the Real Estate Brokers' Act defining a "real estate broker" as one who "leases, or offers to lease, or negotiates the sale, purchase, or exchange of leases." The question which is presented on this appeal is whether the sale of personal property, to which the sale or exchange of a lease of the realty upon which the personal property is located is an incident, is to be treated solely as a sale of personal property and not within the Real Estate Brokers' Act. This is the contention of the appellant, and in support of the argument he cites Weingast v. Rialto Pastry Shop, Inc., 243 N. Y. 113, 152 N. E. 693, and Salisbury v. Alskog, 144 Wash. 88, 256 P. 1030. The New York statute involved in the Weingast Case defines a "real estate broker" as any person who for compensation "buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of an estate or interest in real estate." The court held that this language did not include one who made a specialty of procuring purchasers for restaurants, stores, and like going concerns where a lease simply goes with the place as a part of the good will. In the Salisbury Case the Washington statute defined a real estate broker as one who negotiated for the purchase, sale, exchange, lease, or rental of real estate or an interest therein. The Washington court interpreted the statute to apply to a transaction where the broker leased or rented real property, and held that it did not apply to one who sold a lease or leasehold interest in real property. The two cases are on a line with Pike v. Psihogios, 68 Cal. App. 145, 228 P. 722, where it was held under the original Real Estate Brokers' Act of 1919 (Stats. 1919, p. 1252) that the definition of a real estate broker in that act did not include one who negotiated the sale of a lease to real property. As a result of the Pike decision, the Legislature, at its next session amended this section of the act so as to expressly include within the definition of a real estate broker one who negotiated for or sold or exchanged a lease in real property. The cases cited by appellant are therefore not applicable to the California statute as amended. In fact, the real argument of appellant, is not that our statute does not include such a transaction but that in the case at hand the interest in the lease was merely incidental to the interest in the personalty sold, and that therefore that part of the transaction should be disregarded, But it is signficant that the interest in the lease was of such importance that the transaction was delayed for more than a year until it could be judicially determined that the respondents were entitled to assign the lease to the purchasers, and that, if this could not be done, the whole sale would have been canceled.

[4, 5] The point is raised that the transaction upon which the liability is predicated did not come within the term of the bond. The argument is that, because the bond did not become effective until March 14, 1927, it was incumbent upon the respondents to prove that the breach occurred during its term. The trial court found that on March 27, 1927, McKinney misappropriated the money entrusted to him and converted it to his own use. This finding, the appellant states, is not supported by the evidence, but the appellant has taken its appeal under section 953a, Code of Civil Procedure, and has failed to print any of the evidence or the findings which it attacks. We must therefore assume, in support of the judgment of the trial court, that its findings were based upon competent evidence, and we will not search the typewritten record to discover if error has occurred. Estate of Berry, 195 Cal. 354, 358, 233 P. 330.

The evidence upon which the respondents rely is that the sale was made on May 27, 1926, and the purchase price delivered to McKinney in escrow to be held by him in the event of a controversy "until adjudication by a court of jurisdiction." A controversy actually arose over the right of the respondents to assign to the purchasers the lease covering the premises upon which the service station was located. On June 1, 1926, the purchasers notified McKinney not to turn over the money because of this controversy, and on June 7 of the same year the respondents filed an action in the superior court to have these rights adjudicated. On January 20, 1927, judgment was entered in favor of these respondents in that action decreeing that they had the right to assign the lease involved. After the entry of this judgment a demand was made upon McKinney for the balance of the purchase money, but he refused to turn it over to them upon advice of counsel that the adjudication referred to in the escrow instructions meant a final judgment, and that he should therefore hold the money until the expiration of 60 days after the entry of the judgment in the case referred to. When the 60 days had expired, the respondents again demanded of McKinney that he turn the money over to them, but he refused, stating at the time that he had used it for other purposes. This demand, it is claimed, was made on March 27 or 29, 1927, within the period covered by the term of appellant's bond.

[6] Finally, it is argued that the breach for which recovery was had does not come within the terms of the bond. Section 9a of the Real Estate Brokers' Act, as amended in 1923 (St. 1923, p. 93), calls for a bond conditioned for the faithful performance by the broker of any undertaking as a licensed real estate broker under the act. The same section provides that any person injured by the failure of the broker "to perform his duties, or comply with the provisions of this act" has a right of action against the broker and the surety for the recovery of damages sustained by the failure of the broker to perform his duties or to comply with the provisions of the act. The bond which was given pursuant to the terms of the act is in the same language. It will be noted that the breach for which recovery may be had may arise either from a failure of the broker to perform his duties as such or from his failure to comply with any of the provisions of the act. In this respect the act differs from the Corporate Securities Act, prior to its amendment in 1925, which required a bond conditioned for the "compliance with the provisions of law." This language was held, in Blumenthal v. Larson, 79 Cal. App. 726, 730, 248 P. 681, to relate to a compliance with the terms of the Corporate Securities Act alone. The same ruling was made in Mitchell v. Smith (Cal. Sup.) 267 P. 540, where the court commented upon the amendment to the Securities Act in 1925, which extended the liability of the surety under bonds given pursuant to the act. The language of the Real Estate Act, like this amendment of 1925, is so much broader than the language of the original Securities Act that the cases cited are not applicable to the case presented here. If the act intended to limit the application

of the bond to a failure to perform duties specified in the act itself, there would have been no need of adding the alternative—the failure on the part of the broker to perform his duties as a licensed broker. It cannot be doubted that, when a licensed broker has obtained the proceeds of a sale of property belonging to his principal and refuses to turn over such proceeds to his principal, he has failed to perform the duty incumbent upon him as such broker or agent irrespective of any provision of the act requiring him to do so.

Judgment affirmed.

We concur: BUCK, Presiding Justice pro tem. STURTEVANT, J.

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94 Cal. App. 576

In re IVEY'S ESTATE.★

BROWN et al. v. NELSON et al.

(Civ. 6094.)

District Court of Appeal, Second District, Division 1, California. Oct. 30, 1928.

Rehearing Denied Nov. 19, 1928. Hearing Denied by Supreme Court Dec. 27, 1928.

1. Trial 🔑139(1)—Wills 🔑326—Nonsuit may be granted in civil actions, including will contests, only where plaintiff's case is entirely unsupported by evidence.

In civil actions, including will contests, nonsuit may be granted only where plaintiff's case is entirely unsupported by evidence, or where no evidence has been presented on some indispensable averment of complaint, and, if different conclusions reasonably may be drawn from evidence, or even if any doubt exists as to whether evidence is sufficient, nonsuit should be denied.

2. Wills 🔑50—Testator has "testamentary capacity" if able to understand nature of his act, nature and situation of property, and relations to persons having claims on his bounty.

A testator is of sound and disposing mind and memory if, at time of making will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, his relations to persons who have claims on his bounty, and whose interests are affected by provisions of instrument.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Testamentary Capacity.]

3. Wills 🔑21, 53(2)—"Testamentary capacity" depends on whether testator was of sound mind at instant of execution of will, but circumstances before and after execution may be considered.

In determining testamentary capacity, the ultimate question is whether, at very instant will was executed, testator was of sound mind, but testamentary capacity may be indicated by circumstances and conditions surounding testator both before and after execution of will.

4. Wills 🔑324(2)—Evidence held sufficient to take issue of testatrix' testamentary capacity to jury.

In will contest, evidence of testatrix' testamentary capacity at time of execution of will *held* sufficient to require submission of issue to jury, and court erred in granting nonsuit.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Proceeding by Pearl L. Brown and another against Maud L. Nelson and another, executrices of the estate of Anna M. Ivey, deceased, and others, to contest the will of deceased after probate. From a judgment of nonsuit, plaintiffs appeal. Reversed.

Duke Stone, of Los Angeles, for appellants.
R. D. McLaughlin and J. B. McLaughlin, both of Los Angeles, for respondents.

HOUSER, J. From the record it appears that Anna M. Ivey made her will by which she devised and bequeathed the greater part of her estate to her two living daughters. Following her decease, and after her will had been admitted to probate, two of her grandchildren, who were children of a deceased daughter of the testatrix, instituted a contest of the will on each of the grounds of insanity and of undue influence. On the trial, at the close of the evidence introduced by contestants, on motion made by the proponent of the will, the trial court ordered a nonsuit as to each of the issues presented by the contest, and judgment was entered accordingly. It is from such judgment that this appeal is taken.

While the notice of appeal purports to be taken from "the whole" of the judgment, the only point presented for consideration of this court is "whether or not Mrs. Ivey at the date of the execution of the will was of sound mind."

In substance, it appears that the evidence adduced by the contestants on the trial of the action showed the following state of facts: At the time the will was executed Mrs. Ivey was 92 years of age. She was nearly blind, and, because of her infirmities, was constantly under the care of an attendant. On account of her defective sight, she was unable to read, and could write her name only when her hand was placed in position to do so. Covering a comparatively short period of time preceding the execution of the will, which occurred 17 days before the demise of Mrs. Ivey, as well as subsequent to the date on which the will was signed, and up to the time of her death, the physical and mental condition of Mrs. Ivey was described by various witnesses. For the greater part, the following are excerpts taken from the testimony of five different witnesses:

> "She looked very bad. * * * She was very weak. * * * Failing. * * * There were times when she was very rational and there was times when she was anything but right. * * * At times she seemed rational; then

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★Rehearing denied. Hearing denied by Supreme Court.

again she did not. * * * She was physically very weak and very feeble, and mentally in one sentence she was fairly rational; the next she would contradict it and be absolutely irrational. * * * One minute she did (appear to know what she was talking about) and one minute she did not. * * * At times she seemed perfectly rational in her talking, and at other times she would appear to repeat, and so forth. * * * She talked irrational; I would say she was irrational for a year before she passed away, not at all times; she had periods of being rational, and then again she was absolutely irresponsible. * * * The last visits (within a week of Mrs. Ivey's death) she was very much excited and was not clear in just what she was saying. * * * A few weeks before her death she seemed very bad, very irrational."

Furthermore, with reference to the instability of mind of Mrs. Ivey, the following statements were also made by different witnesses:

> "She would make statements and then she would contradict them in the same breath, and she said a great many things about her daughters' girls, things that were out of all reason to say against anybody. * * * Quite frequently (she contradicted herself). * * * She said things and contradicted things and made statements that I knew were not so."

A witness narrated the following incident as a part of a conversation which took place between her and Mrs. Ivey at a time when Mrs. Ivey was quite ill, and about one week before she died:

> "Well, she told the lady she had housekeeping for her to go and get her sweater. She said Mr. Nelson had given her a sweater and she wanted me to see it, and the lady went and got it, and she says, 'Now, this is purple, isn't it? I can't see whether it is purple, or what, but they tell me it is purple.' I said, 'Yes, it is purple.' She said, 'Do you know what I want you to do?' I said, 'No.' She said, 'I have some white feathers. I want you to take them white feathers over home and color them purple like this sweater.' I said, 'What are you going to do with them?' She said, 'I am going to have a bonnet made.' I said, 'Are you going to take a trip?' She said, 'Yes, I am going to Sacramento. I want those feathers colored purple to put on my bonnet and I am going to take a trip.'"

As to her memory, the following appeared in evidence:

> "Well, when I went there she seemed to be very poorly, but as she grew older, and as long as I was there, she was getting very poor and her memory was failing a good deal. * * * She was very forgetful. * * * At times she had no memory. * * * I would say she rambled a good deal, what I mean by that, she would talk about things and switch about to other things and contradict herself. In other words, she would not stay put on any one subject only for a moment or two. * * * She would ask a question and then before you could give her an answer she would repeat the question, and if you gave her an answer she would say, 'Oh, never mind, never mind.' * * * She talked the same thing over and over again. * * * She would talk it (the same subject) over several times during the day. * * * She would go from one thing to another. * * * One thing she would say which there was no truth or sense in, she just said, 'I have done something I shouldn't.' I said, 'What have you done?' She said, 'Oh, I don't remember. I just don't remember; I just don't remember.' That is all I could get out of her."

It also appeared in evidence that Mrs. Ivey talked to herself; that she would talk as though she were conversing with persons who were not present. Some months preceding her death a pet dog owned by Mrs. Ivey died. After the death of the dog, while lying in her bed, Mrs. Ivey "talked to this dog, purporting to pet it, and instructed her nurse or attendant about the care of the dog, and she would then call for the dog to have it brought to her bed and attempt to converse with him." A half dozen times a day she would call for this dead dog. With reference to another purported hallucination of the testatrix, the evidence included the following conversation, which took place between Mrs. Ivey and one of the contestants:

> "She said to me one day, 'Pearl, what is that across the street?' I said, 'Where do you mean, grandma?' She said, 'Up in that window, isn't somebody standing over there?' I said, 'No.' She said, 'Look again, I think there is somebody in the window.' I said, 'No, grandma, there is only the lace curtain and the shade in the window.'"

It further appears that Mrs. Ivey was in the habit of hiding rather large sums of money about the house where she lived, and that on one occasion, perhaps wrongfully, she accused some one of stealing same.

Shortly before her death Mrs. Ivey was "very much upset. She looked to me, looked like as though she had been harassed and driven to death. * * * She slept most of the time, and seemed to be in a daze. She would mumble. * * * Her conversation was not coherent and clear. She would mumble. * * * She would be sitting there and just doze off like she was going to sleep. She told me one time, 'I think I have sleeping sickness, I sit here and I go to sleep all the time.' * * * She would talk awhile and then she would stop talking and she would mumble something. I couldn't understand what she said. * * * Wouldn't say a word for perhaps twenty minutes. * * * She would take naps in the day time. * * * She appeared to be very drowsy and very weak. * * * She was inclined to be drowsy. * * * Seemed downhearted; she couldn't hardly talk. * * * She would cry and then she would talk and then she would cry. * * * She appeared to be rational * * * then she got into a terribly nervous state and began to cry. * * * She would cry a good deal. She often said, 'Oh, I wish I was dead.' About three weeks before her death she was lying in bed. * * * Then she seemed to lapse into sort of a coma, something of that kind. * * * I thought she was dying."

Based upon at least some of the foregoing circumstances, each of five different witnesses, who were intimate acquaintances of the deceased, expressed the opinion that she was of unsound mind.

[1] Broadly speaking, the rule is well established that in civil actions a motion for nonsuit may be granted only where the plaintiff's case is entirely unsupported by evidence, or where no evidence has been presented upon some indispensable averment of the complaint. More particularly, an order of nonsuit should not be made when the plaintiff has produced any evidence, or, as sometimes stated, any substantial evidence which, freed from conflicts, contradictions, or inconsistencies therein, and viewed in its most favorable light, together with all legal inferences and presumptions deducible from such evidence, would tend to support the plaintiff's case and a judgment in his favor. If different conclusions reasonably may be drawn from the evidence so interpreted, or even if any doubt exist as to whether such evidence be sufficient, the motion for a nonsuit should be denied. 9 Cal. Jur. p. 558, and cases there cited. Among the several authorities supporting the foregoing declarations of the law may be found the following statements:

> "A nonsuit should be denied when there is any evidence tending to sustain plaintiff's case, *without passing upon the question as to the sufficiency of such evidence*." Zilmer v. Gerichten, 111 Cal. 73, 77, 43 P. 408, 409.
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> "It is elementary that a motion for nonsuit is not to be granted where there is any substantial evidence which, with the aid of all legitimate inferences favorable to the plaintiff, would support a verdict or finding that the material allegations of the complaint are true." Burr v. United Railroads, 163 Cal. 663, 665, 126 P. 873, 874.
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> "* * * In order to sustain a motion of this kind the defendant is bound to make a case so free from doubt that the court can say that there is no reasonable ground upon which it can continue to entertain the case or put the defendant to his defense. *If there is any question of doubt left*, the court is bound to leave the parties to their proof and final hearing. * * *" Wehner v. Bauer (C. C.) 160 F. 240, 245.
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> "It is the duty of the court *if there be any doubt* to let the case go to the jury." Bush v. Weed Lumber Co., 55 Cal. App. 588, 590, 204 P. 24, 25.

In Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 599, 112 P. 53, 54, the following is quoted with approval from Kramm v. Stockton Electric R. R. Co., 3 Cal. App. 606, 609, 86 P. 738, 739:

> "The motion for nonsuit admits the truth of plaintiff's evidence, and every inference of fact that can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the defendant. * * * If there is any evidence *tending* to sustain plaintiff's action the nonsuit should be denied, *without passing upon the sufficiency of such evidence*, * * * and where there is a conflict in the evidence, some of which *tends* to sustain the plaintiff's case, a motion for a nonsuit should not be granted. * * *"

See, also, Goldstone v. Merchants' Ice etc., Co., 123 Cal. 625, 56 P. 776.

And in Bush v. Wood, 8 Cal. App. 647, 651, 97 P. 709, 710, it is said:

> "From the foregoing it is clear that it makes no difference, where the motion for a nonsuit is made on the close of plaintiff's case, *whether the court itself believes the testimony presented or not*, for, as is obvious, the material facts which the evidence tends to prove must be assumed to be true for the purposes of the motion, just the same as the material facts alleged in a pleading must be so treated in the consideration of a demurrer to such pleading. * * *"

Nor is the principle limited to the ordinary civil case. It has its similar and complete application in a case involving the contest of a will; and in applying the rule no court of appellate jurisdiction is warranted in drawing any distinction between different classes of civil cases.

In Estate of Caspar, 172 Cal. 147, 149, 155 P. 631, 632, it is said:

> "* * * The rules of evidence and the weight to be accorded to the evidence *are the same in a contested will case as in any other civil case*, and those rules apply when the question goes to the sufficiency of the evidence to justify its submission to the jury. * * *"

In Estate of Arnold, 147 Cal. 583, 586, 82 P. 252, 253, in discussing the question involved in a motion for nonsuit, in part the court used the following language:

> "* * * In determining whether or not in a proceeding to contest a will, the evidence produced by the contestants is sufficient to require the submission of the case to the jury *the same rules apply as in civil cases*. Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the contestants. Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants. All the evidence in favor of the contestants must be taken as true, and if contradictory evidence has been given it must be disregarded. If there is any substantial evidence *tending* to prove in favor of the contestants all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits." Vermont, etc., Co. v. Declez, 135 Cal. 579, 67 P. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; Freese v. Hibernia Savings & L. Soc., 139 Cal. 392, 73 P. 172; Hanley v. California, etc., Co., 127 Cal. 237, 59 P. 577, 47 L. R. A. 597; Ferris v. Baker, 127 Cal. 522, 59 P. 937; Goldstone v. Merchants', etc., Co., 123 Cal. 625, 56 P. 776; Zilmer v. Gerichten, 111 Cal. 73, 43 P. 408; Pacific M. L. I. Co. v. Fisher, 109 Cal.

566, 42 P. 154; O'Connor v. Hooper, 102 Cal. 528, 36 P. 939.

And in Estate of Newhall, 190 Cal. 709, 719, 214 P. 231, 235 (28 A. L. R. 778), where a similar question was before the court, the rule is thus stated:

> "It is, of course, the general and well-understood rule that ordinarily upon a motion for a nonsuit, in civil cases generally, every inference favorable to plaintiff's case deducible from the evidence and every favorable presumption resulting fairly from the evidence must be taken in favor of plaintiff's case. *This rule applies with equal force to cases of contests of wills.* Of course, if the evidence is fairly susceptible of two constructions, or if several inferences may reasonably be made from the evidence as a whole, it goes without saying that the view most favorable to the contestant must be taken. And further, all of the evidence in favor of the contestant must, as against a motion for a nonsuit, be taken as true, and contradictory evidence, if any, must be disregarded. This having been done, if there is any substantial evidence *tending* to prove the fact necessary to make out the contestant's case, the motion for a nonsuit must be denied and the case given to the jury"—citing cases.

Likewise, In re Ross, 173 Cal. 178, 159 P. 603, where the following language in Estate of Ricks, 160 Cal. 450, 459, 117 P. 532, 536, is quoted with approval:

> "The rule is well established that in contests of wills, as in other civil actions, in determining whether the evidence presented was sufficient to take the case from a jury, the entire evidence presented is to be viewed from a point most favorable to the contestant. Disregard is had of any *contradictory evidence.* All facts supporting the case of contestant must be taken as true and all presumptions from the evidence and all reasonable inferences susceptible of being drawn therefrom must be considered as facts proven in his favor. * * *"

Ordinarily, it may be said that on the contest of a will on the ground of insanity of the testator the particular issue to be submitted for the determination of the jury is whether, at the time of the execution of the will, the testator was possessed of testamentary capacity. Naturally, the contestant of a will is rarely able to produce any evidence favoring his contention, excepting that which relates to conditions surrounding the testator either before or after the will was executed. If the will be holographic, direct evidence of the condition of mind of the testator is practically impossible of production. If executed before witnesses who in writing probably have attested the soundness of mind of the testator, such witnesses may scarcely be presumed to be willing to stultify their former solemn declarations. And so it happens that, in the nature of things, what transpired at the exact moment when the testator affixed his signature to the document and when the witnesses, if any, certified to the facts required by the statute, are facts ordinarily extremely difficult of production by the contestant, or, if such facts be within his ready power to produce, are quite in conflict with the other evidence by which the contestant may hope to sustain his theory of the case. Consequently for the support of his cause the contestant must rely upon a showing of conditions existing either preceding or following, or both preceding and following, the precise moment when the testator signed his purported will.

[2] Testamentary capacity may be manifested by the present ability of the testator to grasp and to hold within his mental faculties all conditions necessary to the future disposition of his property. Assuredly, he must realize the nature, extent, and effect of his act, not only as relates to the property itself, but, as well, to both the persons who are to be pecuniarily benefited thereby, and those who stand in such a relation to the testator as naturally to have claims upon his bounty, and also such of the latter class who are either entirely omitted from the beneficial provisions of the will, or who are subjected to adverse discrimination thereby. More concise, and perhaps more nearly accurate, is the statement contained in Estate of Sexton, 199 Cal. 759, 764, 251 P. 778, 780, that:

> "A testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property and to remember, and understand his relations to, the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument"—citing cases.

While the rule in the abstract may not be so difficult in its formulation, its application to concrete facts presents some obstacles. Measured by such a rule, it is obvious that the legal requirements imposed upon an aged multimillionaire, possessed possibly of dozens or hundreds of different kinds of properties, each having a value differing from each of the others, having several living sons and daughters, some grandchildren who are children of a deceased son or daughter of the testator, numerous dependent brothers, sisters, cousins, or other relatives, close friends, faithful employees, trusted servants, partners and associates in business, presenting many difficult and complex financial situations and complications arising from or incident to the disposition of a vast fortune, necessarily would present a severe test upon testamentary capacity; whereas a widower with two living sons and no other living relatives, whose sole possession is $500 in cash, and who is confronted with none of the attachments or situations ordinarily surrounding a man of great wealth, will suffer comparatively little mental strain in qualifying for the legal ordeal. It results that, viewed superficially, the law does not appear to bear impartially, or uniformly, or with equal severity, upon all persons. If, perchance, on a given date, measured by the rule of thumb, the man of immense wealth, though wishing to make a will, and understanding perfectly the nature of the proposed act, be unable to remember and to carry in his mind the various details concerning the nature, situation, and extent of his numerous properties, together with the number and names of his relatives, friends, employees, servants and business associates (assuming that each of them has some claim upon his bounty), and consequently be to that extent of "unsound mind"—but by reason of some turn of the wheel of fortune, or by reason of some great catastrophe, his vast wealth be swept away in one night, and all his servants, employees, friends and relatives, other than two sons, be killed, and thereby he have remaining but a comparatively small pittance for testamentary disposition, with no one other than two living sons having a claim upon his "bounty"—however deep and abiding his grief, or how intense his anguish, if then, in his altered circumstances, and on the day following such determination of his lack of testamentary capacity, he still desire to make his will, and can but correctly remember that his sole possession consists of $500 in cash, and that of all his former relatives, friends, etc., his two sons are the sole survivors, on that instant his late "unsoundness of mind" will be completely cured, and his "testamentary capacity" be perfectly restored. The brain of the millionaire may be unsound; but the same brain, transferred to the comparatively impecunious individual, unquestionably will be capable of complying with all legal requirements. It thus becomes apparent that, tested by the rule of law to which reference has been had, memory, and not necessarily brain power, or even superintelligence, is the all-important and essential prerequisite to legal ability to dispose of property by will.

[3, 4] As hereinbefore suggested, while the ultimate question always is whether, at the very instant the will was executed, was the testator of sound mind, nevertheless testamentary capacity may be indicated by circumstances and conditions surrounding the testator both before and after the execution of the will, respectively, just as certainly, clearly, and unmistakably as by evidence of what was the general conduct and condition of the testator at the very instant that the testator affixed his name to the instrument. Evidence of whims, fantasies, vagaries, hallucinations, or delusions in the mind of the testator at a time shortly preceding the execution of the will, and also at a time closely following its execution, would constitute a foundation for an inference that the condition of mind of the testator was at least unstable at the very moment when the signature of the testator was affixed to the instrument. Just so, abnormally advanced age, weakened physical condition, "terribly nervous state," excitability, repeated periods of weeping, "very much upset," presenting the appearance of having been "harassed and driven to death," irrationality, irresponsibility, incoherency, mumbling, rambling, talking to persons not present, contradictions or inconsistencies in speech, inability to carry the thread of a conversation, repetition of statements, the making of improbable or palpably untrue statements, general loss of memory, downheartedness, wishing he were dead, drowsiness, sleeping most of the time, in a daze, and, finally, coma in the testator, together with the respective opinions of several of his intimate acquaintances to the effect that the testator was of unsound mind—would constitute some substantial evidence that the testator was not entirely normal in either mind or body, or possessed of testamentary capacity. Universally it is conceded that evidence of such facts as heretofore have been set forth herein is admissible for the very purpose of *tending* to prove the unsoundness of mind of the testator.

It is manifest that, unless such facts tend to prove unsoundness of mind, they are wholly irrelevant to the issue, and consequently inadmissible in evidence. Unless relevant, they would be utterly useless, and have no legitimate place in the evidence. Being clearly pertinent to the inquiry, the conclusion is irresistible that they furnish some *substantial evidence* relating to the testamentary capacity of the testator. The authorities to which attention has been directed herein are to the effect that if *any substantial evidence* be adduced by the contestant, based upon which reasonable men might differ as to whether the testator was of sound mind, a motion for a nonsuit may not be legally granted. It would seem so clear as to be beyond controversy that one reasonable man might differ from another as to the effect of the evidence herein regarding the question of the unsoundness of mind of the testatrix. At least, the correct determination of the question is not "free from doubt." Considering that according to the evidence, which, freed from inconsistencies or contradictions, shows conclusively that as to the testatrix each of the conditions referred to herein was present, both practically immediately before and, as well, closely following the time when the will was executed, we are constrained to hold that the requirements as to the quantum of evidence essential to the submission of the question to the jury were presented by the contestant, and, consequently, that the motion for nonsuit should have been denied. In so ruling this court is not unmindful of recent decisions of the Supreme Court of this state which may seem to indicate that the ruling by the trial court was proper. But in none of such cases was the evidence anything like as great in volume or in quality as it was in the instant case. After all that may be said or written affecting any particular case, the law as therein laid down has its application more peculiarly to that one case; and, while the principle of law therein announced may have its application to other cases, the decision of each case must ultimately rest upon its own facts.

The judgment is reversed.

We concur: CONREY, P. J.; YORK, J.

94 Cal. App. 602

JONES v. STEVENS et al. (Civ. 3563.)

District Court of Appeal, Third District, California. Oct. 30, 1928.

1. Escrows 🔑14(1)—Evidence held to justify finding that contract was delivered to contractor by escrow holder in violation of defendants' instructions, requiring its retention while contractor secured rentals and loan.

In contractor's action to recover on contract placed in escrow pending contractor's securing rentals and loan for carrying on work, evidence *held* to sustain trial court's finding that contract was delivered to contractor by escrow holder against defendants' instructions.

2. Appeal and error 🔑1011(1)—Trial court's determination of conflicts in evidence is conclusive on appeal.

Trial court determines conflicts in evidence, and its determination is conclusive on appeal.

3. Escrows 🔑3—One whose agency extends merely to procuring contract cannot receive contract in escrow for conditional delivery to his principal (Civ. Code, §§ 1056, 1057, 1627).

Delivery of contract in escrow may be made to general agent of party to whom a conditional delivery is intended to be made, but contract cannot be delivered in escrow if the proposed escrow holder is agent merely for the purpose of procuring the contract under Civ. Code, §§ 1056, 1057, 1627.

4. Contracts 🔑350(2)—Evidence held to sustain findings that contractor suing for compensation for erecting apartment house had agreed to secure rentals and procure loan for financing building.

In contractor's action to recover compensation under contract for erection of apartment house, evidence *held* to sustain findings of trial court that contractor agreed to secure rental from tenants of proposed apartment building in the sum of $4,500 and to secure advance for defendants to finance building.

5. Contracts 🔑321(1)—Contractor's breach of agreement to secure advance rental and procure loan to finance erection of apartment building precluded recovery of compensation under contract.

Failure of contractor to secure advance rental from tenants of proposed apartment building, and failure to secure loan for defendants upon property to enable them to finance erection of apartment building, as agreed, *held* to preclude recovery of compensation under contract.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by R. V. Jones, Jr., against Maye D. Stevens and husband. Judgment for defendants, and plaintiff appeals. Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

HART, J. This is an action for damages for the alleged breach by the defendants of a building contract.

The cause was tried by the court, sitting without a jury, and judgment passed for the defendants. The plaintiff appeals upon a record prepared in accord with sections 953a and 953b of the Code of Civil Procedure.

The nature of the contract upon which this action is founded is in substance well explained in the complaint as follows:

"On or about the 11th day of December, 1923, at the City of Los Angeles, County of Los Angeles, State of California, plaintiff and defendants made and entered into a contract in writing dated the 11th day of December, 1923, wherein and whereby plaintiff, therein designated as contractor and architect, agreed to furnish and provide necessary labor and materials, tools, implements and appliances, and to do and perform in a good and workmanlike manner, the preparing and drawing of plans and specifications and the construction of an apartment house in accordance therewith upon that certain real property owned by said defendants in the City of Los Angeles, County of Los Angeles, State of California, described as follows, to-wit:

"East Half of Lot Four (4), Block Nine (9), of Los Angeles Homestead Tract. Said lot being 52.75 x 177 feet.

"Construction work to commence on or about the 1st day of March, 1924, and said defendants promised and agreed to pay plaintiff therefor, as contractor in the construction of said Thirty-two-room apartment house, the actual net cost of materials furnished and labor performed by plaintiff thereunder in the construction of such building, plus a profit of Ten (10%) per cent. thereof, and said defendants further promised and agreed to pay plaintiff as compensation for services in drawing such plans and specifications and the performance of services as architect as might be required on and in the construction of said building an additional sum of Five (5%) per cent. of the estimated cost of construction, which said estimated cost was fixed at the sum of Thirty-two Thousand ($32,000.00) Dollars, which Five (5%) per cent. was to be paid to said plaintiff in addition to the sums otherwise provided to be paid to plaintiff for his services as contractor in building and constructing said building and appurtenances, and it was further provided that such compensation to be so paid to said plaintiff by said defendants as contractor should not, in any event, exceed the sum of Thirty-Two Hundred ($3,200.00) Dollars, and his compensation for services as such architect should not exceed the additional sum of Sixteen Hundred ($1,600.00) Dollars."

The complaint alleges that, upon the making of said contract by the plaintiff and the defendants, the former forthwith entered upon the performance of the terms thereof, "and between the 11th day of December, 1923, and the 23d day of February, 1924, drew and prepared plans and specifications for the building and appurtenances described in said contract." It is alleged that, at all times from the date of the making of said contract, the plaintiff has been "and now is" ready, willing and able to fully and punctually perform all the covenants on his part to be performed, as set forth in said contract, but that he has been prevented from so doing by the "defendants' failure, neglect and refusal to perform said contract on their part; and their refusal to allow plaintiff to further perform the same on his part"; that defendants were notified in writing of their refusal to proceed with the performance of the contract on the 25th day of March, 1925; that the acts of the defendants in refusing to perform their obligations under said contract and in thereby preventing plaintiff from carrying out his part of the convention, were without cause or excuse, "in violation of the terms of said contract, and against the will and without the consent of plaintiff." The aggregate damages claimed are segregated and listed in the complaint as follows:

"In the sum of Three Thousand Two Hundred ($3,200.00) Dollars, being Ten (10%) per cent. of the estimated cost of construction of said Thirty-two-room apartment house described in said contract, the amount of the compensation provided therein for the services of plaintiff as contractor, and in the further sum of one Thousand Six Hundred ($1,600.00) Dollars, being Five (5%) per cent. of the estimated cost of construction of said Thirty-two-room apartment house described in said contract as compensation for plaintiff's services as architect, and

"In the further sum of Twenty ($20.00) Dollars expended and laid out by plaintiff in causing the real estate described in said contract to be surveyed."

The contract in its entirety is by the complaint expressly made a part thereof.

At this point, it may parenthetically be stated that the testimony of both the plaintiff and the defendant, Mrs. Stevens, was that, notwithstanding that the contract bears date of December 11, 1923, it was not in point of fact signed by the former and the latter until some time in the month of January, 1924; the plaintiff testifying that he and Mrs. Stevens signed the instrument at some time between the 15th and 20th of January, 1924, and Mrs. Stevens testifying that she and plaintiff subscribed their names thereto on the 24th day of January, 1924.

The answer denies specifically each of the averments of the complaint, and then alleges:

"That plaintiff represented to the defendant that he, the plaintiff, could and would, upon the execution of the contract involved in this act, if signed and delivered by the defendants, secure for the defendants an advance rental from tenants in the sum of $4,000; that thereupon these defendants were to advance the sum of $2,000 and the plaintiff was then to secure a loan upon said property in a sufficient amount to complete said building, said loan to bear not to exceed 7% interest; that plaintiff has failed, neglected and refused to do any of the things above mentioned, but did specifically agree with the defendants on January 14, 1924, and subsequent to the date of the contract upon which this suit is brought, as follows:

"'January 14, 1924.

"'Maye D. Stevens, 1111½ W. 17th St., Los Angeles, Calif.

"'Dear Madam: In regards to your proposed apartment building to be built on Lot 4 Block 9, Los Angeles Homestead Tract, will state that if we are unable to secure you a loan there will be no charge made for plans and specifications.

"'We further agree to find a party to lease said building at Seventeen ($17.00) Dollars a room.

"'Yours truly, R. V. Jones, Jr.'"

Proceeding, the answer charges that—

The plaintiff "has totally failed and refused to secure a tenant for said building who would either pay the sum of $17.00 per room or the sum of $4,000 in cash; that he has failed to secure a loan on said building or to place a loan with the funds available to these defendants, or to do any of the things in said contract, except to present plans and specifications upon which these defendants refused to proceed," etc.

As a special defense, the defendants by their answer reallege the promise of plaintiff that, to promote and facilitate the construction of the proposed apartment house, he would secure an advance cash rental for the rooms or apartments in the proposed apartment house, and that he (plaintiff), upon an advance of $2,000 by the defendants, would secure a sufficient loan on the building to complete its construction, and the refusal and failure of the plaintiff to carry out said promise. The answer then proceeds:

"That at the time of the execution of said contract, it was delivered by them, after its signature, to the agent of the plaintiff to wit, one ——— Gregg, with the distinct understanding and agreement that the said Gregg would hold the contract, as the agent of these defendants, until such time as the said R. V. Jones should well and truly execute and deliver to the defendants a written agreement under the terms of which it should be specifically agreed on his part to do the things herein mentioned, to wit, to secure the loan, to secure the tenants, and to do the other things herein mentioned; that the said Gregg, without the consent or knowledge of these defendants, and in violation of the instructions given to him, and in collusion with the plaintiff, delivered said contract and secured back only the statement under date of January 14, 1924, to which reference is herein made, and these defendants allege that the plaintiff has not performed even the agreements and covenants mentioned in said statement of January 14, 1924. Defendants further allege that the said contract should not have been delivered and was never intended to be delivered to the plaintiff until such time as he should have arranged to do the things agreed by him that he would do, and that for this reason there was no consideration for the execution of said contract, even though the same had been delivered," etc.

The court, among other things, found (finding 6) that the plaintiff represented to the defendants that if they would sign and deliver to him the contract pleaded, he could and would, upon such signing, secure for the defendants the sum of $4,000 for the purpose above explained, that he could and would secure for defendants, upon an advance to him by the latter of the sum of $2,000, a loan sufficient to complete the construction of the building, that thereupon defendants did advance said sum of $2,000, but that plaintiff "failed, neglected and refused" to do those things; that the defendant Maye D. Stevens, under the circumstances, and upon the condition and with the instructions and understanding as alleged in the answer, and which are hereinbefore set forth, gave the contract to one Gregg, under specific instructions and with the distinct understanding that the instrument was not to be delivered into the manual possession of the plaintiff until the latter should have complied with the conditions as explained above, but that said Gregg, in violation of said instructions, "and in collusion with the plaintiff," delivered said contract to the latter, "and secured back only the statement under date of January 14th, 1924" (being the writing hereinabove reproduced from the answer); "that it is true that plaintiff has not performed even the agreements and covenants mentioned in said statement of January 14, 1924; that it is true that said contract should not have been delivered and was not intended to be delivered to the plaintiff until such time as he should have arranged to do the things agreed by him that he would do; and that for this reason there was no consideration for the execution of said contract or the delivery thereof by these defendants. The court further finds (finding 9) that the plaintiff did not, in order to promote the construction of said apartment house, secure for the use or benefit of defendants the sum of $4,000 advance rental; that he did not secure a loan on said building to bear interest at the rate of not in excess of 7 per cent. per annum."

[1, 2] Both findings 6 and 9 derive ample support from the evidence. The testimony of the defendant Mrs. Maye Stevens was that her husband was in Arizona when he signed the contract, she having by mail sent the instrument to him before she or the plaintiff signed it. This testimony of Mrs. Stevens was corroborated by that of her husband. Her testimony further verified the allegations of the answer relative to the placing by her of the contract, after it was signed by her and her husband, in the hands of O. M. Gregg (referred to in the above findings as "one Gregg"), with specific instructions to Gregg that he was not to deliver the instrument to the plaintiff until the latter had executed and delivered to her and her husband a written promise or agreement that he would secure the rentals mentioned and a loan of sufficient money upon the property to complete the construction of the building and also the allegation as to the delivery by Gregg to plaintiff, contrary to said instructions, of said contract, or in making such delivery without first having obtained from plaintiff for the defendants such agreement. This testimony supports the finding as to the matter of the delivery of the contract against the instructions of Mrs. Stevens, although, it is to be said, there was other testimony apparently tending to contradict or at least discredit the testimony of Mrs. Stevens regarding that transaction. It was, of course, for the trial court to determine the evidentiary conflict, and its decision in favor of the defendants upon the question of the delivery of the contract is conclusive upon appeal. The defendants contend that the delivery of the contract by Gregg to the plaintiff under the indicated circumstances was neither in law nor in point of fact a delivery, and that therefore the minds of the parties never met on the terms and the covenants of the agreement; that hence no contract for the construction of the building was ever entered into between them.

[3] The undisputed testimony discloses that Gregg was an agent of the plaintiff for the very purpose of procuring building contracts. The scope of his authority as plaintiff's agent was circumscribed to the securing of contracts for his principal from persons desiring or intending to or contemplating the erection of buildings upon their real property or to conduct preliminary negotiations which would lead to the bringing of such parties and the plaintiff together with the view of securing such contracts. He was, in other words, a special agent whose authority as such was restricted to the performance of a particular kind of duty. The rule now seems to be settled that, while a delivery of a contract in escrow may be made to the general agent of the party to whom a conditional delivery is intended to be made, such delivery cannot be so made if the agency is, as here, for the purpose of procuring the contract. 10 R. C. L. 631; 10 Cal. Jur. 586; Civ. Code, §§ 1056, 1057, and 1627. There are, of course, conceivable circumstances under which the deposit of a contract in escrow with such special agent, to be delivered to his principal upon the happening of a specified condition, could and properly would be sustained, as, for illustration, where the possession of the contract by the agent as such "escrowee" is obtained by the fraud either of the agent

or the principal or by both acting in unison to accomplish the fraudulent purpose. But it is not necessary further to consider this branch of the controversy between the parties, since upon another consideration the judgment must be upheld.

[4] As has been stated, the answer alleges (and the court finds) that, for the purpose of promoting the construction of the building, the plaintiff agreed that he would secure for the defendants the sum of $4,000 advance rental and also a loan on the property in a sum sufficient to complete the construction of the apartment house; that plaintiff failed and refused to procure such rental and such loan. In support of these allegations, the defendant introduced in evidence the letter or document set forth hereinabove as a part of the answer of the defendants, which is dated January 14, 1924, and signed by the plaintiff. From that document it is clear that the plaintiff agreed to procure the sum of $4,000 as advance rental for apartments in the building, and, further, it is clearly to be implied therefrom that he also agreed to procure a loan on the property of a sufficient sum of money to complete the construction of the building. There was also introduced in evidence a letter, addressed to plaintiff by Mrs. Stevens, and signed by her, and dated at Somerton, Ariz., January 24, 1924, which is in the following language:

> "Will accept your offer for lease on proposed Apt. House. Will lease for 5 years or more at $17.00 per room with $4,000.00 in advance to be applied to construction building."

That letter, together with the one to the defendants from plaintiff dated January 14, 1924 (hereinabove set forth), and the contract, dated December 11, 1923, but executed January 24, 1924, must be construed as one document, or the two letters mentioned read as a part of the contract of date December 11, 1924. As so read, and as is made clear from the parol testimony properly received for the purpose of explaining and establishing their connection with each other, there is left no reasonable ground for doubting that the finding that the plaintiff did promise to secure the advance rental and the loan referred to as the necessary means for promoting the financing of the work of constructing the apartment house rests upon a sound evidentiary foundation. This testimony came not alone from Mrs. Stevens but also from the plaintiff himself. We need not repeat herein the testimony of Mrs. Stevens as to that phase of the transaction, and only so much of the testimony of the plaintiff as will unquestionably show that he did make such an agreement and that it was a part of the contract for the erection of the building. He testified that—

> "When we first started talking to her (Mrs. Stevens) I told her we could procure a loan for the amount she required, and also lease the apartment house. * * * I told her that we would secure whatever money that she needed for financing the apartment house. * * * I told her I would take a first mortgage for $25,000.00 and a second mortgage for $7,000.00."

Proceeding, the plaintiff said that he had arranged to secure the money from R. V. Jones & Co., a corporation, of which he was secretary, and in which his father practically owned all the capital stock. But it is made by the testimony perfectly plain that the plaintiff had never made any such arrangements for securing the loan from the corporation or his father as would or did place him in the position of one ready and able to procure the loan, even if he was willing to do so. Mrs. Stevens testified that, having been assured by the plaintiff that he had made definite arrangements for securing the loan from the Jones corporation, she insisted that the money so acquired should be placed in escrow—that is, placed in the hands of some disinterested third party—so that it would be readily available as payments on the work of construction from time to time fell due, but that the plaintiff replied that his father would not stand for such an arrangement, or words to that effect. But it is perfectly clear from the evidence that the plaintiff at no time was able to provide the loan which he agreed to procure to finance the construction of the building. In fact, his own testimony, as well as the records of the corporation from which he represented to the defendants he could secure such loan, shows that he had obtained no agreement or promise from the corporation or from his father for the loan of the money which could be enforced in law. It was admitted by the plaintiff through his counsel that there was nothing on the minutes of the corporation or any of the records of its transactions showing that any such loan had been asked from or considered by the corporation. It is true that the plaintiff testified that he applied to the corporation for the loan, and that, after he and his father (in December, 1923) went to and inspected the premises, the latter said to him (plaintiff) that he (the father) would make the loan and directed the plaintiff to prepare the necessary documents to effect the transaction, but the loan was not made, nor were any proper documents prepared, so far as the record shows, looking to the consummation of the loan, or any showing that there was any intention on the part of the corporation of making it. It also appears that in June, 1925, the corporation addressed a letter to the plaintiff, stating that it would make the loan; but that letter and the proposition it contained were prepared, sent to and received by the defendants a trifle over a year after the present action was commenced, and they were therefore wholly without any legal force. Thus it is plain that the plaintiff was not at any time in the course of the negotiations involving the construction of the proposed building able and ready to furnish or procure a loan of a sufficient sum of money necessary to the financing of the construction of the building or any loan for that purpose at all. This loan, as is obvious, constituted the dominant feature or element of the consideration upon which the defendants were induced to sign the contract for the erection of the proposed apartment house. Nor did the plaintiff at any time procure the $4,000 advance rental which he promised to secure. In this connection, it should be stated that there was received in evidence, at the behest of the plaintiff, a letter dated March 12, 1924, and signed by him and addressed to the defendants, in which he "guaranteed" to secure a tenant "for you before your building is complete, and in case we are not able to secure a lease, we will at once lease it upon completion and furnish it ourselves, for ten (10) years and Four Thousand Dollars ($4,000.00) advance rent." Mrs. Stevens testified that neither she nor her husband ever received or saw such a letter. The trial court, as is necessarily to be implied from its findings, accepted Mrs. Stevens' testimony as verity regarding that matter, and so this court must accept it.

[5] The findings (particularly findings 6 and 9), as has been above pointed out, being of facts alleged in the answer, and, as likewise shown, being strongly bolstered by the evidence, disclose a complete defense to plaintiff's action. Merzoian v. Kludjian, 183 Cal. 422, 428, 191 P. 673; Pellaton v. Brunski, 69 Cal. App. 301, 304, 231 P. 583; Tashjian v. Krikorian, 55 Cal. App. 160, 164, 202 P. 956; McCarthy v. Grider, 72 Cal. App. 393, 402, et seq., 237 P. 751. In the last-named case (an action for the rescission of a contract), an offer in writing was made by the vendee to the vendor under said contract, which was for the purchase and sale of lands, to pay the balance of the purchase price, provided the vendor could and would tender and give to the vendee a merchantable title to the property. It was shown that the vendee did not himself have the money necessary to make good the offer, but the vendee or offerer testified that he had sought a loan of sufficient money from a bank to cover the amount to be paid, and that the bank agreed to let him have the loan if he furnished personal security in the person of a certain other party, who had promised the vendee that he would become a surety on the note for the loan. The evidence showed that the proposed surety was under no legal obligation to indorse or become a surety on the note—that the promise of the proposed surety to become such was a mere naked promise or without consideration. Under this state of facts, it was held, of course, that the offer was not a valid one because the vendee or offerer was not ready and able to make the offer good. The court said:

> "In actions by brokers to recover commissions for procuring a purchaser of property, it is requisite, to support such actions, that it be shown that such proposed purchaser is ready, able, and willing to make the purchase, and where it appears in any such action that the purported ability of the purchaser to make the purchase is wholly dependent upon the verbal promises of a third party, without consideration, to assist him in securing the money necessary to make the purchase, then the latter is not shown to be able to make such purchase, and the broker is hence not entitled to recover. He has not shown that he produced a purchaser either able or ready to purchase. (Merzoian v. Kludjian, 183 Cal. 422, 191 P. 673, per Lawlor, J.; 4 Cal. Jur. 591; note, 1 A. L. R. 528.) The principle thus stated is, of course, applicable to any case where, as here, an offer to perform an act carries with it the necessity for the payment of money to make good the offer of performance as a condition to the performance of a concurrent condition by him to whom the offer is made."

The other cases above cited hold to the same principle.

For the reasons hereinabove given, the judgment appealed from is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

94 Cal. App. 382

JENSEN, State Director of Department of Institutions, v. McCULLOUGH, County Treasurer. (Civ. 6427.)★

District Court of Appeal, First District, Division 2, California. Oct. 19, 1928.

Rehearing Denied Nov. 16, 1928. Hearing Denied by Supreme Court Dec. 17, 1928.

1. Mandamus 🔑154(10)—Clerical error in reciting wrong year appearing on face of petition may be corrected.

Where petition to require county treasurer to pay state treasurer moneys claimed to be due alleged certain sums were due in 1927, and that county treasurer refused to pay sum in 1926, clerical error on face of petition in reciting year 1926 instead of 1927 may be corrected.

2. Mandamus 🔑154(7)—Ordinarily, mandamus petition must allege demand and refusal, unless duty is public or demand would have been useless.

In ordinary cases of mandamus, petition must allege that demand was made on respondent to perform act, and that he refused to comply, except when act is mere public duty affecting public at large and in which petitioner has no immediate benefit, or when attitude of respondent shows that demand would have been refused if made.

★Rehearing denied. Hearing denied by Supreme Court.

3. Mandamus 🔑154(7)—In mandamus to compel county treasurer to pay moneys due state, allegation of specific demand is not necessary (Pol. Code, §§ 2192, 2193).

In petition for mandamus to compel county treasurer to pay moneys due state, brought under Pol. Code, §§ 2192, 2193, for benefit of state and without any private or personal interest by petitioner in subject-matter, law itself stands in lieu of demand, and it is not necessary to allege that specific demand has been made.

4. Mandamus 🔑154(7)—Mandamus to compel county treasurer to pay moneys due state did not require allegation of demand, where country treasurer asserted continued resistance against claim (Pol. Code, § 2192).

Where county treasurer in his brief stated that he resisted and would continue to resist all efforts to compel him to pay money in unauthorized manner as attempted, and that for 30 years county has contended that it could not be compelled to make payments under Pol. Code, § 2192, mandamus petition to compel county treasurer to pay money due state did not require allegation of specific demand.

5. Mandamus 🔑154(7)—Petition to compel county treasurer to pay state money due, alleging treasurer refused to pay on order of controller, if insufficient to allege demand, showed treasurer was not prejudiced.

Petition to compel county treasurer to pay state money due, alleging that county treasurer refused to pay on order of controller, if not sufficient as allegation that demand was made, was sufficient to show that county treasurer was not prejudiced by failure to more specifically allege demand.

6. Mandamus 🔑154(4)—Mandamus to require county treasurer to pay moneys due state, alleging treasurer refused payment on order of controller, sufficiently raised issue of county treasurer's duty (Pol. Code, §§ 2192, 2193, 4101, subds. 6, 7).

Petition to require county treasurer to pay moneys due state under Pol. Code, §§ 2192, 2193, alleging that at time of settlement with state, county treasurer refused to pay, on order of controller, amounts found due to state, did not fail to show amount had ever been found due state, but was sufficient to raise issue of county treasurer's duty under section 4101, subds. 6, 7, requiring county treasurer to pay money on warrants or "as otherwise provided for by law."

7. Mandamus 🔑15—That amount demanded of county treasurer was not in fact due is matter of defense in proceeding to require payment (Pol. Code, §§ 2192, 2193).

In mandamus petition to require county treasurer to pay state money due under Pol. Code, §§ 2192, 2193, fact that amounts demanded are not in fact due is matter of defense and is one of issues to be tried in proceeding.

8. Mandamus 🔑15—Auditor in determining from records amount due by county treasurer for commitments to state home does not exercise judicial function, and failure to do so is no defense to recovery of amount due (Pol. Code, § 2193).

Under Pol. Code, § 2193, authorizing director of department of institutions to require county treasurer to pay state, on order of controller, all amounts found to be due by reason of commitments from county to state home, auditor in determining amount due need only compute fixed charge on basis of number of commitments made, based solely on public records, without exercising discretion or independent judgment, and does not exercise any judicial function, so that auditor's failure to comply with statute is no defense against payment of amount to state treasurer.

9. Insane persons 🔑47—Statute authorizing director of institution to require county treasurer to pay money due state held not invalid as conflicting with statute regulating payments by county (Pol. Code, §§ 2192, 2193, 4041, 4101).

Pol. Code, §§ 2192, 2193, authorizing director of department of institutions to require county treasurer to pay state treasurer, on order of controller, all amounts found due state for commitments from county to state home, *held* not invalid as conflicting with sections 4041, 4101, authorizing supervisor to pass on all claims against county, except such as are authorized by law, and providing for disbursements on warrants of auditor or as otherwise provided by law.

10. Constitutional law 🔑55—Mandamus 🔑2—Statute authorizing mandamus against county treasurer to recover moneys due state held not void as relieving state of alleging there were funds applicable to claim (Pol. Code, §§ 2192, 2193; Const. art. 4, § 25, subd. 3).

Pol. Code, §§ 2192, 2193, authorizing director of department of institutions to require county treasurer by writ of mandamus to pay state treasurer amounts due for commitments from county to state home, *held* not void as relieving state from necessity of alleging that there were funds in county treasury applicable to payment of claim as required by the Code of Civil Procedure, and therefore contrary to Const. art. 4, § 25, subd. 3, prohibiting special laws regulating court practice.

11. Statutes 🔑85(1)—Statute authorizing mandamus against county treasurer to recover money due for commitments to state home held not void as local or special law (Pol. Code, §§ 2192, 2193).

Pol. Code, §§ 2192, 2193, authorizing director of department of institutions to require county treasurer by writ of mandamus to pay state treasurer amounts due for commitments from county to state home, *held* not contrary to Const. art. 4, § 25, subd. 9, prohibiting local and special laws regulating county business.

12. Mandamus 🔑3(2)—Adequacy of legal remedy is determinable by court to which mandamus application is made.

In mandamus proceedings, question of speed and adequacy of legal remedy is matter determinable by court to which application is made.

13. Mandamus 🔑1—Mandamus proceedings will be more liberally entertained when question is of state-wide concern, involving construction of general state statute.

When question presented in mandamus proceeding is one of state-wide concern, involving construction of general state statute, courts have been more liberal in entertaining proceedings.

14. Mandamus 🔑3(5)—Refusal, because of adequacy of legal remedy, to entertain mandamus to compel county treasurer to pay moneys due state pending for many months and fully heard, would be abuse of discretion (Pol. Code, §§ 2192, 2193).

Where application for mandamus to require county treasurer to pay money due state for commitments from county to state home, as required by Pol. Code, §§ 2192, 2193, was pending in court for many months, and was defended on ground that statute was unconstitutional and was fully heard and briefed, it would be an abuse of discretion to refuse to entertain petition on ground that petitioner had speedy and adequate remedy at law.

15. Counties 🔑24—Act charging county for support of insane wards held not contrary to Constitution prohibiting tax on county for county purposes (Pol. Code, §§ 2192, 2193; Const. art. 11, § 12).

Pol. Code, §§ 2192, 2193, making charge against county for support of its insane wards payable by county to state treasurer, *held* not in violation of Const. art. 11, § 12, prohibiting Legislature from levying tax on county for county purposes.

16. Counties 🔑24—Statute making charge on county for support of its insane wards held not unconstitutional as levying tax (Pol. Code, §§ 2192, 2193; Const. art. 13, § 14).

Pol. Code, §§ 2192, 2193, making charge against county for support by state of insane wards of county, does not purport to levy tax, and is not in violation of Const. art. 13, § 14.

17. Counties 🔑153½—Act making charge against county for support of county's insane wards held not unconstitutional as appropriation of county funds for support of state institution (Pol. Code, §§ 2192, 2193; Const. art. 13, § 14).

Pol. Code, §§ 2192, 2193, making charge against county for support by state of insane wards of county, *held* not in violation of Const. art. 13, § 14, on ground that act attempts to appropriate county moneys for support of state institution, since act makes direct charge against county for support of patient, and whether state requires county to maintain home within its borders for feeble-minded, or whether it requires county to pay proportionate share of expenses of maintaining feeble-minded in state home, is not concern of county, which is mere agency of state and subject to direction of state in such matters.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second and Third Series, County.]

18. Counties 🔑153½—Act directly charging county for commitments to state home for insane held not unconstitutional as making gift to persons who might be liable therefor (Pol. Code, §§ 2192, 2193; Const. art. 4, § 31).

Pol. Code, §§ 2192, 2193, making charge against county for support by state of county's insane wards direct charge against county from which commitment to state home is made, *held* not in violation of Const. art. 4, § 31, as making gift to undisclosed donee who might be liable for maintenance of person committed.

19. Constitutional law 🔑26—State Constitution is limitation on Legislature's powers, not grant of power.

State Constitution is limitation on powers of Legislature, and not grant of power.

20. Counties 🔑3—Legislature, if not limited, has inherent right to subdivide state into political subdivisions and provide for government thereof.

In absence of limitation of power, Legislature without express grant has inherent right to subdivide state into political subdivisions and to prescribe mode of government, powers, duties, and obligations of each subdivision and officers and employés created for governmental functions of subdivisions.

21. Constitutional law 🔑81—Legislature has inherent power, in exercise of police power, to provide for care and maintenance of its citizens.

Legislature has inherent power, in exercise of its police power and for general welfare of state at large, to provide for care and maintenance of its citizens.

22. Counties 🔑24—Legislature may place entire burden of maintaining dependent classes on political subdivisions, or may share portion of burden with subdivisions.

In absence of some limitation on power of Legislature, entire burden of care and maintenance of dependent classes can be placed by Legislature on political subdivision of state, and Legislature may provide that portion of burden be born by political subdivision and portion of state as a whole.

23. Constitutional law 🔑70(3)—Courts cannot determine wisdom of legislative action within powers of Legislature.

Where Legislature acts within its powers, question of wisdom of its action is not for courts to determine.

24. Insane persons 🔑46—Legislature could require political subdivision to maintain home for care of feeble-minded, or provide state home and share burden of support with subdivisions.

Legislature had power to determine that each political subdivision should maintain home for care of its feeble-minded, or could provide state home for purpose and bear entire burden of maintenance, or require each political subdivision to contribute to share of expense.

25. Mandamus 🔑164(3)—Denial, on information and belief, of regularity of commitments to state home, by county treasurer sued for cost thereof, is sham (Pol. Code, §§ 2192, 2193).

In mandamus petition by director of department of institutions to compel county treasurer to pay moneys claimed to be due state, under Pol. Code, §§ 2192, 2193, for persons committed to state home from county, denial on information and belief of regularity of commitment of two inmates is denial of matters of public record, which should have been denied positively or admitted to be regular, and such denials are sham and raise no issue.

26. Mandamus 🔑164(3)—Denial that anything was due state by county for commitments to state home raised question of law, where county treasurer admitted nonpayment and failed to deny statutory requirements for payment (Pol. Code, §§ 2192, 2193).

In mandamus petition by director of department of institutions to compel county treasurer to pay moneys claimed to be due state, under Pol. Code, §§ 2192, 2193, for persons committed to state home from county, denial that anything was due state on account of claims alleged raised question of law alone, in face of admission that nothing was paid and failure to deny any ultimate circumstances specified in statute under which claims are made valid charges against county.

27. Mandamus 🔑164(3)—Denial, by county treasurer sued for money due state home, that state controller made demand for payment, held without merits under evidence (Pol. Code, §§ 2192, 2193).

In mandamus petition to require county to pay state amount due for commitments to state home, under Pol. Code, §§ 2192, 2193, denial that state controller made demand or order to pay on county treasurer *held* without merit, where controller wrote letter of notification stating amount due.

28. Mandamus 🔑164(3)—Denial, on information and belief, that judges failed to inquire into financial conditions of responsible persons, held sham in mandamus to require county treasurer to pay for commitments to insane home (Pol. Code, §§ 2192, 2193).

In mandamus petition to require county to pay state amount due for commitments to state home, under Pol. Code, §§ 2192, 2193, denial, on information and belief, that judges of superior court of county failed to perform their duty to inquire into financial condition of parents and guardians of persons committed, *held* sham, and raised no issue.

29. Mandamus 🔑164(3)—Defense that amount due state for commitments from county to state home was not determined nor presented to supervisor were insufficient in mandamus to require payment (Pol. Code, §§ 2192, 2193).

In mandamus petition to require county to pay state amount due for commitments to state home, under Pol. Code, §§ 2192, 2193, defense that no person or tribunal has determined amount due state, and that no claim has been presented to board of supervisors, *held* not to raise triable issue, since law did not require either of such things to be done.

30. Pleading 🔑122—Defendant, though public officer, cannot raise issue, depending wholly on public records, by denial on information and belief.

Person may not raise issue, depending wholly upon public records, by denial on information and belief alone, though defendant is public officer.

Application for writ of mandamus by Earl E. Jensen, Director of the Department of Institutions of the State of California, against C. F. McCullough, Treasurer of San Benito County. Writ granted.

U. S. Webb, Atty. Gen., and R. L. Chamberlain and Chas. A. Wetmore, Jr., Deputy Attys. Gen., for petitioner.

Wyckoff & Gardner, of Watsonville, and A. M. Runnells, of Hollister, for respondent.

NOURSE, J. This is an original proceeding in mandamus to require the respondent to pay to the state treasurer moneys claimed to be due the state by reason of commitments from the county of San Benito to the Sonoma State Home. The petitioner is the director of the department of institutions of the state, and the respondent is the treasurer of San Benito county. The controversy arises over the claim of the respondent that the act of the Legislature (sections 2192 and 2193, Pol. Code), which places this charge upon the county from which the commitments are made, is unconstitutional. The respondent has appeared by both demurrer and answer, and the whole cause has been submitted on these pleadings.

[1] The first ground of demurrer is that the petition fails to state sufficient facts, in that it does not show any sum to be owing the state, because it alleges that in May and December, 1927, certain sums became due, and that in May and December, 1926, the respondent failed and refused to pay such sums. The error is plainly a clerical one—the figures 1926 should read 1927. The petitioner has asked leave to make the correction on the face of the petition, and such leave will be granted. This disposes of the point raised.

[2-5] It is argued that the petition is insufficient because it fails to allege a prior demand upon respondent to do the act prayed for in the petition. There is no quarrel with the general rule that, in ordinary cases of mandamus, the petition must allege that demand was made upon the respondent to perform the act, and that he refused to comply. But there are two well-recognized exceptions to this general rule: First, that a demand is excused when the act is a mere public duty affecting the public at large and in which the petitioner has no immediate benefit; and, second, that a demand is excused when the attitude of the respondent shows that it would have been refused if made. Both of these exceptions are applicable here. The petitioner is a state officer proceeding under a general state statute for the benefit of the state and without any private or personal interest in the subject-matter. In such a case the law itself stands in lieu of a demand, and it is not necessary to allege that a specific demand has been made. 16 Cal. Jur. 771, 772. It also appears from the admissions in respondent's

brief that any demand upon him would have been futile. He says:

> "But the treasurer resists and will continue at all times to resist the efforts of the state to compel him to pay in any such unauthorized manner as is here attempted."

The respondent further admits that, for a period of 30 years, the county of San Benito has contended that it cannot be compelled to make payments to the state under Political Code, § 2192. As the controversy between the state and the county over this long period of time has been based upon the question of the constitutionality of section 2192, and as that is the real basis of the defense in this proceeding, it is apparent that the respondent would not have complied with any demand in any form for the payment of these sums. The petition does allege, in form of recital, that the respondent refused to pay "upon the order of the controller." If this is not sufficient as an allegation that demand was made, it is sufficient to show that respondent is not prejudiced by the failure to allege demand in specific terms and to show that it would be an idle act to sustain the demurrer and require petitioner to allege specific demand or to allege the admitted fact of the futility of making a demand.

[6-8] It is argued that the petition is insufficient because it does not allege facts showing that said amounts have ever been found to be due to the state. The petition alleges that at the time of the settlement with the state the respondent refused to pay, upon the order of the controller, the amounts found to be due to the state. This allegation is sufficient to raise the issue of the duty of the respondent under section 2193 of the Political Code. If the amounts demanded are not in fact due, that is a matter of defense for the respondent in this proceeding. The duty of the county treasurer is to pay out moneys in the treasury on warrants when they are based upon orders of the board of supervisors or upon orders of the superior court, "or as otherwise provided by law" (section 4101, Pol. Code, subd. 7). An exception to the rule that the treasurer can pay only upon warrants issued by the auditor is made in cases of "Settlement with the State" (subdivision 6, same section). Section 2193 expressly fixes upon the county treasurer the liability to pay to the state treasury the sum of $20 monthly for each person committed to the home from the county, and requires the county auditor to include in his report to the state controller the amount due the state under the act. When the auditor performs this duty the amount due the state is fixed, and the treasurer's duty to pay the amount so fixed follows. However, when either auditor or treasurer fails to perform his duty under the act, the director of the state department of institutions is empowered to proceed against the treasurer by writ of mandate to require him to pay to the state the amounts found due, and in such a proceeding one of the issues of fact to be tried is the amount due under the terms of the act. In this respect the proceeding is similar to that in mandamus against the trustees of reclamation districts, authorized by section 3457 of the Political Code, where it is provided that if a controversy arises as to the amount due a claimant against the district, the court must determine the same in the manner provided for determining controversies in other civil actions and cause a writ to issue to the trustees requiring them to draw their warrant for the amount found due. So in section 2193 the petitioner herein is expressly authorized to require the county treasurer by writ of mandate "to pay to the state treasurer upon an order of the controller all amounts found to be due to the state." By the same section the county auditor is required to include in his report to the state controller "the amount due the state under this act." In finding the amount due under this section the auditor need only compute the fixed charge on the basis of the number of commitments made from his own county—a finding based solely on public records—without any room for discretion or independent judgment. We hold, accordingly, that the auditor does not exercise any judicial function in determining the amount due the state, and that his failure to comply with the statute is no defense in this action against the treasurer because section 2193 declares it shall not be a defense. Thus, the point is not available on the demurrer to the petition because the petition recites the treasurer's failure to pay the "amounts found to be due to the state." If the auditor has not in fact determined these amounts, that is a matter to be raised by answer, and this, in turn, would raise the issue before this court as to what was in fact due.

[9] The respondent argues that section 2193 is invalid because it conflicts with sections 4041 and 4101 of the Political Code relating to payment of claims against the county. The point is that the two later sections relating to the approval of claims by the supervisors and the payment on warrants drawn by the auditor conflict with section 2193, which authorizes the treasurer to pay the claims arising under that section upon the order of the controller. The difficulty with the argument is that it is based upon wrong premises. Section 4041 provides that the supervisors shall pass on all claims against the county "except salaries of officers, and such demands as are authorized by law to be allowed by some other person or tribunal." Section 4101 provides that the treasurer shall disburse the funds only upon warrants from the auditor, "or as otherwise provided by law." These exceptions fully cover the special provisions in section 2193 relating to the payment of claims arising under it.

[10] It is also argued that the section is

void because it relieves the state from alleging that there are funds in the county treasury applicable to the payment of the claim, whereas, in other actions by individuals in mandamus, it is necessary to allege that the respondent has funds within his control applicable to the payment of the demand which is sought to be enforced. From this it is argued that the section is in conflict with the interpretations which have been put on the general sections of the Code of Civil Procedure relating to proceedings in mandamus, and that it therefore offends the provisions of subdivision 3 of section 25 of article 4 of the state Constitution. The inhibitions of this section of the Constitution are that the Legislature shall not pass any local or special law regulating the practice of courts of justice. The respondent refers to Meyer v. City & County of San Francisco, 150 Cal. 131, 88 P. 722, 10 L. R. A. (N. S.) 110; State Commission of Lunacy v. Welch, 20 Cal. App. 624, 129 P. 974; People v. Central Pac. R. Co., 83 Cal. 393, 23 P. 303, and City of Tulare v. Hevren, 126 Cal. 226, 58 P. 530. It would serve no purpose to discuss any of the cases cited. The rule applicable to the situation before us is stated in the later case of People v. Central Pac. R. Co., 105 Cal. 576, 589, 38 P. 905, 908, where it was held that, in proceedings to enforce obligations to the state, the Legislature "may prescribe such procedure as may best avail for that purpose, irrespective of the mode of procedure provided for the determination of controversies between individuals." Many later authorities may be found to the same effect: Selowsky v. Superior Ct., 180 Cal. 404, 410, 181 P. 652; Brambini v. Superior Ct., 192 Cal. 19, 26, 218 P. 569; In re Sutter-Butte By-Pass, etc., 191 Cal. 650, 671, 218 P. 27; Fleming v. Superior Ct., 196 Cal. 344, 351, 238 P. 88; Gridley v. Fellows, 166 Cal. 765, 768, 138 P. 355, and City of Stockton v. Ellingwood, 78 Cal. App. 117, 120, 248 P. 272.

[11] That the act does not contravene the provisions of subdivision 9, section 25, article 4, of the Constitution, prohibiting local and special laws regulating county business, is so obvious that we merely mention it to show that the point has not been overlooked.

[12-14] It is argued that the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law, and that therefore mandamus should not issue. This question of the speed and adequacy of the legal remedy is always a matter to be determined by the court to which the application is made. When the question presented is one of statewide concern, involving the construction of a general state statute, the courts have been more liberal in entertaining the proceeding in mandamus. As the matter has been pending in this court for many months and has been fully heard and briefed by the respective parties, it would be an abuse of discretion to refuse to entertain the proceeding at this time.

[15] Section 2193 is attacked upon the ground that it violates section 12 of article 11 of the state Constitution, which prohibits the Legislature from levying a tax upon the county for county purposes. There is, of course, no attempt to levy a tax. The act merely makes a charge against the county for the support of its insane wards just as the Legislature has made a charge upon the county for the support of its indigent sick, its dependent poor, its orphans, and for the maintenance of persons charged with or convicted of crime.

[16, 17] But respondent states that if he be wrong in this view he might be right in another—that it is a tax for state purposes, and hence in violation of section 14 of article 13 of the state Constitution. That the act does not purport to levy a tax is obvious. The argument that the act is unconstitutional because it attempts to appropriate county moneys for the support of a state institution is without merit, because the act makes the charge a direct one against the county for the support of the patient, and whether the state should require the county to maintain a home within its borders for the feeble-minded, or whether it should require it to pay its proportionate share of the expense of maintenance of its feeble-minded in a state home, is no concern of the county. It being a mere agency of the state, it is subject to the direction of the state in matters of this kind. County of Sacramento v. Chambers, 33 Cal. App. 142, 145, 164 P. 613.

[18] It is then said that the act violates section 31 of article 4 of the state Constitution as providing for a gift to some unknown or undisclosed donee who might be liable for the care and maintenance of the person committed. As we have pointed out, the act makes the charge a direct charge against the county from which the commitment is made. The fact that it also provides that the judge of the superior court shall order that the party liable for the support of the feeble-minded person shall pay to the hospital stated sums for the support of the inmate does not constitute a gift of public money to those who are not found or who are not ordered to pay.

[19-23] We have covered each point raised by the respondent in support of his demurrer to the petition, and, for the reasons given, the demurrer is overruled. There are, however, certain considerations governing legislation of this character which are not discussed in the briefs, but which may be adverted to at this time. The state Constitution is a limitation on the powers of the Legislature, and not a grant of power. There are, of course, many provisions found therein which are express grants of power, but these are made, not because an express grant is necessary, but, because of some limitation on the power of the Legislature, the presence of the express power is in doubt. Thus, in the absence of a limitation, and without an express grant, the Legislature has the inherent

right to subdivide the state into political subdivisions and to prescribe the mode of government, the powers, duties, and obligations of each of such subdivisions and of the officers and employés created for the purpose of exercising, on behalf of the state, the governmental functions of such subdivisions. Having heretofore discussed the limitations which surround the power of the Legislature in matters of this kind, and having found none of them applicable to the case in hand, we are left with the inherent power of the Legislature, in the exercise of its police power, and for the general welfare of the state at large, to provide for the care and maintenance of its citizens. Without specifying the particular acts, we know that the state has provided for the care and maintenance of the indigent, the orphans and half-orphans, the blind, the insane, the feeble-minded, the juvenile delinquents, the criminal, and other dependent persons. In the absence of some limitation on the power of the Legislature, there is no sound reason why the entire burden of the care and maintenance of such dependent classes could not be placed upon the political subdivisions of the state. Sacramento v. Chambers, 33 Cal. App. 142, 145, 164 P. 613. If, therefore, in the wisdom of the Legislature a portion of this burden is ordered to be borne by the political subdivisions and a portion by the state as a whole, the Legislature is acting within its power, and the question of the wisdom of the action is, of course, not one for the courts to determine.

[24] Thus, the Legislature has the power to determine that each political subdivision should maintain a home for the care of its feeble-minded, or it could provide a state home, or homes, for the purpose, and bear all the burden of maintenance, or it could require each political subdivision to contribute a share of the expense of the maintenance of the individual. In the case at hand the Legislature has provided a home where such patients may be kept, and has fixed a uniform charge upon every county in the state determined by the number of patients committed from each county. This plan has been in operation for more than 25 years and has been followed by every county in the state but San Benito. A similar situation arose in County of Los Angeles v. State, 64 Cal. App. 290, 297, 222 P. 153, 156, where the county of Los Angeles had refused to pay the state charge for the care and maintenance of wards committed to a state institution under the Juvenile Court Act (St. 1915, p. 1225). In speaking of the obligation of the county under the act, the court said:

> "It was the duty of the court of Los Angeles County to make the order, and under the law, as we read it, it was also the duty of Los Angeles County to provide for the maintenance of its own wards and not to shift that burden upon the state or upon other counties of the state who, following the statute, had made provision for the support and maintenance of their wards."

[25-30] Upon the suggestion of the court the cause was submitted upon the demurrer and answer, with the understanding that both parties might produce their proof by affidavits, as the only matters in dispute were of public record. Counsel for respondent now complain that they did not formally stipulate to the use of affidavits, and they move that those filed by petitioner be stricken from the files. At the same time they have filed counter affidavits in reply. Without approving the procedure followed by respondent, his motion is granted, and all affidavits filed by petitioner and by respondent are accordingly stricken. There is no call for any further hearing, however, as the respondent's answer does not raise any triable issue. The denial upon information and belief of the regularity of the commitment of two of the inmates of the home is a denial of matters of public record which should have been denied positively or admitted to be regular. Such denials are sham and raise no issue. The denial that nothing was due the state on account of the claims set forth in the petition raises a question of law alone in face of the admission that nothing was paid and the failure to deny any of the ultimate circumstances specified in the statute under which the claims are made valid charges against the county. The denial that the state controller did not make a demand or order to pay upon the respondent does not call for much comment. The argument in the brief is that the courteous letter of notification from the controller stating the amount due should not be treated as an explicit demand for payment. The denial upon information and belief that the judges of the superior court of San Benito county failed to perform their duty to inquire into the financial condition of the parents or guardians of those committed is sham and raises no issue. The denials that no person or tribunal has determined the amount due the state, and that no claim has been presented to the board of supervisors, do not call for a trial, because the law does not require that either of these things must be done, as we have heretofore pointed out. If the commitments were not made as alleged in the petition, or if the individuals were not confined in the institution in the manner and for the periods alleged, or if the statutory charges for the care of these individuals in the state home were in fact paid, any one of these matters would constitute a defense to this petition, but the fact that the respondent is a public official does not alter the application of the rule that one may not raise an issue dependent wholly upon public records by a denial upon information and belief alone.

Let a peremptory writ issue as prayed.

We concur: **KOFORD, P. J.; STURTEVANT, J.**

94 Cal. App. 657

CARP v. CARP. (Civ. 6266.)

District Court of Appeal, First District, Division 1, California. Nov. 2, 1928.

1. Divorce 🔑167—Court's finding that allegations of answers in action to set aside divorce decree are true held sufficient to support judgment for defendant (Code Civ. Proc. § 1908).

In action to set aside interlocutory divorce decree on ground of plaintiff's ignorance of fact that she was served with summons, court's finding, sustained by record, that allegations of answers and defenses that plaintiff had served affidavits for order setting aside decree on same grounds, that superior court denied motion for such relief, and that such decision was a judgment between parties on issues involved, are true and supported by evidence, was sufficient to support judgment for defendant under Code Civ. Proc. § 1908.

2. Divorce 🔑167—Evidence held to support finding in action to set aside divorce decree that plaintiff knew she was served with summons.

In action to set aside interlocutory divorce decree, on ground that plaintiff was ignorant of fact that she was served with summons, evidence *held* to support court's finding that allegation of complaint that plaintiff, by reason of her state of mind, did not recall delivery of papers, nor connect them with her relations with defendant, and did not know that divorce suit was pending, but believed that they concerned other matters, were untrue.

3. Divorce 🔑167—Evidence held to sustain findings that wife was not terrorized into making property settlement, nor ignorant of what she was doing.

In action to set aside interlocutory divorce decree, evidence *held* to sustain court's findings for defendant on plaintiff's allegations that defendant terrorized her into making property settlement and executing deed, and that she was in ill health and did not know what she was doing.

4. Appeal and error 🔑1011(1)—Trial court's decision, on conflicting evidence, as to validity of property settlement by wife, is binding on appeal.

Trial court's decision, on conflicting evidence, as to whether plaintiff, in action to set aside interlocutory divorce decree, was terrorized into making property settlement and executing deed, and did not know what she was doing because of ill health, is binding on appellate court.

5. Appeal and error 🔑757(3)—Appellate court need make only cursory examination of typewritten record, where brief contains only appellant's version of testimony in condensed narrative form (Code Civ. Proc. § 953c).

Where appellant reproduces in her brief only her version of testimony in condensed narrative form, with but few extracts from record itself, contrary to Code Civ. Proc. § 953c, requiring parties to print in briefs such portions of record as they desire to call to court's attention, appellate court is not required to make more than a cursory examination of typewritten record on file.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Action by Hilma Carp against August Carp. Judgment for defendant, and plaintiff appeals. Affirmed.

J. Logan Beamer and Henry L. Ford, both of Eureka, for appellant.

J. F. Coonan and Mahan & Mahan, all of Eureka, for respondent.

CAMPBELL, Justice pro tem. [1] Plaintiff in her complaint alleges three causes of action. The first cause of action is to set aside an interlocutory decree of divorce granted to August Carp, defendant herein and plaintiff in the divorce action, on the ground of ignorance of the fact that she was served with summons in such divorce action. She admits the delivery to her of the summons and copy of the complaint, but claims that "by reason of her state of mind as aforesaid plaintiff did not think of and did not recall the delivery of said paper writings upon her as aforesaid, and did not connect the same with the relations between herself and her husband, and did not know that an action for divorce was pending by the parties hereto, but believed that said paper writings concerned said property and the said Selma Aster." Defendant in his answer denies these facts alleged, and as a separate defense alleges that, after the interlocutory decree had been granted, the appellant here has served affidavits praying for an order to set aside the interlocutory divorce decree upon the identical grounds set up in this action; that such motion was duly heard upon affidavits, and that on June 8, 1923, the superior court of Humboldt county, California, rendered its judgment and decision therein, denying the motion to set aside and vacate such interlocutory decree; that the decision of the court on such motion to set aside the interlocutory decree was duly entered in the minutes of such court, and thereupon became, ever since has been, and now is, a judgment between said parties on the issues therein involved, and involved in this action. The court found, and the record sustains such finding:

> "That the allegations of the first and second separate answers and defenses to said first cause of action in said amended complaint are true, and that each and every of them is supported by the evidence."

The appellant does not attack this finding, which of itself is sufficient to support the judgment. Code Civ. Proc. § 1908; Lake v. Bonynge, 161 Cal. 120, 118 P. 535; 15 R. C. L. 975.

[2] But, aside from this, the court found the allegation of plaintiff's complaint above quoted to be untrue. This finding is supported by the testimony of Wiking Carp, plaintiff's son, Joe Miller, and M. Challman, each of whom testified that, before the time allowed to answer the complaint, he read the summons to her. Miller testified that he told her "they were a divorce summons," and Challman testified he told her "that was a summons for Mrs. Carp to prove the charges brought against her in the divorce suit by Mr. Carp," and further:

> "Well, I told her. I told Mrs. Carp she had so many days left to appear, but I don't remember exactly how many days it was."

[3, 4] The second cause of action alleges that on February 5, 1923, five days after the filing of the divorce suit, plaintiff made a property agreement with defendant; that defendant terrorized her into making this settlement, and also into executing the deed which is the subject of the third cause of action; and further that she was in ill health, and did not know what she was doing. The court found against appellant and in favor of respondent on these allegations. The evidence amply sustains the court's findings. The agreement was made in the office of Attorney J. F. Coonan. Present part of the time were Coonan, appellant, respondent's brother-in-law, Branston, and appellant's sister. Part of the time appellant's attorney Irwin Quinn was there. Attorney Coonan testified:

> "So I took that old agreement and read it paragraph by paragraph to Mr. Branston. * * * Now I understood Mr. Branston represented Mrs. Carp, and I considered myself as acting for both parties. * * * Now every paragraph of this contract was read to Mr. Branston, and I had Mr. Branston restate each paragraph to Mrs. Carp, every one."

The testimony of Irwin T. Quinn, appellant's attorney at the time sustains Mr. Coonan. He testified that the agreement was fully discussed in his office; that he went over all the items with appellant; that he had certain changes made in the agreement. It appears that the agreement was discussed, each side being represented by an attorney; that appellant was aided by her sister and Branston, who explained each detail to her. We fail to see how, under the circumstances, there could be fraud in the execution of the agreement or deed. At the utmost, all that appellant can claim is that there is a conflict in the evidence, the decision on which by the trial court is binding on this court.

[5] There is no merit in appellant's contention that the court erred in not granting plaintiff's motion for judgment on the pleadings. The appeal is taken under section 953c of the Code of Civil Procedure, which requires the parties to print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court. This requirement has not been complied with, as appellant in the main has reproduced in her brief only her version of the testimony, in a condensed narrative form giving but a few extracts from the record itself. In this condition of the record we are not required to make more than a cursory examination of the typewritten record on file. O'Rourke v. Skellenger, 169 Cal. 271, 146 P. 633; Estate of Keith, 175 Cal. 28, 165 P. 10. We have, however, examined the record sufficiently to conclude that there is ample evidence to support the findings of the trial court.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.★

94 Cal. App. 635

PEOPLE v. STOVALL et al. (Cr. 1716.)

District Court of Appeal, Second District, Division 2, California. Nov. 1, 1928.

Hearing Denied by Supreme Court Dec. 27, 1928.

1. Criminal law 🔑200(3)—Conviction of asportation of automobile in violation of statute does not preclude conviction of grand theft (Motor Vehicle Act, § 146).

Acquittal of asportation of automobile in violation of Motor Vehicle Act (St. 1923, p. 564, Deering's Gen. Laws, Act 5128), § 146, does not preclude conviction of grand theft, if evidence is sufficient to establish guilt thereof.

2. Criminal law 🔑538(3)—Police officer's testimony as to defendant's practical confession held sufficient to support conviction of grand theft, though defendant took stand and denied guilt.

Police officer's testimony as to conversation wherein defendant made statements practically amounting to confession of guilt *held* sufficient to support conviction of grand theft, though defendant took stand and denied his guilt; his testimony giving rise only to conflict of evidence.

3. Criminal law 🔑761(12)—Instruction that taking of automobile is grand theft held not erroneous, as assuming that defendant took automobile.

In trial for grand theft, instruction that, when property taken is an automobile, the offense is grand theft, *held* not erroneous, as assuming that defendant had taken an automobile.

4. Criminal law 🔑822(1)—All instructions must be read together.

All instructions must be read together, in order to ascertain their import.

5. Criminal law 🔑823(2)—Instruction that taking of automobile is grand theft held not harmful, in view of instructions as to presumption of innocence, reasonable doubt, and absence of intimation by court as to what facts were established.

In trial for grand theft, instruction that, when property taken is an automobile, offense

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

is grand theft, *held* not harmful, if erroneous, as assuming that defendant took an automobile, where jury was carefully instructed as to presumption of innocence and reasonable doubt, and also that court had not intimated or intended to intimate what facts were or were not established by evidence.

6. Criminal law ⊂⇒878(3)—Defendant may be convicted of grand theft, though such charge includes statutory offense of asportation of automobile (Motor Vehicle Act, § 146).

Defendant may be convicted of grand theft in taking an automobile, even if such charge includes offense of asportation of automobile, in violation of Motor Vehicle Act (St. 1923, p. 564, Deering's Gen. Laws, Act 5128) § 146.

7. Criminal law ⊂⇒1172(8)—Instruction that defendant might be convicted of either or both grand theft and violation of statute by asportation of automobile was harmless, where he was acquitted of latter charge (Motor Vehicle Act, § 146).

Where defendant was acquitted of violating Motor Vehicle Act (St. 1923, p. 564, Deering's Gen. Laws, Act 5128) § 146, by asportation of automobile, he was not harmed by instruction that such offense and grand theft are distinct offenses, and that he might be convicted of either or both.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Bill Stovall, Hubert Roark, and Launie Miller were tried for grand theft and violation of the Motor Vehicle Act by taking an automobile. From a judgment on conviction of defendant Miller for grand theft, he appeals. Affirmed.

M. H. Broyles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

WORKS, P. J. Defendants were informed against jointly in two counts; the first charging them with the crime of grand theft, the second charging a violation of section 146 of the Motor Vehicle Act, both charges being based on the same taking of an automobile. Stovall and Roark entered pleas of guilty to the charge made under section 146, and the grand theft charge was dismissed as to them. Miller pleaded not guilty as to both charges, and after trial was convicted of grand theft, and acquitted of the charge of violating section 146. Miller appeals from the judgment, and from an order of the trial court denying his motion for a new trial.

[1] Section 146 of the Motor Vehicle Act (Stats. 1923, p. 564, Deering Gen. Laws, Act 5128) provides:

> "Any person who shall drive a vehicle not his own, without the consent of the owner thereof and in the absence of the owner, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, shall be deemed guilty of a felony."

As this language denounces the asportation of an automobile, under the other circumstances stated in the section, appellant contends that his acquittal of the charge made under it rendered it impossible for the jury to find him guilty of grand theft. He therefore says that the verdict of guilty returned against him cannot stand. This does not follow. The real question—one to be mentioned again later—is whether the evidence was sufficient to establish guilt of grand theft. If it was, it is immaterial that the jury acquitted on the other charge. Perhaps a conviction should have resulted on both. Under a state of facts somewhat similar to that here presented we once said:

> "It may be conceded, for the purpose of the argument, that under the evidence the jury had as much reason for finding appellant guilty on the first and second counts as it had for finding him guilty on the third; but even so, the fact remains that the evidence was sufficient to justify the verdict on the third count, and we must conclude that the jurors were convinced of his guilt thereon. If the jurors paltered with their oaths and with the law they must make their own peace with conscience. If appellant was wrongfully acquitted on the first and second counts the error was in his favor, and he cannot be heard to complain. The fact that the jurors relieved him on two counts does not oblige this court to relieve him on the third." People v. Edwards, 72 Cal. App. 102, 236 P. 944.

[2] It is contended that the evidence was insufficient to support the verdict finding appellant guilty of grand theft, but the contention cannot be upheld. A police officer testified to a conversation between him and appellant, in which the latter made statements practically amounting to a confession of guilt. Appellant, it is true, took the witness stand in his own defense and denied his guilt. This testimony, and that of the officer, gave rise only to a conflict of evidence, and the verdict indicates that the jury believed the testimony of the officer, as it had the right to do. There was also some other evidence, perhaps slight in character, which tended to support the verdict.

[3-5] Immediately following a definition of the word theft, the trial judge instructed the jury "that when the property taken is an automobile that the offense is grand theft." It is objected to this instruction that, "taken independent of any other instruction, it was misleading to the jury in that it assumed * * * that the defendant and appellant had taken an automobile." Even considered by itself, we think the instruction is not susceptible of the construction thus placed upon it, but it cannot be read "independent" of other instructions. All instructions must be read together in order to ascer-

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⊂⇒For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes tain their import. Here the jury was carefully instructed as to the presumption of innocence and upon the law of reasonable doubt, and the judge also gave the usual instruction to the effect that he had not intimated or intended to intimate to the jury what facts were or were not established by the evidence. On the whole, we can see nothing in the questioned instruction that was erroneous or harmful.

[6, 7] Appellant insists that the following instruction, given by the court, was erroneous:

> "The defendant is charged * * * with grand theft and violation of section 146, California Vehicle Act, distinct offenses and may be convicted upon either or both."

It is said that the crime of violating section 146 is included within the crime of grand theft and that, therefore, appellant could not have been convicted of both crimes. If the offense under section 146 was included under the charge of grand theft, this affords no reason why appellant should not have been convicted of the latter crime. If the instruction was erroneous, as contended, which we do not decide, appellant was not harmed by it as he was acquitted of the charge made under section 146.

Judgment and order affirmed.

We concur: CRAIG, J.; THOMPSON, J.

205 Cal. 484

NEFF v. ENGLER et al. (L. A. No. 9515.)

Supreme Court of California. Nov. 14, 1928.

1. Fraud 🔑41—Complaint, alleging that defendants made statements concerning stock which they knew to be false, and that, in reliance thereon, plaintiff exchanged land for stock, resulting in loss, held sufficient in action for damages.

In action for damages for fraud, complaint, alleging that defendant made statements to her concerning stock which defendants sought to exchange for plaintiff's land, that they knew their statements to be false, and that plaintiff entered into contract of exchange in reliance thereon to her injury, on account of fact that stock was practically worthless, *held* to state cause of action.

2. Fraud 🔑35—Prompt action on discovery of fraud, required as condition to rescission, need not be shown to maintain action for damages.

Where rescission is sought on account of defendant's fraud, party defrauded must act promptly on discovery of fraud as condition to right to rescind, whereas showing of promptness is not necessary to maintain action for damages for fraud, right probably continuing for statutory period after discovery of fraud, where no prejudice results from delay.

3. Fraud 🔑20—It was no defense to defendants sued for fraud that plaintiff was unduly credulous.

In action for damages for fraud, based on false representations of defendant inducing plaintiff to exchange her real estate for stock of little value, it was no defense that plaintiff should not have believed defendant's representations, or that she failed to make inquiries in her own behalf which would have shown them false.

4. Fraud 🔑11(1)—False statement of opinion, based on alleged facts known to party making statement, may afford basis of action for fraud.

False statement of an opinion, expressed to one entitled to rely on it, and based on supposed facts known to party making the statement, may afford basis for action for fraud, to the same extent as any other misrepresentation of fact.

5. Fraud 🔑49—Plaintiff suing for fraud need not prove all misrepresentations relied on, but may recover on single material misstatement.

Plaintiff, suing for damages for fraud, need not prove that all specifications of fraudulent misrepresentations are true, but single material misstatement may afford ground for relief.

6. Fraud 🔑62—$3,000 damages for defendant's fraud in inducing exchange of plaintiff's land for practically worthless stock held not excessive.

$3,000 damages to plaintiff, in action for defendant's fraud in inducing exchange of properties, *held* not excessive under evidence, where amount represented difference in value between the land which plaintiff transferred and the stock which she received.

Department 1.

Appeal from Superior Court, Los Angeles County; Edward T. Bishop, Judge.

Action by Arly Foulkes Neff against William F. Engler and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Eugene T. McGann, of Los Angeles, for appellants.

Minor Moore, of Los Angeles, for respondent.

PRESTON, J. Defendants appeal from judgment in favor of plaintiff in an action involving an alleged fraud on their part in accepting from plaintiff certain real property in exchange for a sum of money and some practically worthless stock.

The complaint, with its amendment, alleges that on February 4, 1925, plaintiff, the owner of said real property, which was of the reasonable value of $6,500, subject to a $1,700 mortgage, exchanged it for personal property owned by defendants as follows: $800 in cash and 400 shares of the preferred capital stock of Income Builders, Inc., a corporation, together with 500 shares of the common stock of said corporation held in escrow for their benefit. It further alleges that prior to said exchange, for the purpose of cheating and defrauding plaintiff, defendants made various statements to her, enumerating them, respecting said stock, which they knew to be false, but which plaintiff believed to be true, and solely by reason of her reliance upon them consummated said exchange; that on April 17, 1925, plaintiff first discovered their falsity, and knew of her right to rescind said contract of exchange; that thereafter, on April 23, 1925, she served notice and offer of rescission upon defendants. The amendment to said complaint alleges the suppression by defendants from plaintiff of certain facts known to them relative to the condition of said corporation; the complaint is in two counts, one stating a cause of action for rescission, the other for damages in the sum of $5,100. During the trial, plaintiff elected to stand on her action for fraud, and dismissed the first count in so far as it concerned rescission.

The court found that the reasonable value of plaintiff's said property did not exceed $5,500, subject to said $1,700 mortgage; that on February 4, 1925, the parties entered into the said agreement of exchange; that defendants did not make all of the untrue statements alleged, specifying them; that they did not state that said stock was bonded, secured, or guaranteed by the state of California, but that plaintiff understood their statements to mean that said stock was guaranteed by the state of California; that, however, prior to said exchange, for the purpose of cheating and defrauding plaintiff, defendants did state to her that said preferred stock was then worth $3,200, and that they were receiving, and had been paid, semiannually dividends on it at the rate of 8 per cent. per annum, which statement was, and defendants knew it was, untrue, but that plaintiff believed and relied upon it, and, solely by reason of such reliance, agreed to said exchange; that, at the time said statement was made, said corporation had issued and outstanding $108,070 of its capital stock, and owed about $500 in accounts payable, while its assets consisted of not to exceed $1,800 in money and $14,208 in unsecured accounts and notes receivable, which were for balances due by subscribers to the preferred stock of said corporation, it being extremely probable that no portion thereof would ever be paid; that defendants did not suppress such facts from plaintiff, but that they knew in part of the financial condition of said corporation and, by the exercise of ordinary care, reasonable diligence, and prudence, could have ascertained all said facts; that, if said statement made by defendants had been true, said stock would have been worth $3,200, but that its actual value, based on said assets, did not exceed $200; hence, by reason of said false statement, plaintiff was damaged in the sum of $3,000. Judgment accordingly went for plaintiff, awarding her $3,000 as damages, with interest fom April 24, 1925, and defendants have appealed.

Appellants make two main contentions: First, that the complaint, with the amendment, does not state facts sufficient to constitute a cause of action; and, second, that the evidence does not sustain the findings and judgment. Further, they contend that the court below abused its discretion in overruling their demurrer to said amendment, in denying motion for nonsuit, and that the judgment is excessive and contrary to law.

[1, 2] The attack upon the complaint is unfounded. It contains all the essential averments of a pleading which seeks to charge fraud. (See 12 Cal. Jur. p. 806, § 64, and cases there cited.) It alleges in detail the fraudulent representations; it alleges that they were false, and such falsity was known to defendants; that they were made with intent to induce plaintiff to enter into the transaction, and were relied upon by her as true, to her injury. It likewise shows on its face reasonable diligence on the part of plaintiff in discovering the facts constituting the fraud and in instituting her action, in that less than two and a half months elapsed between the date of the agreement and the discovery of the fraud, and the complaint was filed a week later. However, such a showing is not essential to a statement of the cause of action for damages. In applying the doctrine of laches after discovery of the fraud, where suit is brought within the statutory period, a distinction exists between an action in which relief is sought by way of rescission and an action for damages. Where rescission is sought, the party defrauded, as a condition of his right to rescind, must act promptly upon discovery, while in seeking damages based upon the fraud under ordinary circumstances, and where no prejudice is shown to have resulted from the delay, he probably has the right to institute and maintain his action at any time within said statutory period after his discovery of the fraud. This subject is fully considered in Victor Oil Co. v. Drum, 184 Cal. 227, 242, 243, 193 P. 243. See, also, Estudillo v. Security Loan, etc., Co., 149 Cal. 556, 565, 87 P. 19.

[3] It would appear from the evidence that appellants deliberately took advantage of plaintiff's credulity and general unfamiliarity with commercial transactions to secure in haste her final consent and signature during the absence of her husband, who had theretofore expressed his disapproval of the contemplated exchange, and at a time when she was ill at home, and in no proper condition to negotiate or investigate the matter further. Their conduct cannot be excused upon the ground that plaintiff should not have believed said representations, which were mere expressions of opinion in the nature of trade talk, but that she should have prosecuted inquiries on her own behalf, and would then have found them to be untrue.

The rule in this respect is well stated in Dow v. Swain, 125 Cal. 674, 682–684, 58 P. 271, where the facts are similar to those of the instant case. That action was one to rescind an exchange of land for foundry stock upon the ground that the plaintiffs were induced to make said exchange solely by reliance upon materially false and fraudulent representations of fact by defendants as to the solvency, profits, and assets of the corporation owning the foundry, value of the stock, etc. The court said:

> "The plaintiffs were not put upon inquiry by having their suspicions so aroused that it was negligence on their part not to inquire further, and it also appears that they did not in fact rely upon any examination made by themselves —if it can be held that they made any. It is quite obvious that the plaintiffs in this case did not make an examination for themselves, or attempt to do so. Defendants knew that they were utterly incapable of so doing, except, as the court finds, by the employment of experts. * * * 'It is now settled law that one who chooses to make positive assertions without warrant will not excuse himself by saying that the other party need not have relied upon them. He must show that his representations were not in fact relied upon. * * *' (Webb's Pollack on Torts, 378, and see note, where numerous authorities are cited.) In Bishop on Noncontract Law, sec. 330, it is said: That plaintiff is too credulous is not generally a defense. 'The test of the representation is its actual effect on the particular mind, whether it is a strong and circumspect mind, or one weak and too relying.' (See, also, Bigelow on Frauds, 524.) 'Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.' (Mead v. Bunn, 32 N. Y. 275.) * * *"

To the same effect see Teague v. Hall, 171 Cal. 668, 154 P. 851; DeGarmo v. Petitfils Confiserie (Cal. App.) 269 P. 692; Spreckels v. Gorrill, 152 Cal. 383, 395, 92 P. 383; Tracy v. Smith, 175 Cal. 161, 165 P. 535.

[4] Of course, mere expressions of opinion honestly made are not actionable, but a false statement of an opinion expressed to one entitled to rely upon it, and professedly based upon alleged facts known to the party stating them, may form the basis of an action just like any other misrepresentation of fact. Stockton v. Hind, 51 Cal. App. 131, 137, 196 P. 122, and cases therein cited. "Matters which might otherwise be only expressions of opinion, when stated as accomplished facts by one of the parties to a contract and accepted and relied upon by the other as such, may, and often do, become the basis of actions for fraudulent misrepresentations." Sheer v. Hoyt, 13 Cal. App. 662, 110 P. 477; Bickel v. Munger, 20 Cal. App. 633, 129 P. 958; Tracy v. Smith, supra, at page 164 of 175 Cal. (165 P. 535); Stirnus v. Adams, 50 Cal. App. 730, 195 P. 955.

There is contained in the record here competent and persuasive evidence in support of the findings and judgment. As might be anticipated in a case of this character, the testimony is in conflict as to whether defendants made the representations charged against them, but there is nevertheless sufficient evidence of a tangible character to uphold the conclusions of the trial court, to meet the requirements as to the degree of proof required to support findings of fraud, and to establish the misrepresentations found by the court to have actually been made. Discussion with respect to certain immaterial findings is unnecessary.

[5] A plaintiff is not required to prove that all the specifications of fraudulent representations are true. As said in Davis v. Butler, 154 Cal. 623, 626, 98 P. 1047, 1048:

> "A single material misstatement, knowingly made with intent to influence another into entering into a contract, will, if believed and relied on by that other, afford as complete ground for rescission as if it had been accompanied by a multitude of other false representations."

See, also, Thomas v. Hacker, 179 Cal. 731, 733, 178 P. 855; Fisher v. Brotherton, 82 Cal. App. 532, 538, 255 P. 854.

[6] It is demonstrable from the record that said judgment is not excessive. Defendants received from plaintiff property valued by her at $6,500 and found by the court to be of the value of $5,500, subject to a $1,700 mortgage. Plaintiff received from defendants stock represented to be of the value of $4,000 and $800 in cash. Deducting from said amount of $4,000 said cash payment, and also $200, the actual value placed upon said stock by the court, leaves $3,000, the sum awarded plaintiff as damages, with interest. As the evidence, which includes the financial sheet of the corporation, showed how problematical it was that anything could ever be realized on the stock, the amount awarded plaintiff was plainly just.

We have examined all the points made by appellants, and find that none of them have merit. The judgment is affirmed.

We concur: CURTIS, J.; SEAWELL, J.

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205 Cal. 479

SOUTHERN SIERRAS POWER CO. v. RAILROAD COMMISSION OF CALIFORNIA et al. (L. A. 10433.)

Supreme Court of California. Nov. 10, 1928.

1. Corporations 🔑636—Railroad commission had no authority to issue permit for issuance of stock by foreign public utility electrical corporation (Const. art. 12, § 23; Public Utilities Act, §§ 2, 52).

Railroad commission had no authority under Public Utilities Act (St. 1911, Ex. Sess. p. 18, as amended) § 52, to issue permit for issuance of stock by foreign public utility electrical corporation as defined by Const. art. 12, § 23, and Public Utilities Act, § 2, since the issuance of stock by corporation is essentially an internal function thereof, cognizable and regulatable only under laws of state or nation creating corporation.

2. Corporations 🔑639—Law granting powers and privileges to corporations must, in absence of plain indications to contrary, be held applicable only to corporations created by state.

Statute of a state granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the state and over which it has the power of visitation and control.

3. Corporations 🔑636—Legislature cannot regulate or control intra vires acts of foreign corporations concerning their internal affairs.

While a Legislature has power to dictate under what terms and conditions foreign corporations may transact business within state, such power does not extend so far as to give Legislature power to regulate or control the intra vires acts of such corporation concerning their internal affairs.

4. Corporations 🔑639—Foreign corporation is not, because engaged in business within state, subject to legislation purporting to regulate exercise of its inherent powers.

The fact that a foreign corporation engaged in business within state is within jurisdiction within state courts in suits against it upon its contracts or for fraud practiced in operation of its business does not subject it to legislation purporting to regulate exercise of its inherent powers.

In Bank.

Original mandamus by the Southern Sierras Power Company against the Railroad Commission of California and others. Writ denied.

Henry W. Coil, Newman Jones, and H. M. Hammack, all of Riverside, for petitioner.

Carl I. Wheat, Reginald L. Vaughan, and Roderick B. Cassidy, all of San Francisco, for respondents.

TYLER, Justice pro tem. Mandamus against the Railroad Commission to compel it to issue its permit for the issuance of certain stock. Petitioner, a Wyoming corporation, is now, and since November, 1911, has been, engaged in generating, transmitting, and distributing electrical energy in this state. It is a public utility electrical corporation as defined by section 23 of article 12 of the Constitution and section 2 of the Public Utilities Act of the state of California. St. 1911, Ex. Sess. p. 18, as amended. Although a foreign corporation, it is operating lawfully in this state, since it has been engaged in doing business therein prior to March 23, 1912, the date when the Public Utilities Act became effective. Petitioner is authorized by its certificate of incorporation obtained from the state of Wyoming to issue $5,000,000 common stock, and also a like amount of 7 per cent. preferred stock. The common stock was all issued prior to the effective date of the Public Utilities Act. The company, being desirous of issuing $2,000,000 of its preferred stock for the refunding or payment of its outstanding indebtedness, applied to the Railroad Commission to authorize such issue under section 52 of the Public Utilities Act. The application was in due form and included all the necessary facts required by law and the rules and regulations of the commission. That body declined its permit upon the ground that it possessed no jurisdiction over the issuance of stock by a foreign corporation. An application for rehearing was asked for and denied, and the writ of mandate here applied for is sought to compel the Railroad Commission to exercise its alleged jurisdiction and to hear and determine petitioner's application. The sole question here involved, therefore, is whether or not the Railroad Commission has authority to authorize a foreign corporation, operating a public utility, to issue its capital stock.

[1] Petitioner claims that section 52 of the Public Utilities Act, making the authorization of the commission a prerequisite to the issuance of stock by a public utility, is applicable to foreign and domestic corporations alike. It is respondents' position that the issuance of stock in a corporation is essentially an internal function thereof, cognizable and regulatable only under the laws of the state or nation creating the corporation. We are of a like opinion. Section 52 of the Public Utilities Act (amended, Statutes 1925, p. 817) provides, in part, that the power of public utilities to issue stocks and stock certificates or other evidence of interest or ownership, and bonds, notes, and other evidences of indebtedness, and to create liens on their property, situated within the state, is a special privilege, the right of supervision and regulation over which is vested in the state to be exercised by the Railroad Commission under such rules and regulations as it may prescribe. The purposes for which said securities may be issued are definitely set forth, and it is declared that all such securities issued without the authority of the Railroad Commission shall be void, and penalties are provided for violations of its provisions. While the language employed in the section is broad and comprehensive and makes no distinction in express terms between foreign and domestic corporations, it was never intended thereby to subject foreign corporations to regulation concerning the exercise of the inherent corporate powers conferred upon them by the legislative power of the incorporating state. Whether or not the term "corporation," when used in a statute, applies to foreign corporations operating within the state depends largely upon the subject-matter of the statute, its policy, and the context in which the term is employed. A statute of a state granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the state and over which it has the power of visitation and control. 14a C. J. p. 1241.

[2-4] While the Legislature has the power to dictate under what terms and conditions foreign corporations may transact business in this state, this power does not extend so far as to give the Legislature the power to regulate or control the intra vires acts of such corporations concerning their internal affairs. Over such matters it has no power of control. Miles v. Woodward, 115 Cal. 308–311, 46 P. 1076; Commonwealth Acceptance Corp. v. Jordan, 198 Cal. 618, 630, 246 P. 796; 8 Fletcher Cyc. of Corp. § 5807; Guilford v. Western Union Tel. Co., 59 Minn. 332, 61 N. W. 324, 50 Am. St. Rep. 407; Beach on Foreign Corp. § 307. Nor does the fact that a foreign corporation engaged in business within the state is within the jurisdiction of the state courts in suits against it upon its contracts or for fraud practiced in the operation of its business subject it to legislation purporting to regulate the exercise of its inherent powers. Application of Ostrander, 206 App. Div. 362, 201 N. Y. S. 423. For the same reason courts will refuse to exercise visitatorial powers over foreign corporations, or interfere with the management of their strictly internal affairs. Nat. Corp. v. Worth, 274 Pa. 148, 117 A. 914; Travis v. Knox, etc., Co., 215 N. Y. 259, 109 N. E. 250, L. R. A. 1916A, 542, Ann. Cas. 1917A, 387; Howell v. Chicago & N. W. R. Co., 51 Barb. (N. Y.) 378; In re Fryeburg Water Co., 79 N. H. 123, 106 A. 225, 18 A. L. R. 1373. Such matters must be settled by the courts of the state creating the corporation. This rule rests upon a broader and deeper foundation than the mere want of jurisdiction in the ordinary sense of that word. It involves the extent of the authority of the state over foreign corporations. Guilford v. Western Union Tel. Co., 59 Minn. 332, 61 N. W. 324, 50 Am. St. Rep. 407.

While the term "internal affairs" is more or less indefinite, there can be no question but that the issuance of stock by a corporation is purely an internal affair, and to entertain an action to compel its issuance would clearly constitute the exercise of visitatorial powers over the corporation, or an interference with the management of its internal affairs. Id. From the very nature of corporate stock, which is created by and under the authority of a state, the right or duty to issue it, like the other attributes of the corporation, is governed by the local laws of the state from which it derives its existence, and not by that of any other state. In re Fryeburg Water Co., 79 N. H. 123, 106 A. 225, 18 A. L. R. 1373. The Fryeburg Case is on all fours with the present one. There a foreign corporation doing business in the state of New Hampshire sought to compel the commission to issue certain stock which was authorized by the corporation's home state. It was there held that the issuing of the stock is a corporate act which is regulated and controlled by the laws of the incorporating state, for the reason that it relates to the internal conduct and management of the corporation. See, also, Com. Acc. Corp. v. Jordan, supra.

For the reasons stated the application before the Railroad Commission to issue the stock in question was properly denied. It follows that the writ here sought should, for like reasons, be denied and the matter discharged.

It is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; PRESTON, J.

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205 Cal. 472

PALMER et al. v. FIX et al. (L. A. 10254.)

Supreme Court of California. Nov. 9, 1928.

1. Attachment 🔑183—Trial court alone had jurisdiction to extend lien of attachment, notwithstanding pendency of appeal, where appeal did not embrace question of expiration of attachment (Code Civ. Proc. §§ 542a, 946, 1049).

Court in which action was commenced, and in which it remained pending until after determination of appeal, under Code Civ. Proc, §§ 946, 1049, alone had jurisdiction to extend lien of attachment, under Code Civ. Proc. § 542a, permitting extension by court in which action is pending, notwithstanding pendency of appeal in Supreme Court at time extension was sought, where appeal did not embrace question of expiration of attachment.

2. Appeal and error 🔑487—Supersedeas to protect appellant's rights under attachment pending appeal held not to affect limitation on attachment lien (Code Civ. Proc. §§ 542a, 946).

Issuance of writ of supersedeas in favor of appellant under Code Civ. Proc. § 946, to protect his rights under attachment pending appeal *held* not to affect expiration of attachment lien under section 542a, nor rights or duties of attaching party thereunder.

3. Attachment 🔑183—One whose attachment lien is about to expire during pendency of appeal must apply to trial court for extension, notwithstanding issuance of supersedeas (Code Civ. Proc. §§ 542a, 946).

Where attachment lien preserved pending appeal under Code Civ. Proc. § 946, is about to terminate under three-year limitation period prescribed by section 542a, attaching party, notwithstanding pendency of appeal and issuance of writ of supersedeas, must apply to trial court for extension of term of lien and file certified copy of order of extension with county recorder.

In Bank.

Action by Fred Palmer and others against M. J. Fix and others, in which defendants filed a cross-complaint and instituted attachment proceedings. From an adverse judgment defendants and cross-complainants appeal. On motion of defendants and cross-complainants to extend the lien of the attachment pending determination of the appeal. Motion denied.

John A. Jorgenson, C. H. Tyler, and C. H. Sherrick, all of Los Angeles, for appellants.

Arthur C. Verge, Patrick J. Cooney, and Verge & Cooney, all of Los Angeles, for respondents.

PER CURIAM. The appellants and cross-complainants herein have moved this court for an order which would have the effect of extending the lien of an attachment issued and levied upon the real property of the plaintiff and respondent herein at the time of the filing of the cross-complaint in this action and the lien of which attachment is about to expire under the provisions of section 542a of the Code of Civil Procedure. The said motion has been presented upon the theory that, under the provisions of the section of the Code above referred to, this court has by virtue of the appeal which is pending herein the sole jurisdiction to make the order sought. The portion of said section of the Code upon which this claim is predicated reads as follows:

"The attachment, whether heretofore levied or hereafter to be levied, shall be a lien upon all real property attached for a period of three years after the date of levy unless sooner released or discharged as provided in this chapter, by dismissal of the action or by entering and docketing of judgment in the action. At the expiration of three years the lien shall cease and any proceeding or proceedings against the property under the attachment shall be barred; provided, that upon motion of a party to the action, made not less than five nor more than sixty days before the expiration of said period of three years, the court in which the action is pending may extend the time of said lien for a period not exceeding two years from the date on which the original lien would expire."

[1] We are of the opinion that the clause in the foregoing portion of said section of the Code which requires a motion for the extension of the lien of an attachment to be made in "the court in which the action is pending" has reference to the court wherein the action was commenced and wherein it remained pending under the provisions of section 1049

of the Code of Civil Procedure, "from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." The effect of an appeal upon the pendency of an action is provided for in section 946 of the Code of Civil Procedure, which reads in part as follows:

> "Whenever an appeal is perfected, as provided in the preceding sections of this chapter, it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein, * * * but the court below may proceed upon any other matter embraced in the action and not affected by the order appealed from."

The matters referred to and provided for in section 542a of the Code of Civil Procedure, above set forth, are matters which are not embraced in the appeal herein and are not affected by the judgment or order appealed from, and hence under the provisions of section 946 of the Code of Civil Procedure, above quoted, have not been transferred from the court in which this action remains pending to this court for determination upon this appeal, or for the making of any order with relation thereto. In our opinion the sole jurisdiction to make such order under the provisions of section 542a of the Code of Civil Procedure abides in the superior court from the judgment in which court this appeal has been taken.

[2, 3] It has been made to appear upon this motion that heretofore the appellant herein applied to this court for a writ of supersedeas which had for its purpose the prevention of the superior court from issuing a writ of execution at the instance of the plaintiff after the cross-complainant and appellant herein had undertaken to give a bond upon this appeal which would have the effect, under the further provisions of section 946 of the Code of Civil Procedure, of continuing in force the attachment pending this appeal. This court, for good cause shown, ordered a writ of supersedeas to issue as applied for upon the giving by the appellant and approval of an undertaking as provided for in its said order, and which undertaking, having been so given and approved, the writ of supersedeas was issued accordingly and is still in full force and effect. See (Cal. Sup.) 264 P. 255. The issuance and terms of said writ of supersedeas, however, under the provisions of section 946 of the Code of Civil Procedure, and which had for its purpose the protection of the rights of the appellant under his said attachment pending this appeal, had no reference to or effect whatever upon the matters which are referred to in section 542a of the Code of Civil Procedure, nor to the rights or duties of an attaching party thereunder, and if it should appear that his attachment lien which has been preserved to him pending said appeal and in conformity with the provisions of section 946, Code of Civil Procedure, above referred to, is otherwise about to cease, under the provisions and limitations of section 542a, Code of Civil Procedure, it remains the duty of the attaching party, notwithstanding the pendency of the appeal and the issuance of the writ of supersedeas thereunder, to make timely application to the superior court wherein the action is pending for an extension of the term of said lien for the period provided for in said section of the Code, and to procure from said court an order to that effect, upon the filing of a certified copy of which, within the required period, with the recorder of the county in which the property attached is situated, the lien of his attachment may be extended.

For the foregoing reasons the application of the cross-complainant and appellant herein is denied.

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205 Cal. 787

Fred PALMER et al., Plaintiffs, Cross-Defendants and Respondents, v. M. J. FIX et al., Defendants, Cross-Plaintiffs and Appellants. (L. A. 10254.)

Supreme Court of California. Nov. 9, 1928.

In Bank.

Motion by plaintiff for order releasing real property from attachment pursuant to section 554, Code of Civil Procedure, pending appeal by defendant from a judgment of the Superior Court of Los Angeles County, Walter S. Gates, Judge. Motion denied.

See also, 264 P. 255.

John A. Jorgenson, C. H. Tyler, and C. H. Sherrick, all of Los Angeles, for appellants.

Arthur C. Verge, Patrick J. Cooney, and Verge & Cooney, all of Los Angeles, for respondents.

PER CURIAM. The motion of the plaintiff heretofore made and submitted herein for an order releasing the property of the plaintiff and respondent herein from the attachment of the cross-complainant and appellant herein, under the provisions of section 554 of the Code of Civil Procedure, is denied upon the authority of Palmer v. Fix (Cal. App.) 271 P. 749, L. A. 10254, this day filed.

205 Cal. 478

EL GRANADA HOLDING CO. v. BETTENCOURT et al. (S. F. 13114.)

Supreme Court of California. Nov. 10, 1928.

1. Appeal and error 🔑627(2)—Where transcript was not filed within 40-day period, appeal must be dismissed (Supreme Court Rules 1, 5).

Where transcript was not filed within 40-day period provided by Supreme Court Rule 1, motion to dismiss appeal under Rule 5 must be granted.

2. Appeal and error 🔑628(1)—On motion to dismiss appeal, it avails appellants nothing that they appealed from order denying relief from default in filing request for transcript, where latter appeal was taken too late (Supreme Court Rules 1, 5; Code Civ. Proc. § 953a).

On motion to dismiss appeal under Supreme Court Rule 5, for failure to file transcript within 40-day period required by Rule 1, it avails appellants nothing to urge that they have prosecuted separate appeal from order denying their motion for relief from default in failing to file request for transcript within 10-day period prescribed by Code Civ. Proc. § 953a, where latter appeal was not taken within 60 days after entry of order.

In Bank.

Action by the El Granada Holding Company against Joseph S. Bettencourt and another. From an order granting a new trial, defendants appeal. On motion to dismiss the appeal. Appeal dismissed.

John H. Crabbe, of San Francisco, for appellants.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, for respondent.

PER CURIAM. [1, 2] There is presented herein a motion by the plaintiff to dismiss an appeal from an order granting a new trial. The motion is made under rule 5 of this court, which provides, in part, for the dismissal of an appeal if the transcript to be used in support thereof be not filed within time. Defendants' inability to procure a transcript is due to the trial court's refusal on May 17, 1928, to certify to the correctness thereof because of the tardy filing of the request therefor. The 40-day period provided by rule 1 for the filing of a transcript having expired, the motion to dismiss must be granted. It avails the appellants nothing to urge, in opposition to the motion, that they have prosecuted a separate appeal from an order of the trial court denying their motion for relief from default in failing to file their request for a transcript within the 10-day period prescribed by section 953a of the Code of Civil Procedure, for inspection of the transcript upon this latter appeal discloses that it was taken too late, having been perfected more than 60 days after the entry of the order attempted to be appealed from.

The appeal herein is dismissed.

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94 Cal. App. 696

PEOPLE v. MEYER. (Cr. 1512.) ★

District Court of Appeal, First District, Division 2, California. Nov. 8, 1928.

Rehearing Denied Dec. 5, 1928. Hearing Denied by Supreme Court Dec. 8, 1928.

1. Indictment and information 🔑192—Conviction of taking liberties with body of infant may be sustained, though evidence also showed attempt to rape (Pen. Code, § 288).

A conviction of violation of Pen. Code, § 288, making felonies of liberties with the body, other than specific acts elsewhere enumerated, may be sustained, notwithstanding that evidence showed the attempt to commit rape, where it also showed violation of the Penal Code section.

2. Indictment and information 🔑125(47)—Contention that indictment charging violation of statute making felonies of liberties with body, other than acts elsewhere enumerated, was insufficient, because also pleading attempt to rape, held without merit (Pen. Code, § 288).

Contention that indictment charging violation of Pen. Code, § 288, making felonies of liberties with the body, other than specific acts elsewhere enumerated, was insufficient, because also pleading facts showing an assault with attempt to commit rape, *held* without merit; such surplusage not vitiating it.

3. Criminal law 🔑824(1)—Court's failure when charging jury to again read indictment counts not required was not error, defendant not then requesting it.

Failure of court when charging jury to again read certain counts of indictment was not error, where no statute required it, and defendant at the time did not request them to be read again.

4. Criminal law 🔑1178—Reviewing court need not build up argument or find authorities to support appellant's contention.

A court of review is not bound to build up argument or to search out authorities to support contention of an appellant who fails to give argument or cite authorities.

5. Criminal law 🔑1186(5)—Defendant cannot complain because public defender did not move for new trial, where court heard defendant's motion therefor in propria persona and denied it.

Where trial court listened to and denied motion by defendant in propria persona for new trial, after public defender representing him announced that defendant had no legal cause to show why judgment should not be pronounced, defendant cannot complain of failure of public defender to make the motion.

Appeal from Superior Court, City and County of San Francisco; K. S. Mahon, Judge.

★Rehearing denied. Hearing denied by Supreme Court.

Willis James Meyer was convicted of violation of Pen. Code, § 288, and he appeals. Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

STURTEVANT, J. The grand jury presented an indictment against the defendant, he appeared and entered his plea, a trial was had before the court sitting with a jury, the jury returned a verdict of guilty, the defendant made a motion for a new trial. the motion was denied, and he has appealed from the judgment and the order denying his motion for a new trial.

[1, 2] The defendant contends that the indictment is insufficient to sustain the verdict, that the verdict is contrary to the evidence, and that the verdict is contrary to law, and he presents the three contentions together. The indictment alleged the commission of certain acts by the defendant on the 28th day of April, 1928, on the person of each of three little girls, Esther Stanghellini, age 12; Sophie Church, age 10; and Betty Tisma, age 7. In the first, third, and fifth counts the pleader charged assault to commit rape. In the second, fourth, and sixth counts the pleader charged a violation of section 288 of the Penal Code. The defendant calls attention to the fact that by its terms section 288 enacts a law supplementing other offenses defined by other statutes and is not applicable if the acts charged fall within the provisions of such other statutes. He then asserts that when the prosecution dismissed the second, fourth, and sixth counts, it did so by mistake. That is purely the assumption of the defendant and is sustained by no part of the record. Continuing, the defendant quotes certain parts of the record which would tend to prove the commission of an assault to commit rape. In doing so he neglects to quote passages from the record which tend to prove the commission of a violation of section 288 of the Penal Code. Having given a one-sided view of the evidence, the defendant makes the claim that the defendant was guilty of an assault to commit rape, if anything, and therefore by the expressed language contained in section 288 of the Penal Code he was not properly charged under that section, that the evidence was insufficient, and that the verdict may not be sustained. However, as suggested above, there was evidence that the defendant violated the provisions of section 288 of the Penal Code, and perhaps there was evidence that he committed an assault to commit rape. Under no logical reasoning was the latter offense a defense to the former. In this same connection the defendant contends that the second, fourth, and sixth counts, while pleading a violation of Penal Code, § 288, went further and pleaded facts showing an assault to commit rape. Thereupon the defendant argues that the indictment was insufficient. The point is without merit. Superfluity does not vitiate. No demurrer was interposed, and we are not intimating that if one had been interposed it should have been sustained. The youngest girl was not called as a witness. The other two girls were called as witnesses. Without going into detail, it can readily be seen that the prosecution was attempting to prove, and did prove, a violation of section 288 of the Penal Code, and that it did not prove, nor even attempt to prove, an assault to commit rape on the person of the little girl who was not called as a witness. On this branch of the appeal the contentions of the defendant are wholly illogical, captious, and without merit.

[3] Because the indictment was long the defendant contends that the trial court erred when it came to charging the jury, because it did not again read to the jury counts two, four, and six. The court did not err. No statute required it to read those counts the second time. No request was made of the court asking it to read those counts the second time. There was not under any theory any error committed in this behalf.

[4, 5] The defendant quotes an instruction which the court gave to the jury, and argues that it was erroneous. He gives us no argument and no authority supporting the contention. A court of review is not bound to build up the argument or to search out the authorities.

Commencing as early as the day of arraignment the defendant appeared by the public defender. Thereafter from time to time he appeared by the same officer. The jury having returned a verdict against the defendant on August 17, 1928, his case was called for pronouncing judgment. In reply to the question by the trial court as to whether the defendant had any cause to show why judgment should not be pronounced, the public defender announced that the defendant had no legal cause to show. Thereupon the defendant in propria persona commenced to make statements to the court. Instead of reprimanding him and causing him to remain silent, the court allowed him to make some statements. At this time the defendant asserts that he personally stated to the trial court that he had not been informed of the day of trial until the day before the case was called, and that he had not had a fair trial—that he could have gotten some witnesses. He presented no affidavit; he did not offer to be sworn; and, furthermore, his attorney stated in open court that he had called on the defendant several times to obtain the names of his witnesses, that he had sent for the defendant's mother and sister to secure such information, and that from all those sources he had been unable to get it. The record even at this time does not disclose that there was any fact outstanding which, if it had been brought to the attention of the court, would have been of the least assistance to the defendant.

Complaint is made because the public defender did not make a motion for a new trial. Every point made by the defendant in this court is based on the assumption that a motion for a new trial was made—rests on the motion made by the defendant in propria persona, although that individual was guilty of contempt of court when he made the motion. The trial court listened and denied the motion. Consequently the trial court did not fail to see that the defendant's case was fully presented. The action of the public defender was clearly the proper practice, and the criticism of his conduct is clearly unfounded.

We find no error in the record.

The judgment and order are affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

94 Cal. App. 673

In re SULLIVAN'S ESTATE.★

SULLIVAN et al. v. SULLIVAN et al.

(Civ. 6554.)

District Court of Appeal, First District, Division 2, California. Nov. 7, 1928.

Rehearing Denied Dec. 7, 1928. Hearing Denied by Supreme Court Jan. 3, 1929.

1. Wills ⚷133—Court determines from entire holographic will whether signature appearing elsewhere than at end was token of execution.

If testator's signature on alleged holographic will appears in some other place than at the end of the instrument, it is for the court to say from an inspection of the whole document, its language, form and relative position of its parts, whether the signature was placed there with intent that it should serve as a token of execution.

2. Wills ⚷133—Holographic will containing signature only in introductory clause, followed by specific legacies, appointment of executrix, residuary clause, and final direction, held not void for want of execution.

Instrument sought to be probated as holographic will, which contained signature of testator only in introductory clause, followed by listing of legacies, appointment of executrix, and residuary clause, with final direction as to one of legacies, *held* not invalid as holographic will for want of signature, since circumstances showed testator's adoption of signature in first clause as token of execution.

3. Wills ⚷125—Original holographic will held sufficiently incorporated in codicil by reference, where contents and date were correctly described and both instruments were sealed in single envelope.

Original holographic will, referred to in codicil as a "codicil will," *held* nevertheless sufficiently incorporated therein, where correct date was recorded and description of contents of former instrument was accurate, and the two documents were sealed together in a single envelope without considering that envelope bore inscription "holographic will."

4. Wills ⚷130—Envelope containing inscription relative to holographic will and codicil contained therein, followed by testator's signature, did not of itself constitute will.

Envelope in which original holographic will and codicil were inclosed, and which bore inscriptions, "holographic will of M. C. S., July 14, 1926. Date of will," and, "codicil dated October 13, 1926. Opened and resealed by self, October 13, 1926," followed by testator's signature, did not of itself constitute will incorporating by reference the two documents sealed within.

5. Wills ⚷400—Admission of envelope containing inscriptions, to probate, was harmless, where will and codicil contained therein were entitled to admission.

Admission to probate of envelope containing inscriptions relating to holographic will and codicil sealed within was harmless, where the documents inclosed were entitled to probate, though the envelope itself had no testamentary character.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceedings by Myrtle Ann Sullivan and another for the probate of the will of Mark Cornelius Sullivan, deceased, opposed by Mark R. Sullivan and other contestants. From an order admitting the will to probate, contestants appeal. Affirmed.

Wm. M. Stafford, of San Francisco, for appellants.

William M. Maxfield, of San Francisco, and Robert B. Gaylord, of San Francisco, for respondents.

KOFORD, P. J. This is an appeal from an order admitting to probate as the last will and testament of said deceased three documents written in his handwriting. The three documents in question follow:

The first reads as follows:

"I, Mark Cornelius Sullivan, of Banning, California, revoking all wills by me heretofore made, do hereby publish and declare this my Last Will and Testament on this Fourteenth day of July Nineteen Houndred and Twenty-Six, in manner and form following:

"To each of my blood relatives, offspring of my deceased brother Robert E. Sullivan, the sum of Fifteen hundred dollars and to his widow the same amount and to the daughter of my nephew Mark R. Sullivan One thousand dollars.

"To my step-son R. D. Wilson Twenty five hundred dollars.

"To my wife, I leave and bequeath the balance of my property and hereby appoint her as Executrix of this will and without bonds or obligations of any kind. I further direct that she pay to my sister Mary Five hundred dollars.

★Rehearing denied. Hearing denied by Supreme Court.

"In regard to the bequest to her Son, and my Step-son, R. D. Wilson, I direct the Executrix to treat this bequest more as a debt against the estate which it really is but I leave its payment entirely to her good judgment."

The second reads as follows:

"Codocil

"Referring to that portion of Codocil Will dated July 14, 1926, and being my last will and Testament, dealing with the quests to the wife and children of my deceased brother R. E. Sullivan. The daughter of his Son, M. R. Sullivan, commonly called 'Pat' and to my sister Mary—The bequests are changed to read as follows—
"To Margaret Sullivan, Two hundred dollars, $200.00
"To Mark R. Sullivan, Two hundred dollars, 200.00
"To Mrs. Edward Gillespie, Two hundred dollars, 200.00
"To 'Pat' daughter of M. R. Sullivan Seven hundred dollars, 700.00
"To my sister Mary Two hundred dollars 200.00
"Dated—October 13, 1926.
"Mark Cornelius Sullivan."

The third document was an envelope within which were sealed the two documents above set forth and it bore, also in the handwriting of the deceased, the following inscriptions:

"Holegraphic will of Mark C. Sullivan July 14, 1926. Date of will ——
"Codocil—Dated October 13, 1926. Opened and resealed by self, October 13, 1926.
"Mark Cornelius Sullivan."

[1, 2] It is contended by appellants that the first document is not a will because it is not signed within the meaning of the Code requirements of an holographic will. It is not essential that such a will be signed at the end thereof. "The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document itself that the signature was so placed with the intent that it should there serve as a token of execution." Estate of Manchester, 174 Cal. 417, 421, 163 P. 358, 360 (L. R. A. 1917D, 629, Ann. Cas. 1918B, 227). This rule has in substance been many times repeated by the Supreme Court.

We are of the opinion that the signature in the document of July 14, 1926, meets these requirements. Appellants claim that in no California decision has a signature in the exordium clause been held sufficient, and that in many cases it has been held insufficient, such as Estate of Manchester, supra; Estate of Hurley, 178 Cal. 713, 174 P. 669; Estate of Bernard, 197 Cal. 36, 239 P. 404, and Estate of Devlin, 198 Cal. 721, 247 P. 577. In each of these cases, however, there was also evidence on the face of the will of incompleteness indicating that the signature found at the beginning of the will could not have been intended as the token of execution and could not be regarded as proof that the execution of the will was a complete and concluded act. On the other hand, there are several authorities which uphold a signature at the top or beginning of a will. Estate of McMahon, 174 Cal. 425, 163 P. 669, L. R. A. 1917D, 778; Estate of Streeton, 183 Cal. 284, 191 P. 16; Estate of Morgan, 200 Cal. 400, 253 P. 702; Estate of England (Cal. App.) 259 P. 956.

In the last two cited cases the signature appeared at the very top of the document in a phrase independent of the will proper as though it were a label or description of the will to follow, thus: Last will or last will and testament of ——. We are unable to distinguish the case at bar from these two authorities. The mind which writes at the top of the will "Last will of ——" is the same mind which writes in the first paragraph "I —— do hereby publish and declare this my last will," and the two expressions convey substantially the same idea. Whether the signature appearing within either one of these expressions amounts to a signing of the will must be determined from the entire will. The Sullivan will of July 14, 1926, ends with a period and appears to be complete. After listing the legacies, appointing an executrix, and inserting a residuary clause, the testator's mind returned to the bequest to his stepson found in about the middle of the will and added what appears to be a finishing touch by giving directions as to how that particular bequest should be treated. Completeness or lack of completeness appearing on the face of the purported will has been an important consideration entering into the decision of all the cases referred to herein. We think the Sullivan will of July 14, 1926, shows by itself that the testator adopted his signature in the first clause of the document as the token of execution, and that it is therefore signed within the meaning of the Code requirements.

[3] The conclusion upon the point is arrived at, as of course it must be, without regard to what the testator afterwards did with the will and without regard to what he afterwards thought about it or wrote about it. However, the codicil of October 13, 1926, is admittedly validly executed according to law. Its terms are such as to incorporate into and as a part of itself the document of July 14, 1926. In Estate of Plumel, 151 Cal. 77, 90 P. 192, 121 Am. St. Rep. 100, a codicil to an invalidly executed will was held to make the defective will a part of the testator's last will

and testament. See, also, 26 Cal. Jur. 849, 850, 851, and cases cited. Appellants do not contend that a preceding validly executed will is essential for the rule of incorporation by reference to apply, but contend that the requirements of that rule are not met in the instant case. They quote these requirements from Estate of Young, 123 Cal. 337, 55 P. 1011, to the effect that the description (of the incorporated document) in the will itself must be so clear, explicit, and unambiguous as to leave its identity free from doubt. The description of the July document in the October document is claimed to be fatally defective because it refers to the July document as a codicil will. It is said that the document is not a will because not signed, that it is obviously not a codicil, that there is no such thing as a codicil will, and the July document itself is not labeled as a codicil will. For these reasons it is said that the precise document referred to is not proven to be in existence, if in existence it is not the July document produced and probated, and that the description is too uncertain and vague to be capable of being applied to any instrument in particular.

Absolute certainty in any description is not possible. The description here is not perfect because it refers to the July document both as a "codicil will" and as "my last will and testament." The date, however, is exactly correct and the description of the portion of its contents referred to is also accurate. An inspection of the two documents without recourse to other facts in evidence can leave no reasonable doubt that the testator referred to the July document probated. The fact that an incorporated document is upon the same sheet of paper or attached to the same sheet of paper containing a valid codicil has been held to constitute a sufficiently certain description for incorporation by reference without other description. Estate of Skerrett, 67 Cal. 585, 8 P. 181; Estate of Plumel, 151 Cal. 77, 90 P. 192, 121 Am. St. Rep. 100; Estate of Henderson, 196 Cal. 623, 238 P. 938. These authorities will suffice to indicate that absolute certainty is not required of a description of an incorporated document. The fact that two documents are each on different sides of a single sheet of paper can be nothing more than a strong inference. It does not amount to a complete description in words in the incorporating document especially where the latter does not refer in words to the incorporated document as being on the obverse side of the paper.

The third document is the envelope in which the first two documents were found sealed after the death of the testator and the writing thereon. In determining the sufficiency of the description in the second document to incorporate the first by reference, logic directs that the sealing of the two documents in one envelope is just as eloquent as the attaching together of the two documents by other mechanical means. This disregards the inscriptions upon the envelope.

[4, 5] We do not agree, however, with respondent's contention that the writing on this envelope constitutes by itself a will incorporating by reference the two documents sealed within the envelope. If it should be conceded that the date of October 13, 1926, where it secondly appears is the date of the inscriptions and not merely a statement of the date upon which the testator opened and resealed the envelope, still the inscriptions do not appear to have been written animo testandi. This document seems only to be a simple description of the contents of the envelope and a statement that it had been opened and resealed by the testator. For the same reason it should not be regarded as a part of the will within the envelope. Estate of Manchester, 174 Cal. 417, 420, 163 P. 358, L. R. A. 1917D, 629, Ann. Cas. 1918B, 227. In view of our conclusion upon the self-sufficiency of the two documents inclosed, we need not determine the precise value of the indorsements upon the envelope. This document does not add any substance to the terms of the will and codicil and its admission to probate together with the first and second document is at the most harmless.

The judgment appealed from is therefore affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

PODRAT et al. v. OBERNDORFF et al.
(Civ. 6166.) ★

District Court of Appeal, First District, Division 2, California. Nov. 10, 1928.

Hearing Granted by Supreme Court Jan. 7, 1929.

1. Appeal and error 🔑843(2)—Right to foreclose chattel mortgage or trust deed by procedure in equity becomes moot after payment of judgment.

Question relative to right to foreclose chattel mortgage or trust deed containing specific power of sale, pursuant to law of pledges by means of ordinary procedure in equity, became moot after judgment was fully paid and satisfied, except as to items of attorney's fees and taxes.

2. Appeal and error 🔑843(1)—Points raised on appeal which have become moot will not be considered.

Where certain points raised on appeal are settled and have become moot, court will not consider them, but will devote its attention to remaining points in controversy.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing granted by Supreme Court.

3. Chattel mortgages 🔑290—Attorney's fees held improperly allowed, where agreement therefor in chattel mortgage did not contemplate services for foreclosing mortgage in court of equity (Code Civ. Proc. § 1021).

Where agreement contained in chattel mortgage with power of sale relative to payment of counsel fees did not contemplate services for foreclosing mortgage in court of equity, such fees were improperly allowed, since allowance of attorney's fees, under Code Civ. Proc. § 1021, depends entirely on contract between parties.

4. Chattel mortgages 🔑290—Mortgages 🔑581(5)—Reasonable attorney's fees will be allowed, where provision therefor is stipulated, when amount is left blank.

Where provision in mortgage for attorney's fees is stipulated, but amount is left blank, a reasonable fee may be allowed; but in absence of stipulation for payment thereof there can be no recovery.

5. Chattel mortgages 🔑290—Mortgages 🔑581(6)—Attorney's fees will not be awarded in foreclosure suit unless averments authorizing same are incorporated in pleadings.

Attorney's fees will not be awarded in a foreclosure suit unless proper averments authorizing same are incorporated in the pleadings.

6. Chattel mortgages 🔑283—Mortgages 🔑490—Taxes paid by mortgagees held properly allowed on foreclosure as against contention that complaint failed to allege that taxes were paid.

In action to foreclose chattel mortgage and trust deed, taxes paid by plaintiffs *held* properly allowed as against contention that there was no allegation in complaint presenting issue, where during trial plaintiffs were given permission on request to amend complaint by pleading facts concerning disbursements made by them, and contract under which plaintiffs made their claim was pleaded in hæc verba.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Abner Podrat and others against Oscar Oberndorff, Carrie Belle Watson, Findlay Watson, and others. Judgment for plaintiffs, and defendants Carrie Belle Watson and Findlay Watson appeal. Modified and affirmed.

Superseding opinion in 267 P. 750.

Walters & Mauk, of Los Angeles, for appellants.

O'Melveny, Tuller & Myers, of Los Angeles, amici curiæ, on behalf of appellants.

Max Schleimer, of Los Angeles, for respondents.

STURTEVANT, J. Heretofore an opinion in this action was written by Judge R. L. Thompson, acting as justice pro tempore. Later a petition for a rehearing was granted by this court. Having some doubt as to the conclusions reached regarding the disallowance of attorney's fees and the rejection of the item reimbursing the respondent for taxes paid, this court granted a rehearing. Having reconsidered the entire matter, the court adopts so much of the opinion heretofore written by Judge Thompson as follows:

"This is an appeal from a decree foreclosing a chattel mortgage and also a trust deed given to secure a loan.

"October 1, 1923, for value, the defendant Oberndorff executed his note for $8,000 in favor of the appellants Carrie Belle and Findlay Watson, payable in installments of $200 each month. This note was secured by chattel mortgage on the furniture of the Plaza Hotel at Whittier, Cal. November 17, 1923, this note and chattel mortgage were assigned to the respondents. The appellants, who were husband and wife, at the same time executed and delivered to the respondents their promissory note for $7,800 secured by a trust deed on lot 18, block 29, of the original city of Whittier, as collateral security for the payment of the note and chattel mortgage first mentioned. As a part of the same transaction the appellants and respondents executed an agreement imposing certain conditions with respect to the obligations incurred by the foregoing instruments, for the default of which the foreclosure of both the chattel mortgage and trust deed heretofore mentioned were authorized. In the event of foreclosure, the agreement specified that appellants would refund any taxes which the respondents were compelled to pay pursuant to said transaction. The appellants defaulted in the payment of several installments of the first-mentioned note. After demand, this action was commenced in a court of equity to foreclose [both] the chattel mortgage and the trust deed. Judgment was rendered in favor of the respondents for $5,900 and interest, together with $517.67 attorney's fees and $140.04 taxes.

"The appellants contend that (1) the respondents had no authority to foreclose the chattel mortgage in the ordinary equitable proceeding, since the only power conferred by the chattel mortgage, in the event of default, was for the mortgagee to seize the property and sell it pursuant to division 3, pt. 4, tit. 14, c. 3, of the Civil Code, as a pledge; that (2) the trial court erred in allowing attorney's fees and taxes, and that (3) the decree failed to preserve appellants' right of redemption. * * *

[1, 2] "So far as the general question of the right to foreclose a chattel mortgage or trust deed containing a specific power of sale pursuant to the law of pledges by means of the ordinary procedure in equity is concerned, that has become moot in the present case for the reason that the briefs of the respective parties disclose the fact that the judgment has been fully paid and satisfied by the appellants, except as to the items of attorney's fees and taxes. In response to this charge, the appellants admit in their closing brief that: 'We were compelled to pay the amount of the judgment, except attorney's fees and taxes.' If certain points raised on the appeal are settled and have become moot, the court will not consider them, but will devote its attention to the remaining points in controversy. 2 Cal. Jur. 804, § 472, and cases there cited.

[3] "Attorney's fees were, however, improperly allowed in the present case for the reason that the agreement contained in the chattel mortgage to pay counsel fees did not contemplate services for foreclosing the mortgage in a court of equity.

"The allowance of attorney's fees depends entirely upon the contract between the parties. 3 Cal. Jur. 683, § 84. Section 1021 of the Code of Civil Procedure provides: 'The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties. * * *'

[4, 5] "The only contract for the payment of attorney's fees in the present case is found in the language of the chattel mortgage heretofore quoted, which provides that, in the event of default, the mortgagee may take possession of the property and proceed 'to sell the same in the manner provided by law (as a pledge) and from the proceeds (of such sale) pay the whole amount of said note, * * * including the counsel fees not to exceed * * * per cent. * * *' Where a provision for attorney's fees is stipulated but the amount is left blank a reasonable fee may be allowed. 3 Jones on Mortgages (8th Ed.) 514, § 2059; Alden v. Pryal, 60 Cal. 215. If there is no stipulation in the mortgage for the payment of counsel fees, they cannot be allowed. 3 Jones on Mortgages, supra, 215, § 2059; 5 Cal. Jur. 109, § 50; Fell v. Frierson, 171 Cal. 351, 153 P. 229; Sichel v. De Carrillo, 42 Cal. 493; Boob v. Hall, 107 Cal. 160, 40 P. 117. In the case last cited it is said: 'Neither the prayer in the complaint for its allowance nor the averment of the amount which would be reasonable can supply the necessity of a direct averment that an attorney's fee had been agreed to be paid by the mortgagor.' If, however, the fees are provided for in the note, although they are omitted from the mortgage, under proper pleadings, they may still be allowed. Worth v. Worth, 155 Cal. 599, 102 P. 663; National Bank of California v. Mulford, 17 Cal. App. 551, 120 P. 446. But attorney's fees will not be awarded in a foreclosure suit unless proper averments authorizing the same are incorporated in the pleadings. 19 Standard Ency. of Proc. 1056.

"The specific question involved in the present case is whether a contract to allow attorney's fees for the seizure and sale of personal property under a chattel mortgage will authorize the allowance for the performance of entirely different service, to-wit, the foreclosure of the mortgage. The respondent claims that the language of the chattel mortgage implies that attorney's fees were contracted to be paid for services performed in satisfaction of the mortgage lien, by whatever procedure this end was accomplished. No case is cited in support of this claim. On the contrary, it is said in 3 Jones on Mortgages, supra, at page 520: 'Under a provision in a power of sale for an attorney's fee in case of foreclosure by (seizure and sale) no allowance can be made if the mortgage is foreclosed in chancery instead.' Van Marter v. McMillan, 39 Mich. 304; Sage v. Riggs, 12 Mich. 313; Hardwick v. Bassett, 29 Mich. 17. In the case of Brown & Parler v. Kolb, 92 S. C. 309, 75 S. E. 529, it is said: 'The mortgage provided that on default, the mortgagee might seize and sell the property, and that upon the sale "he shall apply the proceeds of such sale, after deducting all expenses and charges, including attorney's fees, toward the payment and discharge of the indebtedness," etc. Under a similar contract, it was held in Walker v. Killian, 62 S. C. 482, 40 S. E. 887, that the mortgagee could not claim the fees if he foreclosed by action and not by seizure under the power.' The judgment in this last-mentioned case was modified by striking out the amount allowed for attorney's fees. Upon the foregoing authorities, we are of the opinion that the counsel's fees were improperly allowed in the present case."

[6] The defendants also assert that the trial court erred in allowing the plaintiffs $140.04 for taxes paid. It is claimed that there was no allegation in the complaint presenting the issue. The point is not well founded. During the trial the plaintiffs requested permission, and they were given permission, to amend by pleading the facts concerning disbursements made by them. The contract under which the plaintiffs make their claim was pleaded by them in haec verba. The court made findings in their favor. On an appeal based on the judgment roll the point is without merit. McKelvey v. Wagy, 157 Cal. 406, 408, 108 P. 268.

For the foregoing reasons the judgment is modified so as to eliminate the allowance of $517.67 attorney's fees. As so modified the judgment is affirmed. The appellants will recover their costs on appeal.

We concur: KOFORD, P. J.; NOURSE, J.

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94 Cal. App. 639

Ex parte BATEMAN. (Cr. 1701.)

District Court of Appeal, Second District, Division 2, California. Nov. 1, 1928.

1. Habeas corpus 🔑22(1)—One imprisoned under judgment void for judge's failure to pronounce sentence could bring habeas corpus (Pen. Code, § 1193).

One imprisoned under judgment of police court invalid on account of failure of police judge to pronounce sentence under Pen. Code, § 1193, *held* entitled to remedy of habeas corpus to secure relief.

2. Criminal law 🔑258(2)—Written statement of police judge, "or 180 days," supplementing oral pronouncement of judgment and sentence in defendant's presence, held not to authorize imprisonment, because not part of judgment; "pronounce" (Pen. Code, § 1193).

Police judge's addition of written words to complaint, "or 180 days," supplementing oral pronouncement, in defendant's presence, of judgment, and sentence that defendant pay fine, rendered defendant's commitment on nonpayment of fine illegal under Pen. Code, § 1193, requiring pronouncement of judgment, since the only sentence given was that pronouncd orally and the words written were not a part of the judgment; "pronounce" meaning to utter, speak, or declare that which is pronounced.

[Ed. Note.—For other definitions, see Words and Phrases, Pronounce.]

Application by L. L. Bateman for writ of habeas corpus prayed to be directed to the chief of police of the City of Bakersfield to liberate petitioner from imprisonment under an alleged invalid judgment of the police court. Writ granted, and petitioner discharged.

Dorris & Henderson, of Bakersfield, for petitioner.

Brittan & Brittan, of Bakersfield, for respondent.

CRAIG, J. The petitioner seeks his liberty through a writ of habeas corpus. In a police court of the city of Bakersfield he was charged with unlawful possession of intoxicating liquor, and on June 27, 1928, he pleaded guilty to said charges and waived time for sentence. The allegations of the petition as to what was said and done by the police judge at that time being controverted by the return to this court, evidence was received in that behalf. Upon that issue we find that the judge orally rendered and pronounced judgment and sentence that the defendant pay a fine in the latter's presence, but did not state to him that he be confined in the county jail in the event that such fine be not paid. However, the judge did then write upon the complaint, "or 180 days," and two days later the judge wrote on the complaint, "given to July 3rd to get the fine."

[1] Respondent interposes a preliminary objection that petitioner has mistaken his remedy, and that even though the facts be as claimed by him, he may secure relief by appeal, and not otherwise. We have no doubt that if petitioner's contention is sound as to the main legal issue involved, his only speedy and adequate remedy is through a writ of habeas corpus.

[2] The issue presented resolves itself into this: Are the words, "or 180 days," written by the police judge at the time of pronouncing sentence in open court, legally a part of the judgment? If so, of course, since it is undisputed that the fine has not been paid, the imprisonment is regular and lawful. If not, the commitment is unauthorized and the petitioner's imprisonment is illegal.

It is most seriously argued that since, if the conviction be of a misdemeanor, section 1193 of the Penal Code permits judgment to be pronounced in the absence of the defendant, the sentence may be written by the court and need not be stated orally. But we think that in so far as the question here involved is concerned the controlling word in the above section is "pronounced." The only decision which we have been able to find bearing upon the subject suggesting a judicial definition of the word "pronounce" is Ex parte Crawford, 36 Tex. Cr. R. 180, 36 S. W. 92. It is there stated that to "pronounce sentence" is to "utter formally, officially or solemnly; to declare or affirm." Wherever in the Penal Code the sentencing of convicted persons is the subject of legislation, the court's action in that behalf is designated as the "pronouncement of sentence," or some other form of the word "pronounce" is employed.

To "pronounce" always implies uttering, speaking, orally declaring that which is pronounced. Webster defines it as, "to give an articulate utterance to; to make sounds of." Without an oral articulation of a sentence, it would not be pronounced. To write a sentence is not the pronouncing of it. Nor do we find any provision in the law for judgment being rendered in a criminal case by the court writing it. We conclude that in this instance the only sentence which was given was that which was pronounced orally, and that the words written by the judge, "or 180 days," form no part of this judgment.

The writ is granted and petitioner is discharged.

We concur: WORKS, P. J.; THOMPSON, J.

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94 Cal. App. 716

MARGOLIS v. LEONARD & HOLT.

(Civ. 6566.)

District Court of Appeal, First District, Division 2, California. Nov. 9, 1928.

Appeal and error ⇨1071(1)—Finding in action for accounting, merely determining balance due to plaintiff, not setting out items of account, held prejudicially erroneous, as indefinite.

In action by real estate salesman to secure accounting from employer of amount due to him for sales made by him, general finding by trial court, merely determining balance due to plaintiff, not setting out any of items of the accounting, *held* prejudicially erroneous, as not being sufficiently definite to permit defendant to specify intelligibly on appeal particulars in which it is not supported by evidence, and as denying defendant specific finding as to every disputed item determining whether money involved in particular transactions had been collected by defendant, so that, in any subsequent action between parties, plaintiff would, as to those items found collected prior to accounting, be precluded from further claiming.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by C. L. Margolis against Leonard & Holt, a corporation. Judgment for plaintiff, and defendant appeals. Reversed.

J. H. Morris, of San Francisco, for appellant.

Harry I. Stafford, of San Francisco, for respondent.

DOOLING, Justice pro tem. Plaintiff, who had been employed by defendant as a real estate salesman, brought this action to secure an accounting from defendant of the amount which had become due to him for sales of real estate made by him while he was in defendant's employ. The action was commenced on July 15, 1925, but by stipulation of the parties entered into during the trial the accounting was had to October 1 of that year.

Under plaintiff's contract with defendant, his commissions did not accrue until the money from the sale of the properties was actually collected by defendant, and the accounting was asked for because the record of those collections was in the possession of defendant and not available to the plaintiff. At the conclusion of the trial, in which evidence, much of it conflicting, was introduced covering a large number of transactions, the court ordered judgment for plaintiff for $3,000. From the judgment which followed, plaintiff has presented this appeal.

The trial court made a general finding that "from the period of March 18, 1924, to October 1, 1925, the defendant received commissions from various sales negotiated and consummated by the plaintiff, and that the portion or share of said plaintiff in said commissions during said period amounted to the sum of three thousand eight hundred ($3,800) dollars, and that no part of said sum of three thousand eight hundred ($3,800) dollars had been paid to plaintiff, except the sum of eight hundred ($800) dollars."

Appellant attacks this finding on the ground that it merely determines the balance due to the plaintiff and respondent as of October 1, 1925, and does not set out any of the items of the accounting. Appellant complains of this upon two grounds: (1) That the finding is not sufficiently definite to permit appellant to specify intelligibly the particulars in which it is not supported by the evidence; and (2) that appellant was entitled to a specific finding of the court as to every disputed item, determining whether or not the money involved in that particular transaction had been collected by appellant prior to October 1, 1925, so that in any subsequent action between the parties respondent would, as to those items found to have been collected prior to October 1, 1925, be precluded from further claim.

Under the facts of this case we are of opinion that appellant is correct in both contentions. The correct rule to be applied in cases of this character is laid down by our Supreme Court in Whann v. Doell, 192 Cal. 680, at page 684, 221 P. 899, 901, in the following language:

> "It is obvious that a statement of the balance due in the findings of the court, without a reference, and without an account or without exceptions being taken to specific items, is not a proper disposition of such an action, because the issues between the parties are not framed or disposed of in such manner as to show the method by which the general result is reached, and the aggrieved party cannot successfully present his grievances to an appellate tribunal, because on such an appeal this court must assume in support of the judgment that every controverted fact was determined in favor of the respondent, and even if there was both the disposition and the power on the part of the appellate tribunal to reexamine the entire account, the presumption in favor of the action of the trial court as to the contested items would ordinarily render such action wholly nugatory.
>
> "On the other hand, the contention that an account must be stated in accepted bookkeeping fashion cannot be maintained. The question presented by such an appeal is a practical one in such cases, particularly in view of our restricted powers under the Constitution (article 6, § 4½), namely, can this court upon the whole record say that there has been a miscarriage of justice in the trial court? Any procedure or record from which it can be intelligently ascertained what the issues were as to the controverted items and how these issues were disposed of by the trial court will suffice for the purpose, whether the matter appears from the findings, the decree or a bill of exceptions, showing the controversy, and the disposition thereof. It may be possible, also, to show such action by a typewritten record prepared under section 953a et seq. of the Code of Civil Procedure."

We are satisfied from an examination of the transcript that it cannot be intelligently ascertained how the issues raised by the many disputed items in this case were disposed of by the trial court.

Respondent cites and relies upon Pratalongo v. Larco, 47 Cal. 378, as supporting the making of a general finding of the amount due in a case of this sort. If there is anything in the Pratalongo Case inconsistent with the later case of Whann v. Doell, supra, it must be considered to that extent overruled. But, as we construe the Pratalongo Case, it is not in conflict with the Whann Case. In the Pratalongo Case the court said:

> "In such a case, if the items on the debit and credit side are intelligibly stated by the referee, so that on the face of the report it clearly appears how the indebtedness arose, this, we think, is a sufficient compliance with the statute in this class of cases."

There is no statement of any items in the findings of the court or elsewhere in the case on appeal here, and there is no way in which we can determine how the court arrived at the amount which it found to be due.

It is also clear, as pointed out by the appellant, that in this particular case, where commissions will continue to accrue to the respondent as money is collected by appellant from sales negotiated by respondent, the appellant is entitled to the protection of a specific finding of every transaction in which money is found by the court to have been already collected by appellant. Otherwise, on a subsequent account, neither appellant nor the court will be advised what transactions were included in the previous judgment and what transactions remain to be inquired into. This itself distinguishes this case from the ordinary accounting case in which every transaction between the parties can be finally disposed of in the one action.

We are satisfied from the record before us that the failure to make any more specific finding on the account between appellant and respondent than the one herein quoted constituted error prejudicial to appellant on both of the grounds heretofore stated. Much space is devoted in the briefs to a discussion of the correct interpretation of a finding covering a modification of the contract of employment between the parties. Upon a second trial, the finding on this point will doubtless be so drawn as to avoid any possible claim of ambiguity.

For the reasons herein stated the judgment appealed from is reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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94 Cal. App. 647

BENGOCHEA v. BENGOCHEA. (Civ. 6235.)

District Court of Appeal, Second District, Division 2, California. Nov. 1, 1928.

1. Executors and administrators 🔑32(2)—Evidence sustained findings, in widow's petition for revocation of administration on husband's estate, that administrator was not deceased's partner and did not procure settlement through fraud (Code Civ. Proc. § 1365).

In proceeding by widow for revocation of letters of administration of her deceased husband's estate issued to his brother, in which defendant denied existence of community property on account of property settlement between spouses, evidence *held* sufficient to support findings that administrator was not partner of deceased at time of his death, rendering administration contrary to provisions of Code Civ. Proc. § 1365, and that property settlement was executed freely without fraud on part of administrator.

2. Appeal and error 🔑1011(1)—Trial court trying facts determines weight of evidence, and its findings under conflicting evidence are not disturbed.

Trial court sitting without a jury weighs the evidence and determines credibility of witnesses exclusively, and courts of appellate jurisdiction will not disturb its findings and judgment where evidence is conflicting.

3. Husband and wife 🔑279(3)—Property settlement between spouses, followed by separation and wife's sale of her interest, held not abrogated by resumption of marital relations.

Property settlement between husband and wife disposing of community property, followed by six months' separation, *held* not abrogated as to wife by subsequent reconciliation of the spouses and resumption of marital relations, where wife sold her community interest to third person and did not thereafter seek to rescind.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

Proceeding by Felicia Bengochea against Paul Bengochea, as administrator of the estate of Blas Bengochea, deceased. From an adverse judgment, petitioner appeals. Affirmed.

Canepa & Castruccio, of Los Angeles, for appellant.

Harry A. Chamberlin, of Los Angeles, for respondent.

CRAIG, J. The respondent was appointed administrator of the estate of Blas Bengochea, deceased, who was his brother, and who also was the husband of the appellant herein. Thereafter the latter petitioned the superior court for revocation of the letters of administration, and for appointment of herself as administratrix, alleging that the estate consisted of community property, and that as surviving wife of the deceased she was a competent and proper person for appointment, and had a prior right to act, in such capacity. Respondent admitted the marital relation between appellant and his intestate, but denied the existence of any community property or interest of appellant in said estate, alleging that on or about December 27, 1923, Mrs. Bengochea and her husband, owing to disputes between them, entered into a property settlement agreement in writing, a copy of which was appended to the answer as an exhibit, "in settlement, adjustment and in compromise of all property questions and rights," each agreeing "to execute and acknowledge any and all deeds or instruments of release or conveyance in order to enable such other to sell, convey or otherwise dispose of his or her own real property, free from any apparent right of interest therein."

Appellant filed a reply, denying the allegations, and the contract last mentioned, and alleged that prior to December 27, 1923, she and her husband owned a one-half interest in certain real property and a hotel maintained thereon, of which Paul Bengochea and his wife also owned one-half. She denied the existence of any dispute between the decedent and herself, but alleged that owing to differences between herself and Paul Bengochea, the latter agreed to purchase the share of herself and husband. She further alleged that she was unable to read the English language sufficiently to understand the purport of written instruments; that Paul Bengochea represented the property settlement contract to be a bill of sale, and that as a kinsman, partner, and co-owner of the common property, she believed and relied upon his representations, and therefore signed the same; that such representations were false, were known to Paul Bengochea to be false, and that he knew that she and her husband believed and relied upon them as being true, and thus obtained their signature, but that they would not have signed instrument except for respondent's false and fraudulent representations.

[1, 2] The case was tried before the court without a jury, whereupon findings of fact, conclusions of law, and a judgment were filed and entered in favor of respondent, from which the petitioner appealed, principally upon the alleged ground that the evidence was insufficient to warrant or to support the judgment. The court found that Paul Bengochea was not a partner of the deceased at the time of his death; that the property settlement was executed by appellant freely and was not obtained through false representations or fraud, or through any reliance upon representations of her brother-in-law.

It is contended by appellant that the evidence established, and that the court should have found, that in view of the fact of all the parties being related by blood and by marriage, having been joint owners of the property in question, having resided together, and jointly conducted the hotel business, there was a partnership between them, and a bond of trust and confidence between appellant and respondent amounting to a fiduciary relationship; that she sold her interest to respondent, but that the alleged property settlement was obtained by respondent through fraud and deceit; and that the evidence failed to show any differences between herself and her husband.

There is much substantial evidence that all of the parties disagreed. The respondent positively swore that Blas and Felicia Bengochea had many quarrels; that there was dissatisfaction all around as to the management of the business; that appellant felt that she was not receiving her share of the income, or being properly treated; that there were discussions as to which of the parties should purchase another's interest; that finally there was a "row," following which appellant left the premises, the others considered the matter, and upon her return respondent "bought her out for $7,500." It is obvious from the record that appellant was illiterate, but it appears from the testimony of various witnesses, including that of her brother, Angel Ardanaz, that the latter understood the English language, and that he was present and explained her desires and advised her at meetings of the family and at the offices of the attorneys who prepared the property settlement. The respondent testified in his own behalf and as a witness for the petitioner that Mrs. Bengochea was desirous of obtaining a property settlement with her husband, and of disposing of her separate interest in the community property; that there was no fraud or deceit; and that she freely and voluntarily lived separate and apart from her husband for some time thereafter. Appellant admitted that she built a home with her own money, and lived alone thereon until her husband came to her shortly prior to his death. It appears that the deceased and his wife divided community moneys in bank, and conveyed to Paul Bengochea and wife all their right, title, and interest in the property in controversy; that respondent resold to his brother, Blas Bengochea, a one-fourth interest, and took back a lease thereof. It was testified that appellant consented to the appointment of respondent as administrator, and requested that none of her property be included in the inventory. The attorney who prepared her petition for revocation of the administrator's letters, about five months after the filing of his petition, testified that she made no mention to him of the existence of a property settlement. Her testimony, while given with difficulty, was nevertheless inconsistent and contradictory, and was flatly contradicted by other witnesses in all material respects wherein it tended to support her theory of the transaction. The trial court had the opportunity of observing all of the witnesses, and of determining their credibility, of weighing the evidence, and deciding the issues presented. Such duties being within its exclusive province, courts of appellate jurisdiction will not, in a case such as that before us, disturb the findings and judgment. Stransky v. Callan, 81 Cal. App. 476, 253 P. 960.

[3] It appears that the deceased remained with his brother for a period of about six months following the property settlement with his wife and her departure, and that he then expressed a desire to join her, which he did. It is insisted that the property settlement, if valid, was abrogated by the fact of the spouses becoming reconciled and resuming marital relations. It is apparent, however, that appellant sold her community interest to a third person for a valuable consideration, which admittedly was adequate, and that she did not thereafter seek to rescind, nor did her husband ever acquire her share. The point is without merit, and authorities cited in that behalf are inapplicable to the issue.

It is asserted that respondent and the deceased were partners, and that the appointment of the administrator of said estate was contrary to the provisions of section 1365 of the Code of Civil Procedure. But as we have pointed out, there is positive testimony and facts and circumstances sustaining the findings of the court below.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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94 Cal. App. 617

In re MORGAN'S ESTATE.

DEXTER et al. v. BAKER et al.

(Civ. 6191.)

District Court of Appeal, Second District, Division 1, California. Oct. 31, 1928.

1. Executors and administrators 🔑507(1)—Special administrator's employment of additional attorney and period of employment held for trial court in determining right to attorneys' fees.

Whether one not attorney of record actually represented special administrator as attorney and question as to length of period of his employment *held* questions of fact for trial court in proceedings for settlement of final account of administrators, in which attorneys of record claimed all of attorneys' fees.

2. Executors and administrators 🔑216(2)—Claim that additional attorney prepared no papers and made no appearances did not preclude finding that he was entitled to compensation from estate.

Claim that attorney, employed by special administrator, in addition to attorneys of record, prepared no papers, made no court appearances, and assumed no responsibility to court in conduct of legal affairs of the estate, did not prevent trial court from finding that additional attorney was actually employed and entitled to a part of attorneys' fees allowed on final settlement.

3. Executors and administrators 🔑268—Trial court could apportion attorneys' fees, on settling estate, though additional attorney was employed for only part time.

Trial court, in proceedings for final settlement of estate, could apportion allowance for fees as between attorneys of special administrator, though additional attorney employed outside of attorneys of record might not have acted as attorney during the entire period covered by the order.

4. Attorney and client 🔑75(1)—Attorneys for special administrator who permitted another attorney to appear, without objection, waived formal substitution.

Where attorneys of record of special administrator had actual notice that administrator had employed another attorney, and signed receipt for notice bearing the name of other attorney as representing administrator, and allowed him to appear for administrator without objection, attorneys of record waived requirement of written notice of change of attorneys and formal substitution, and trial court, in proceedings for final settlement, could award part of attorneys' fees to the other attorney.

5. Executors and administrators 🔑268, 510(10)—Superior court has discretion to apportion fees between attorneys for joint administrators, which is not disturbed on appeal, unless abuse of discretion or error appears.

Superior court, in settling accounts of joint administrators, has discretion to apportion allowance of attorneys' fees between their attorneys, and its action will not be disturbed on appeal, where there is no abuse of discretion, and no errors of law appear.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Petition by A. F. Morgan and others, as special administrators of the estate, and executors of the last will, of J. J. Morgan, deceased, for settlement of final account. From an order making a partial allowance of attorneys' fees to Arthur G. Baker, as attorney for Henry H. Matthieson, one of the administrators, G. R. Dexter and another, attorneys of record, appeal. Affirmed.

G. R. Dexter and Raymond S. Taylor, both of Los Angeles, for appellants.

Arthur G. Baker, of Los Angeles, for respondents.

CRAIL, Justice pro tem. On August 7, 1925, special letters of administration were issued to Henry H. Matthieson and two others. The petition for appointment was signed by appellants, G. R. Dexter and Raymond S. Taylor, as attorneys for the petitioners. They appeared at the hearing, and became attorneys of record. Shortly after the death of the decedent, Henry H. Matthieson filed of record certain deeds in favor of his wife and others, which had been placed in his hands for that purpose by the decedent. The other administrators and their attorneys, appellants herein, believing that the deeds were invalid for failure of delivery, brought an action to quiet title against the grantees, and included, as one of the defendants, the said Matthieson, both as administrator and in his individual capacity. Thereupon, and on September 5, 1925, said Matthieson, "having lost confidence in" appellants as his attorneys, employed the respondent Arthur G. Baker. At all times thereafter respondent represented said Matthieson, with the knowledge of appellants, but no formal substitution of attorneys was entered on the record; and it is the contention of appellants that respondent acted merely as attorney for Matthieson in his individual capacity.

On December 27, 1926, after a full hearing, the court made an order settling the final account of the two special administrators, overruling certain objections which were filed by

Matthieson, administrator, and in the same order made an allowance to respondent, as attorney for Matthieson, of a sum equal to one-fourth the sum which it allowed to appellants. It is from this order that the appeal is taken.

There was some sparring for position by attorneys on both sides in the trial court, for the reason that each was accusing the other of unethical conduct in representing adverse interests. But no adverse interest seems to have suffered by reason of the alleged betrayals of trust, and no such claim is now made; nor is such a question before us for review. When stripped of unpleasant personalities and acrimonious aspersions at the conduct and motives of the respective parties, freely hurled at each other in the briefs, the questions for determination lend themselves more readily to solution.

[1] It is first contended by appellants that, under the facts and circumstances in evidence, the respondent never was attorney for Matthieson, as special administrator. But there is substantial evidence in the record that respondent did so act during the entire period covered by the order. This is a question of fact to be determined by the trial court, and we would not be justified in setting aside its order in this regard.

The same is true with reference to appellants' next contention that the portion of the allowance covering the period from September 5, 1925, to October 1, 1925, was prior to any employment of said counsel by anyone. The same is true with reference to appellants' contention that the period from October 1, 1925, to April 13, 1926, covered a time when appellants had been notified in writing by respondent that he was acting for Matthieson as an individual.

[2] The same is true with reference to the contention that during this period respondent Baker prepared no papers, made no court appearances, nor assumed any responsibility to the court in the conduct of the legal affairs of the estate. These were circumstances in evidence to be weighed by the trial court on the question of the employment of respondent and his services thereunder along with the other evidence bearing upon those questions.

[3] The same is true with reference to appellants' next contention which covers the period from April 13, 1926, to November 10, 1926; and as to appellants' next contention that the order in its entirety must fall, even though one or more of the foregoing contentions be untenable, there being no means available to apportion the allowance, if respondent were not attorney for Matthieson, administrator, during the whole period covered by the order.

[4] The contention that there could be no allowance of fees to respondent because he was never formally substituted as attorney for the administrator on the records of the court, and because no written notice of the motion to substitute was given, requires more extended consideration. In this connection it should be borne in mind that the order appealed from involves, and only involves, the distribution between attorneys of a fractional part of the statutory attorney's fees in a probate proceeding. No one, other than the attorneys themselves, is interested in the outcome. The estate of decedent will not be taxed with greater fees, whether the order appealed from be affirmed or reversed. In this sense neither the administrators of the estate nor the heirs are interested parties, and the rights of an ordinary litigant to notice of motion to substitute attorneys are not involved. There is substantial evidence in the record that appellants had actual notice that Matthieson, administrator, had employed respondent as his attorney, and was using him as such during all the period covered by the order. Appellants actually brought an action against Matthieson, as administrator, prior to that period, and it was for this reason that he first employed respondent and notified appellant Dexter that he had lost confidence in him. There are no intervening equities and no claim by appellants that anything was done which would not have been done had there been a formal substitution of attorneys and written notice thereof. The cases hold that formal substitution of attorneys and notice thereof may be waived. Livermore v. Webb, 56 Cal. 489; Leake v. City of Venice, 43 Cal. App. 568, 185 P. 424; Starkweather v. Eddy, 196 Cal. 74, 235 P. 734. In addition to the actual notice, the record shows that, four months before the date of the order appealed from, appellants signed a receipt for a notice as "attorneys for W. L. Pollock and A. F. Morgan," the two other administrators. The notice was from Matthieson, as administrator, and was signed by respondent Baker, as his attorney. No objection was made that respondent was not so employed. Later, when respondent was appearing in court as attorney for Matthieson, administrator, no objection was made to the appearance. On the contrary, the court was told by appellants that, "when the proper time comes, Mr. Baker, we will challenge your authority as attorney for the executor, but that is a matter of further development." Under the circumstances, it will be deemed that the written notice and formal substitution were waived.

[5] The superior court has discretion in settling the accounts of joint administrators to apportion the allowance of counsel fees between their attorneys, and its action will not be disturbed on appeal, where no abuse of discretion or errors of law appear. Estate of Dudley, 123 Cal. 256, 55 P. 897.

The order appealed from is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

94 Cal. App. 700

PEOPLE v. MUSTO. (Cr. 1467.)

District Court of Appeal, First District, Division 2, California. Nov. 8, 1928.

1. Criminal law 🔑998—Trial court, though losing jurisdiction by not trying defendant within 60 days after information, was not required to vacate regular judgment, without motion for new trial (Pen. Code, § 1050, as added by St. 1927, p. 1036).

Trial court, even though regarded as losing jurisdiction for failure to bring defendant to trial within 60 days after filing information charging defendant with possessing liquor, as required by Pen. Code, § 1050, as added by St. 1927, p. 1036, was not required to vacate and set aside judgment regular on its face, where defendant made no motion for new trial.

2. Criminal law 🔑1144(½)—On appeal from refusal to vacate judgment of conviction, all presumptions favor judgment.

On appeal from order denying motion to vacate judgment on plea of guilty to possession of liquor, all presumptions are in favor of judgment of trial court.

3. Criminal law 🔑1144(7)—Appellate court, on appeal from refusal to vacate judgment of conviction, must assume that over 60 days' delay in bringing defendant to trial was accounted for.

On appeal from order denying motion to vacate judgment on plea of guilty to possession of liquor, in absence of any showing to contrary, District Court of Appeal must assume that delay of over 60 days after filing information and before bringing defendant to trial was duly accounted for.

4. Criminal law 🔑576(9)—Record showing trial over 60 days after information and 4 days' continuance after arraignment showed no violation of Code setting time of trial (Pen. Code, § 1050, as added by St. 1927, p. 1036).

Where record showed that defendant was not brought to trial within 60 days after information was filed, and that there was continuance for 4 days after arraignment until sentence was entered, no violation of Pen. Code, § 1050, as added by St. 1927, p. 1036, providing for time within which case must be heard was shown.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Jimmie Musto was convicted of unlawful possession of intoxicating liquors, and he appeals. Affirmed.

Iener W. Nielsen, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

STURTEVANT, J. The district attorney filed an information against the defendant, and thereafter the defendant pleaded guilty and judgment was duly entered. Thereafter, on February 17, 1928, the defendant made a motion to vacate and set aside the judgment so entered, the motion was denied, and from that order the defendant has appealed, bringing up the judgment roll.

The defendant makes one point which involves a consideration of the following dates: On November 15, 1927, an information was filed, charging the defendant with the unlawful possession of intoxicating liquor. On February 3, 1928, the defendant appeared for arraignment, was arraigned, and pleaded guilty. The case was then continued until February 6, for sentence. On that date it was continued until February 7, when the matter was taken up and the defendant was sentenced. On February 16, the defendant served a notice of motion to vacate and set aside the judgment. On February 17, the motion was presented. On February 20, the motion was denied, and the defendant immediately served his notice of appeal from the order denying the motion.

[1] It is the contention of the defendant that he should have been brought to trial within 60 days, and, not having been brought to trial within 60 days, that the trial court lost jurisdiction, and that the defendant was entitled to be dismissed at any time after January 14, 1928 (the sixtieth day). In the first place, if we concede, as contended by the defendant, that by virtue of the provisions of section 1050 of the Penal Code, as added in 1927 (St. 1927, p. 1036), the trial court loses jurisdiction to further proceed whenever a defendant has not been brought to trial within 60 days after the filing of the information, the concession does not warrant the procedure adopted by the defendant. He made no motion for a new trial and he does not cite us to any other law which authorizes a trial court to vacate and set aside a judgment regular on its face.

[2-4] We have before us the information and a copy of the minutes of the plea and a copy of the judgment, which constitute a record of the action. Pen. Code, § 1207. The transcript does not purport to contain a bill of exceptions. On this appeal all presumptions are in favor of the judgment of the trial court. In the absence of any showing to the contrary, we must assume that the delay occurring between November 15, 1927, the date when the information was filed, and February 3, 1928, the date that the defendant appeared for sentence, was duly and regularly accounted for. In his brief the defendant concedes that prior to the amendment to the statute his motion would have been without merit. However, he bases his claim entirely on the provisions of section 1050 of the Penal Code, as added in 1927. Turning to that section, it will be noticed at once that nothing transpired that did violence to any provision contained in the section. No continuances whatever were had except from February 3, 1928, the date of the arraignment, to February 7, 1928, the date judgment was pronounced. It

does appear on the face of the record that more than 60 days occurred between the date the information was filed and the date the defendant was arraigned, but section 1050 of the Penal Code does not speak on that subject. It is unnecessary to refer to the provisions of section 1382 of the Penal Code. That section was enacted in 1880, and the defendant concedes that under a long line of cases any rights he had under that section have not been violated. However, an examination of the several sections of the Code shows that section 1382 of the Penal Code, and not section 1050 of the Penal Code, deals with the matter of delays after information filed.

We find no error in the record. The order appealed from is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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94 Cal. App. 628

PEOPLE v. BAKER. (Cr. 1610.)

District Court of Appeal, Second District, Division 2, California. Nov. 1, 1928.

1. Homicide 🔑234(1)—Evidence as to identification of defendant held to support conviction for murder.

In prosecution for murder, evidence as to identification of defendant *held* sufficient to support conviction.

2. Criminal law 🔑552(3)—Belief in minds of jurors to moral certainty and beyond reasonable doubt, arising from circumstantial evidence, is sufficient to support conviction.

Circumstantial evidence need not, in order to justify inference of legal guilt, consist of inculpatory facts which are absolutely and to the point of demonstration incompatible with innocence; a conviction in minds of jurors to moral certainty and beyond reasonable doubt, arising from evidence, being sufficient to support conviction.

3. Homicide 🔑170—That defendant, charged with murder, was at or near scene of crime when it was committed, may be considered by jury.

In prosecution for murder, fact that defendant was at or near scene of crime at time of its commission may be considered by jury.

4. Homicide 🔑170—That witnesses are unable positively to identify defendant, charged with murder, as guilty one, may be considered by jury in connection with all other evidence.

In prosecution for murder, fact that witnesses are unable positively to identify defendant as one who committed act, but expressed belief that he was person seen, may be received and weighed by them in connection with all other evidence before them.

5. Criminal law 🔑590(1)—Refusal to grant continuance to defendant, charged with murder, and to furnish him stenographic copy, where there was none, of testimony before grand jury held not erroneous, it being optional with district attorney to demand stenographic services.

Where it is optional with district attorney to demand services of stenographic reporter at time of returning indictment for murder, refusal of continuance and to furnish defendant with stenographic copy of testimony given before grand jury *held* not erroneous, where there was no copy made.

6. Criminal law 🔑406(3)—Statement made by person being tried for murder, shortly after his arrest, freely made, and not confession, held admissible.

In prosecution for murder, statement freely made by defendant to police, shortly after his arrest, *held* admissible, where defendant made no confession, and it appeared he had been cautioned that statements made by him might be used in his trial.

7. Criminal law 🔑829(1)—Requested instructions in murder prosecution, covered in instruction given, held properly refused.

In prosecution for murder, requested instructions, which appeared in those already given, *held* properly refused.

8. Constitutional law 🔑268—Reading of statute as instruction in murder prosecution, covering requested instruction refused, held not unconstitutional, as depriving defendant of liberty without due process of law (Pen. Code, § 1096, as amended by St. 1927, p. 1039).

Reading, under Pen. Code, § 1096a, as added by St. 1927, p. 1039, to jury in murder prosecution, of Pen. Code, § 1096, as amended by St. 1927, p. 1039, which included substance of several separate instructions refused, *held* not unconstitutional, as depriving defendant of his liberty without due process of law.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Elmer Norman Baker was convicted of murder in the first degree, and he appeals. Affirmed.

Cooper & Collings and George H. Shreve, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and John D. Richer, of Los Angeles, for the People.

CRAIG, J. On or about January 15, 1927, one Mike Trifoni, a shoemaker, was attacked in his shop in the city of Los Angeles by a robber, and during a struggle which ensued between them the latter was shot and killed. Baker was prosecuted for the crime, which resulted in a verdict of murder in the first degree, recommending life imprisonment. He moved for a new trial, which was denied, and appeals from the judgment and order denying a new trial.

Appellant seeks a reversal upon the ground that the evidence was wholly circumstantial, and that it was insufficient, particularly as to identification, to support the verdict and judgment. Trifoni testified that at about 11 o'clock p. m. of said date a man entered his place of business, produced a .45 caliber pistol, and ordered him to throw up his hands and give him his money; that the witness then caught the man's hands, and was wrestling with him, when the latter's revolver was discharged several times; that "then the other fellow was outside, and was shooting" from near the sidewalk; that the robber suddenly relaxed, fell to the floor, and a man who resembled the defendant entered with a pistol in his hand, ordered Trifoni to stand by the wall, took the revolver from the hand of the first intruder, went outside, and departed in an automobile in which about six others apparently were waiting. He testified that the second man who entered carried a small gun of about .32 or .38 caliber. Police officers immediately entered the store and found the first arrival lying face downward. It is not denied that he was dead, that a .38 caliber bullet had pierced his heart, and that three .45 caliber empty shells lay on the floor outside, and five .38 caliber shells were found outside, of Trifoni's establishment. It affirmatively appears, in part from appellant's own testimony, that he and the deceased, who proved to be one Paul Cotham, had been friends for about five years, and that they were living together at the time of the homicide; that they visited an acquaintance by the name of Nelson, who loaned them his automobile, and that Cotham also inquired if Nelson would loan him his .45 caliber automatic pistol, which Nelson replied that he was not "in the habit of loaning"; that they drove about the city, finally stopping in front of Trifoni's store, and that Cotham asked Baker to wait for him, alighted, entered the store, and almost immediately shots were heard by the defendant.

Appellant testified that he at once drove to the apartment where he and Cotham had been living, and left the car standing in the street; that he spent the night at a hotel in another part of the city, but did not communicate with Nelson regarding the whereabouts of the automobile, nor the shooting; that on the following morning, at about 6 o'clock, he went to San Pedro, shipped to New York on a tanker, and from there sailed to Italy, from whence he returned some months later. Following his arrest, and on October 27, 1927, the defendant made a statement to officers, in which he replied to questions that he had been anxious to leave Los Angeles for some time, but that he was without money. He was asked when they had discussed holding up the shoemaker, to which he replied:

> "It wasn't discussed. I did not know what he was going to do at all. He never told me of his plans or what he was going to do."

The statement contains also the following question and answer:

> "Q. When you and Cotham went to this shop, was anybody else along, or just you and he? A. There was no one with us. There was no one else in this affair but us."

It was the theory of the people that Cotham did in fact borrow Nelson's .45 caliber revolver, as well as his automobile, and that both he and Baker were armed; that Cotham entered the shop for the purpose of holding up and robbing Trifoni, while Baker remained in or near the automobile, and that, seeing his partner and friends of some years apparently in danger, appellant fired several shots from a .38 revolver, intending to disable or kill Trifoni, but which in fact struck Cotham; that appellant then entered the store and obtained Cotham's weapon, which might be a means of identification, and fled. There was some testimony that Cotham had theretofore stated that he was in fear of being killed by Italians, and appellant contends that the homicide may have resulted from a smoldering animosity between the deceased and the Trifonis, who were of that nationality. It is insisted that in any event the man who took the pistol from the hand of the deceased was not sufficiently identified as the appellant to justify the jury in convicting him of the crime.

[1-4] It cannot be doubted that the defendant and Cotham drove to Trifoni's place of business together in Nelson's automobile, since Baker so admitted, and swore that he witnessed the shooting, and immediately drove away, but did not return the car to its owner. The Trifonis testified that the man who entered and took the .45 revolver had a mustache and sideburns, but that he resembled the defendant, who at the time of the trial wore none. A photograph of the defendant, which had been identified by Nelson as that of Baker, was shown to Mr. and Mrs. Trifoni, and while neither of them was positive that it was a picture of the man who entered their store and was on trial, they both testified that it looked like him. Trifoni testified, "The picture looks like him;" "the front view looks like him." Mrs. Trifoni stated that she was in doubt; that "if he had his mustache and long sideburns and his hair, and, of course, his suit and everything, just like that fellow that came in, I would say it was the man;" "his forehead and his eyes are just like that man that came in the store." Another witness swore that a "man resembling Baker got out of the car." This evidence, together with the fact that the defendant was present at the time of the shooting, but failed to notify Nelson that a mutual friend had been mortally wounded, or shot to death, and did not return the automobile, nor spend the night at his own place of abode, but stayed at a strange hotel some distance

from home, and early on the following morning left the city under the circumstances herein detailed, constituted considerable substantial grounds upon which the jury may well have based its conclusion that the man who fired from outside the store, entered with a .38 caliber revolver with which Cotham was killed, and was photographed and brought to trial before them, was one and the same person, and that his movements strongly tended to show guilty knowledge.

Circumstantial evidence need not, in order to justify the inference of legal guilt, consist of inculpatory facts which are absolutely and to the point of demonstration incompatible with innocence. "A conviction in the minds of the jurors to a moral certainty and beyond a reasonable doubt, arising from the evidence of the defendant's guilt, is sufficient." People v. Bellamy, 109 Cal. 610, 42 P. 236. Circumstantial evidence may be as conclusive in its convincing force as the testimony of direct witnesses to the overt act. "Circumstances very largely control the conduct of men in the most important affairs of life, and may be sufficient to justify a conviction of crime where they are such as to exclude any other reasonable theory than that of the guilt of the accused." People v. Nagy, 199 Cal. 235, 248 P. 906. That the defendant was at or near the scene of the crime at the time of its commission may be considered by the jury (People v. Woodward, 45 Cal. 293, 13 Am. Rep. 176), and the fact that witnesses are unable positively to identify him but express a belief that he was the person seen, may be received and weighed by them in connection with all other evidence before them (People v. Young, 102 Cal. 411, 36 P. 770; People v. Botkin, 9 Cal. App. 244, 98 P. 861).

[5] Error is assigned to the failure of the court to grant a continuance of the trial and to furnish the defendant with a stenographic copy of the testimony given before the grand jury. It appears, however, that at the time of returning the indictment in the instant case no stenographic reporter was present, and no report was made of which a copy could have been furnished. It was optional with the district attorney to demand such service, and it was not error to refuse a continuance in the absence of a stenographic report. People v. Doble, 83 Cal. App. —, 257 P. 81; In re Kennedy, 144 Cal. 634, 78 P. 34, 67 L. R. A. 406, 103 Am. St. Rep. 117, 1 Ann. Cas. 840.

[6] It is next contended that a statement made by the defendant to police officers shortly after his arrest was inadmissible, and that the court erred in allowing it to be read to the jury. It is observed, however, that while the accused was being questioned by the officers he denied having had any participation in the crime, but was cautioned and warned as to the use which might be made of any statements he might make, and that he freely and voluntarily gave information as to his residence, acquaintance with Nelson and Cotham, borrowing the automobile and driving to Trifoni's place of business. He also stated in detail his movements thereafter, as heretofore related. When asked pertinent questions as to his connection with or knowledge of the murder he declined to answer until he could consult an attorney. He made no confession, and hence the argument on behalf of appellant in this respect is without merit. People v. Peete, 54 Cal. App. 333, 202 P. 51.

[7, 8] The trial court read to the jury section 1096 of the Penal Code (St. 1927, p. 1039), which is as follows:

> "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.'"

It is complained that the court erred in refusing three instructions requested by the defendant upon the questions of mere suspicion of guilt, preponderance of evidence, credibility of witnesses, and reasonable doubt, and appellant argues that merely reading the instruction above quoted from the Code was not sufficient. All of the elements of the instructions which were refused appear in those which were given in addition to the section above mentioned. Section 1096a of the same Code provides:

> "In charging a jury, the court may read to the jury section 1096 of this Code, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given." St. 1927, p. 1039.

Appellant contends that reading to the jury an omnibus instruction embracing the substance of several separate instructions, and refusing to give those offered deprived him of his liberty without due process of law, in violation of his constitutional guaranties. As held in People v. Egan (Cal. App.) 266 P. 581, section 1096 of the Penal Code merely codifies the legal principles upon which juries have been instructed for years. Having once given an instruction, it is also a rule of long standing that it is not error to refuse to again state the law in the phraseology requested by the defendant. People v. MacPhee, 26 Cal. App. 218, 146 P. 522. He may submit instructions, but beyond this he has no legal right to dictate their form or substance. People v. Dodge, 30 Cal. 448.

The judgment and order denying a new trial are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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94 Cal. App. 667

RUPP et al. v. HIVELEY. (Civ. 3586.)

District Court of Appeal, Third District, California. Nov. 5, 1928.

1. Highways 🔑83—Complaint, alleging plaintiffs' ownership of land west of avenue, and that defendant, owning land on east side, was threatening to destroy trees on east line thereof, affording wind-break, held insufficient in injunction suit (St. 1909, p. 1129, §§ 7, 9; Pol. Code, §§ 2633, 2742, 4041, subd. 39; Code Civ. Proc. § 733).

Complaint, alleging that plaintiffs were owners of land on west side of avenue, on east line of which eucalyptus trees had been grown for 25 years and used for purpose of breaking wind from plaintiffs' land and orange grove, and that defendant, owning land on east side of avenue was threatening to destroy the trees, thus causing irreparable injury to plaintiffs, *held* insufficient to state cause of action for injunction, under St. 1909, p. 1129, §§ 7, 9, Pol. Code, §§ 2633, 2742, 4041, subd. 39, and Code Civ. Proc. § 733, relating to public protection of shade and ornamental trees on public roads.

2. Constitutional law 🔑87—Property owner's rights may not be interfered with, if rights of others are not disturbed.

No one has right to interfere with or control right of owner of property to use his property as he sees fit, so long as its use in no way impinges on property or personal rights of another.

3. Easements 🔑61(1)—Plaintiffs could not restrain property owner on other side of road from cutting down trees within his property line, thereby destroying wind-break.

Owners of orange grove on one side of road were not entitled to restrain owner of property on the other side from cutting down trees along highway within his property line, even if the trees as located had for many years constituted a protection to plaintiffs' lands as a wind-break.

4. Highways 🔑83—Plaintiffs, owning orange grove, held not entitled to restrain property owner on other side of road from destroying trees growing on defendant's side of highway, which served as wind-break (St. 1909, p. 1129, §§ 7, 9; Pol. Code, §§ 2633, 2742, 4041, subd. 39; Code Civ. Proc. § 733).

Plaintiffs, owning orange grove on one side of highway, *held* not entitled to maintain action to restrain property owner on other side of road from cutting down trees on his side of road, though trees were growing and maintained on the highway itself, and had been used over long period for purpose of wind-break for plaintiffs' grove, since matter of protection and preservation of shade and ornamental trees on public roads is vested in the state and its agencies, under St. 1909, p. 1129, §§ 7, 9, Pol. Code, §§ 2633, 2742, 4041, subd. 39, and Code Civ. Proc. § 733.

5. Highways 🔑83—State has exclusive control over trees on highways and owner of contiguous property may not remove them without permission (St. 1909, p. 1129, §§ 7, 9; Pol. Code, §§ 2633, 2742, 4041, subd. 39; Code Civ. Proc. § 733).

While owner of land abutting on public highway has private interest in trees on highway contiguous to his land, such as to entitle him to damages as against one removing them without lawful authority, state alone has exclusive control over the trees planted and growing on the highways, and not even owner of property himself has right to remove the trees without permission of public authorities, under St. 1909, p. 1129, §§ 7, 9, Pol. Code, §§ 2633, 2742, 4041, subd. 39, and Code Civ. Proc. § 733.

6. Highways 🔑83—Owners of land abutting highway have no property right in trees on highway in front of another's lands, except through state's easement (St. 1909, p. 1129, §§ 7, 9; Pol. Code, §§ 2633, 2742, 4041, subd. 39; Code Civ. Proc. § 733).

Owners of land abutting on public highway have no property right in trees growing on the highway immediately in front of and on the line of the lands of another on the same highway, under St. 1909, p. 1129, §§ 7, 9, Pol. Code, §§ 2633, 2742, 4041, subd. 39, and Code Civ. Proc. § 733, except such right as inheres in or is incidental to the easement which the state has acquired in the lands.

7. Highways 🔑83—Owner of land abutting on highway had no prescriptive right in lands on opposite side to have trees on highway remain as wind-break (St. 1909, p. 1129, §§ 7, 9; Pol. Code, §§ 2633, 2742, 4041, subd. 39; Code Civ. Proc. § 733).

Where state did not acquire fee in lands used for highway purposes, owner of property on one side of highway did not acquire prescriptive right of easement in lands of defendant to have trees planted and growing on highway in front of defendant's lands maintained as wind-break for plaintiffs' property, since extent of easement of owner of land abutting on public highway to lands of others acquired by the state for highway purposes is limited to use as highway; planting of trees by state along public highway, under St. 1909, p. 1129, §§ 7, 9, Pol. Code, §§ 2633, 2742, 4041, subd. 39, and Code Civ. Proc. § 733, being merely incidental.

8. Easements 🔑61(8)—Complaint by owner of property abutting highway, alleging trees on highway had been maintained as wind-break, did not show easement (St. 1909, p. 1129, §§ 7, 9; Pol. Code, §§ 2633, 2742, 4041, subd. 39; Code Civ. Proc. § 733).

Complaint by owner of property abutting on highway, alleging that trees along highway in front of defendant's property had been used for purpose of breaking wind from plaintiffs' lands and orange crops, *held* not to show acquisition of easement in defendant's property, such as to warrant injunction, since it was not shown that any right was acquired through use of property for highway; state having exclusive control of protection and preservation of trees on highway, under St. 1909, p. 1129, §§ 7, 9, Pol. Code, §§ 2633, 2742, 4041, subd. 39, and Code Civ. Proc. § 733.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by W. H. Rupp and another against E. R. Hiveley. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Reese & Bagg, of San Bernardino, for appellants.

M. O. Hert, of Colton, for respondent.

HART, J. By their complaint herein the plaintiffs seek an injunction to prevent the defendant from doing or threatening to do certain acts, the nature of which will presently be explained. A demurrer to the complaint on the ground of the want of sufficient facts was sustained, and the plaintiffs were allowed 10 days within which to amend their pleading. The plaintiffs refused or failed to amend within the time allowed, and thereupon the court rendered judgment dismissing the complaint and dissolving the temporary injunction or restraining order, applied for and granted upon the filing of the complaint. This appeal is from said judgment.

[1] The complaint alleges that the plaintiffs are the respective owners in severalty of two 10-acre tracts of land lying and fronting on the west line of Agate or Ramona avenue, in San Bernardino county; that the defendant is the owner of a tract of land lying and fronting on the east line of said avenue; "that for more than 25 years prior to the date of this suit there have been planted and growing, along the east line of said Agate or Ramona avenue, a large number of eucalyptus trees; that said trees are located on the said Agate or Ramona avenue, and, during all the period of time herein mentioned, have been used for the purpose of breaking the winds from the land and crops of oranges growing on the land belonging to these plaintiffs respectively; that these plaintiffs have planted upon their respective tracts of land large and valuable groves of oranges, and that it is necessary for the proper care and protection of said orange groves that a wind-break along the east of their said tracts of land shall be kept and maintained; otherwise, winds and storms coming from the east and northeast and southeast will sweep across the respective groves of these plaintiffs and greatly injure or destroy the trees and the crop of fruit growing thereon, and that, but for such wind-break existing, as herein described, the land and groves of these plaintiffs respectively, would be almost valueless; that the defendant, E. R. Hiveley, without right or authority of whatsoever kind or nature, is attempting to and threatening to destroy or cut down or otherwise render valueless and uneffective, the said wind-break lying along the east line of said Agate or Ramona avenue, as herein above described, and that in so doing, the said defendant is causing and threatening to cause irreparable injury to these plaintiffs and to their respective orange groves and crops of fruit growing thereon; that these plaintiffs are without remedy at law and that their only relief from such great and irreparable damage can be had in this court, sitting as a court of equity, and by an order of this court perpetually enjoining the defendant, E. R. Hiveley, from committing the wrong herein attempted and threatened." The demurrer was properly sustained.

[2-4] It is not shown by the complaint whether the trees are located on the real property itself of the defendant, or upon the highway. The allegation that for more than "25 years prior to the date of this suit there have been planted and growing, along the east line of said Agate or Ramona avenue, a large number of eucalyptus trees," is the only allegation of the complaint which pretends to fix the exact location of the trees with reference to the real property proper of the defendant, and manifestly it cannot be determined therefrom whether the trees are inside or outside the east line of said property. If on the inside, obviously the defendant has the right to remove the trees. Clearly no one has the right to interfere with or control the right of the owner of property to use such property as he sees fit, so long as such use in no way impinges upon the property or personal rights of another. This would, of course, be true in this case, even if the trees, as so located, had for many years constituted and still constitute a protection of the lands and orchards of the plaintiffs from the alleged destructive effect of the seasonal sweep over and through their said lands of the high winds which, it appears, are common to the section of the country in which the respective tracts of lands of the parties are situated. Nor, even if the trees are growing or maintained on the highway itself, have the plaintiffs legal authority to maintain this action, since the Legislature has expressly declared in several statutes that the matter of the "protection and preservation of shade and ornamental trees growing and to be grown upon the public roads, highways, grounds and property within the state" shall be vested in the state itself or its agencies. See Stats. 1909, p. 1129 et seq. Section 7 of of said act provides, inter alia:

> "Every county board of forestry * * * shall, within their respective counties, have exclusive power over and jurisdiction to decide upon the variety, kind and character of trees, hedges and shrubs that shall be planted upon said roads, highways, grounds and property; and to determine all questions respecting the pruning, cutting and removal of any trees," etc., "growing and to grow thereon."

Said section further provides that the board of forestry shall not, in the exercise of its powers or the performance of its duties under the provisions of the act, interfere with the jurisdiction of the board of supervisors over the roads, highways, grounds and property in the improvement and general control thereof. Section 9 of the act makes it a misdemeanor for any violation of its provisions. It seems to be true that whether any county may or may not invoke the provisions of said act is a matter committed to the discretion of the board of supervisors of such county; but, as stated, there are other sections of our Codes relative to highway tree planting which clearly show, as does the above-named statute, even though the provisions of the latter be not taken advantage of by any county, that the state, having full and exclusive control and jurisdiction over the public highways of the state, may through its agencies plant, grow, and maintain trees along and over the public highways in all cases where it may reasonably be determined by the proper authorities that such trees will not only afford in a large measure the protection of the traveling public against the heat of the summer season, and more or less against inclement climatic conditions of the winter months, but will also serve the purposes of ornamentation.

Section 4041, subdivision 39, of the Political Code, authorizes the board of supervisors to encourage, under such regulations as it may deem proper to adopt, "the planting and preservation of shade and ornamental trees on the public roads and highways." Section 2633 of the same Code gives the owner or occupant of land adjoining a highway the authority to plant trees on and along such public highways on the side contiguous to his land, and the right to recover damages from any person who willfully injures any such trees for any damage which is thereby sustained. Section 2742 of said Code provides:

> "Whoever digs up, cuts down, or otherwise maliciously injures or destroys any shade or ornamental tree on any highway, unless the same is deemed an obstruction by the road overseer, and removed under his direction, forfeits one hundred dollars for each such tree."

Section 733 of the Code of Civil Procedure, among other things, provides that any person who injures any tree on the street or highway in front of any person's house, or village, or city lot, or cultivated grounds, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of the damages which may be assessed therefor, in a civil action, in any court having jurisdiction.

[5] It will be perceived from the foregoing Code sections that, while the owner of land abutting upon a public highway and contiguous to which on such highway trees have been planted and are growing, has such private interest in such trees as to entitle him to damages from one who, without lawful authority, injures or removes such trees, it is established by said sections that in the state alone, or its agencies, resides the exclusive control over the trees planted and growing upon the public highways, and that no one, even the owner himself of the land in front of which on any public highway such trees are growing or standing, has the right to remove such trees without permission from the proper public authorities. The reason that the owner of the land in front of which and on the public highway trees are growing is given the right to complain of and recover damages for the removal of such trees by one having no permit to do so from the proper authorities is because he is the owner of the fee in the land on which the trees stand to the center line of the highway, and therefore in him is vested a limited property right in the trees themselves. "The owner of the fee of the soil," says the Supreme Court, in County of Santa Barbara v. More, 175 Cal. 6, 12, 164 P. 895, 898 (L. R. A. 1917F, 385), "has a limited, not an unlimited, right of property in the trees. The public upon the other hand, has its limited, and not unlimited, property right in the trees. If their destruction is countenanced or *ordered by the authorities,* the wood of the felled trees unquestionably belongs to the owner of the fee; so also do the fruit or nuts upon fruit or nut-bearing trees. But, upon the other hand, being and growing upon the public highway and subserving useful as well as ornamental purposes, *it is for the authorities to say when and under what circumstances they may be destroyed.*" (Italics ours.)

[6] But owners of land abutting upon a public highway obviously have no property right in trees growing on a public highway immediately in front of and on the line of the lands of another upon the same highway, except such right therein as inheres in or is incidental to the easement which the state has acquired in such lands. This proposition finds express recognition in the very provisions of our statutes confining the right to maintain an action for damages against any person who removes or destroys such trees without permission from the proper public authorities to the owner or occupant of the land along the immediate line of which the trees are growing or being maintained on the highway. It follows that the plaintiffs in the instant case have no legal right to maintain an action for damages, or any other character of action, against the defendant for removing or threatening to remove the trees in question, even if it be true that the latter has not been given permission by the authorities to do so.

[7] The plaintiffs claim, however, that they have a prescriptive right of easement in the lands of defendant "to have the tr

to remain where they are as a wind-break." As has been stated, and as is plainly true, unless the state has acquired the fee in the lands themselves over and through which it constructs and maintains its highways, it can only claim an easement in such lands solely for highway purposes. It (the state, or the public, in whatever form the latter may exercise governmental powers) may control the use of the public highways for such purposes only as may subserve their uses *as public highways.* County of Santa Barbara v. More, supra. And in the planting, growing, and the preservation of trees along and over the public highways the state merely performs an act incidental to the proper use of its easement in the lands of others appropriated to or acquired by it for use for highway purposes only. Any other use of such easement, or of the lands in which the state owns only an easement solely for highway purposes, would be beyond the scope or the legitimate extent of such easement; and this could be prevented by the owners of the lands to which the servitude as so wrongfully used is attached. An owner of land abutting upon a public highway has in extent or quality only such an easement in those lands of others which also abut upon such highway as the state or its agencies have acquired in such lands for highway purposes and uses.

[8] If, therefore, the plaintiffs in this case, or any other persons over and through whose lands the highway involved herein passes, have acquired, assuming that they could legally acquire, an easement in those portions of the defendant's lands, also constituting a part of said highway, which is to subserve purposes or uses other than those which are the first essentials of the maintenance of public highways, they should have set up such right of easement in their complaint. This, as is manifest from their pleading, they have not done. The complaint merely states that the trees in question (for the period of 25 years or more) "have been used for the purpose of breaking the winds from the land and crops of oranges growing on the land belonging to these plaintiffs, respectively." This allegation does not say, nor is there any allegation of the complaint which does say, that the trees were planted and have been maintained on said avenue for the purpose of serving as such wind-break. If the trees in question have served and are serving the purposes of a wind-break, as alleged in the complaint, that circumstance, so far as the complaint furnishes us any information upon the subject, is only supervenient or adventitious, and has no connection with or pertinency to the real purpose for which they may by the public authorities be protected and preserved.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

WEBSTER MFG. CO. v. BYRNES et al.

BYRNES v. WEBSTER MFG. CO.★

(Civ. 6430.)

District Court of Appeal, First District, Division 1, California. Oct. 24, 1928.

Rehearing Denied Nov. 23, 1928. Hearing Granted by Supreme Court Dec. 20, 1928.

1. Warehousemen 🔑7—Milling company owning elevator for storage of property to facilitate transportation held "public utility" (Public Utility Act, § 2(aa).

Milling company, which owned elevator in which it stored property to facilitate transportation by common carriers, *held* "public utility" as to such property, under Public Utility Act (St. 1915, p. 118; St. 1911 [Ex. Sess.] p. 21) § 2(aa), regulating business and indebtedness of public utilities.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

2. Corporations 🔑464—Public utility has no power to issue notes or evidences of indebtedness except "as provided by law" (Public Utility Act, §§ 51(a), 52(a, b, d).

Public utility has no power to issue notes or evidences of indebtedness, except as provided by statute; Public Utility Act (St. 1915, p. 115) §§ 51(a), 52(b, d), under section 52(a), permitting exercise of power to issue securities and create liens "as provided by law," which means a law of similar kind; that is, a statute.

[Ed. Note.—For other definitions, see Words and Phrases, First and Third Series, As Provided by Law.]

3. Statutes 🔑206—Statute should be construed so as to give effect to every part of it.

If possible, statute or code section should be construed so as to give effect not only to the statute as a whole, but to every part thereof.

4. Statutes 🔑219—Great weight is accorded construction placed on statute by officers charged with duty of executing it.

Construction placed upon statute by officers who have duty of executing it, though not conclusive, is entitled to great weight in construing statute.

5. Public service commissions 🔑6—Public utilities must have railroad commission's consent to execute trust deeds, mortgages, or evidences of indebtedness, or issue long-term notes (Public Utility Act, §§ 51(a), 52(a, b, d).

Public utilities, not included in Public Utility Act (St. 1915, p. 115) § 51(a), may sell or lease their properties without the order of railroad commission, but cannot execute deeds of trust, mortgages, evidences of indebtedness, or notes running over 12-month period, without order of commission under section 52(a, b, d).

★Rehearing denied. Hearing granted. 280 P. 101.

6. Warehousemen 🔑7—Trust deed given by warehouse company without permission from railroad commission held void; "evidence of indebtedness" (Public Utility Act, § 52(a, b, d).

Deed of trust executed by warehouse company on its property without order from railroad commission *held* void under Public Utility Act (St. 1915, p. 115) § 52(a, b, d), providing that "evidences of indebtedness of public utility issued without the order of the commission * * * shall be void," since "evidence of indebtedness" includes mortgages and deeds of trust, in view of Civ. Code, § 3006.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Evidence of Indebtedness.]

7. Contracts 🔑138(1)—No relief will be given either party under contract expressly prohibited by law.

Where contract is expressly prohibited by law, court will not entertain action thereon or give relief to either party.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by the Webster Manufacturing Company against Charles W. Byrnes and others, in which defendant named interposed a cross-complaint. Judgment for plaintiff, and defendants appeal. Reversed.

James F. Peck and Peck, Bunker & Peck, all of Oakland, and H. H. McPike, of San Francisco, for appellants.

Clarence M. Hawkins, of Oakland, for appellant and cross-complainant.

Clark, Nichols & Eltse, of Berkeley, for respondent.

CAMPBELL, Justice pro tem. This case grows out of the following facts: On March 21, 1925, Western Milling Company, later named Oakland Terminal & Elevator Corporation, executed three deeds of trust upon the real property involved in this action. The first deed of trust secured the trustor's promissory note in the principal sum of $210,000, dated March 21, 1925, and made payable to plaintiff on or before January 1, 1926. The note was not paid when due, and on May 11, 1926, after notice given, the trustee named in the deed of trust sold the real property to plaintiff; the sale being pursuant to the terms of the deed of trust. When the note was made, Western Milling Company owed plaintiff, the Webster Manufacturing Company, in excess of $210,000, to wit, $210,655.47. The second deed of trust is referred to in the record, but is not directly involved here. It ran in favor of E. H. Nielsen Company and Macdonald Engineering Company, and secured another note of the trustor also dated March 21, 1925. The third deed of trust secured a note in the principal sum of $200,000 likewise dated March 21, 1925, and made by the same trustor in favor of J. T. Williams, Lee B. Hawkins, and William N. Wholey. This third deed of trust named B. O. Sawyer and George Rushforth as trustees. Sawyer died, and the payees named in this $200,000 note assigned the note to Charles W. Byrnes. The deed of trust in favor of plaintiff included all of the property of the public utility, consisting of its warehouse, buildings, equipment, and land upon which the same were situated, and was made to secure a note given to refund notes aggregating $90,000, conditional sales contracts aggregating $61,629.64, and the remainder of the $210,000 note was to repay moneys advanced to pay insurance, taxes, etc. This deed of trust was by agreement to be a first deed of trust on the property and was recorded ahead of the other deeds of trust. No foreclosure or sale ever occurred under the third deed of trust made to secure the $200,000 note, and it was stipulated that this deed of trust was recorded last and that it was never foreclosed. Byrnes, after obtaining the assignment of this note, disregarded the security of the deed of trust which had been made to secure it—evidently considering it void for lack of permission given by the railroad commission for its execution—and on February 24, 1926, and prior to the sale of the property to plaintiff filed suit on the note against Western Milling Company and caused a writ of attachment to be issued and levied upon the real property. This suit was not contested, and on April 20, 1926, Brynes took personal judgment by default therein, and on May 24, 1926, the sheriff of Alameda county, under a writ of execution, sold, subject to redemption, the real property to Charles W. Byrnes. Immediately following this sale, plaintiff brought this action to quiet its title to the real property so sold under execution, including as defendants Byrnes, the purchaser at the execution sale, and Williams, Hawkins, and Wholey, beneficiaries under the third deed of trust, and Rushforth, the surviving trustee thereunder. Byrnes in his answer relies upon the execution sale as his claim of title, while Williams, Hawkins, Wholey, and Rushforth filed a separate answer in which they rely upon the third deed of trust.

[1] It was stipulated at the trial that Western Milling Company was a public utility on and after March 21, 1925 (the date the notes and deeds of trust were executed); that at and from that time it owned an elevator in which is stored property and did thereby facilitate transportation of such property by common carriers. This made it a public utility as to such property (section 2 [aa], Public Utilities Act, Stats. 1915, pp. 115, 118; Extra Session Stats. 1911, pp. 18, 21). It was further stipulated that the railroad commission had never given its consent to the making of the $210,000 note nor to the

making of the deed of trust mentioned nor to the procurement of the judgment which Byrnes procured. Judgment was entered decreeing plaintiff to be the owner in fee of the real property in question, and quieting its title against the claims of defendants and all persons claiming under them, or any of them, and from such judgment defendants have appealed.

Appellants contend that the deed of trust under which plaintiff claims was void as having been made without the order of the railroad commission and because the note was given for the refunding of indebtedness and not made for proper purposes; that both the note and the deed of trust securing the same are void; and that, if either is void, the Webster Manufacturing Company obtained no title to the property by virtue of the trustee sale under the deed of trust.

The Public Utility Act of California, in force at the time, so far as it bears on the question here presented, provides:

"Section 51(a). No railroad corporation, street railroad corporation, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation or water corporation shall henceforth sell, lease, assign, mortgage or otherwise dispose of or encumber the whole or any part of its railroad, street railroad, line, plant or system, necessary or useful in the performance of its duties to the public, * * * without having first secured from the commission an order authorizing it so to do."

"Section 52(a). The power of public utilities to issue stocks and stock certificates, and bonds, notes and other evidences of indebtedness and to create liens on their property situated within this state is a special privilege, the right of supervision, regulation, restriction and control of which is and shall continue to be vested in the state, and such power shall be exercised as provided by law and under such rules and regulations as the commission may prescribe."

"Section 52(b). A public utility may issue stocks and stock certificates, and bonds, notes and other evidences of indebtedness payable at periods of more than twelve months after the date thereof, for the following purposes and no others, namely, for the acquisition of property, or for the construction, completion, extension or improvement of its facilities, or for the improvement or maintenance of its service, or for the discharge or lawful refunding of its obligations, or for the reimbursement of moneys actually expended from income or from any other moneys in the treasury of the public utility not secured by or obtained from the issue of stocks or stock certificates, or bonds, notes or other evidences of indebtedness of such public utility," within five years next prior to the filing of an application with the commission for the required authorization, "for any of the aforesaid purposes except maintenance of service and replacements, in cases where the applicant shall have kept its accounts and vouchers for such expenditures in such manner as to enable the commission to ascertain the amount of moneys so expended and the purposes for which such expenditure was made; provided, that such public utility, in addition to the other requirements of law, shall first have secured from the commission an order authorizing such issue and stating the amount thereof and the purpose or purposes to which the issue or the proceeds thereof are to be applied. * * * A public utility may issue notes, for proper purposes and not in violation of any provision of this act, * * * payable at periods of not more than twelve months after the date of issuance of the same, without the consent of the commission, but no such note shall, in whole or in part, be refunded by any issue of stocks or stock certificates," or other evidence of interest or ownership, "or of bonds, notes of any term or character or any other evidence of indebtedness, without the consent of the commission."

"Section 52(d). All stock and every stock certificate," or other evidence of interest or ownership, "and every bond, note or other evidence of indebtedness, of a public utility, issued without an order of the commission authorizing the same then in effect, shall be void."

Section 51 (a) of the Public Utilities Act was amended in 1927 (Stats. 1927, p. 78) so as to include warehousemen and other utilities, and consequently the question here presented will not arise under the act as amended.

In the Matter of Russell, 163 Cal. 672, 126 P. 875, Ann. Cas. 1914A, 152, it is said that the first step in the interpretation of a statute is to consider the conditions existing prior to its adoption so as to ascertain its objects and purposes.

The Public Utilities Act is existent for and because of certain definite reasons, causes, and purposes. It is not hasty legislation enacted in the crisis of time or occasion; but, on the contrary, it is the reaction of the public to long years of oppression from public utilities and misuse of the powers and purposes of such institutions. The act represents the considered, measured, and determined policy of the public to regulate and control the actions of such institutions in their conduct towards the public, and competition between the utilities themselves. It is the intent that investors be secured by regulated and approved securities issued; that credits be allowed only in certain approved lines and classifications; that the money gathered from stockholders and security holders be used only for approved and proper purposes. People v. Willcox, 207 N. Y. 86, 100 N. E. 705. 45 L. R. A. (N. S.) 629. The California Utilities Act, like similar acts in other states, was for a purpose and because of abuses from which the public suffered. It states a policy of this state and declares a rule of conduct for all public utilities named therein. Its purposes are manyfold, and among them are: To remove the operation of public utilities from the realm of common business and place such operation in the domain of permitted, restricted, and regulated business; to place such institutions and their activities within the sovereign control of the state.

[2] The California act, as we have seen (section 52 [a], Public Utilities Act), declares that the power of public utilities to create liens on their property is a special privilege. Authority as to the meaning of "special privilege" is not needed, so well is it understood, but from and after the declaration of the people, the business of a public utility became something more, other and different than a common business. The people have placed public utilities among that class of business existing at sufferance, and in addition declared that certain powers may only be exercised "as provided by law." The phrase "as provided by law" means a law of a similar kind; that is, a statute. In re Campbell, 138 Mich. 597, 101 N. W. 828. The act then means that authority to exercise the power must be found in the statute. Such authority is found in our Public Utilities Act, but it is coupled with the burden that certain acts must be done by and with the consent of the commission and that unless so done the acts are void. There is no intent in the legislative department that this result be obviated or avoided either by contract or by construction. It is the plain intent of the Legislature that no power in issuing notes or evidences of indebtedness shall be exercised except as provided in the statute.

It is urged in support of the judgment that as the note is payable at a period of less than twelve months from the date it was made, no question arises as to its validity; that under section 51 (a) of the act it is provided that certain classes of public utilities may not sell, lease, or otherwise dispose of or incumber their properties, or any portion thereof, without authorization from the railroad commission, and that as the classes of public utilities so mentioned do not include warehousemen, they are not covered by that section; that section 52 was intended to provide in general terms and for general purposes for the issuance of securities and the creation of other obligations, while section 51 (a) was intended to deal with sales or incumbering of properties by making them security for such obligations; that the special provisions of section 51 (a) govern the general provisions of section 52 relating to the issuance of securities and the creation of other obligations.

[3] It is fundamental that, if possible, a statute or code section should be construed so as to give meaning and effect not only to the statute or code section as a whole, but to each and every part thereof. 23 Cal. Jur. 758, and cases cited. If we conclude that warehouse companies may execute deeds of trust without obtaining the permission of the railroad commission for the reason that warehousemen are not mentioned in section 51 (a), wherein it is provided that certain specified corporations shall not sell, lease, assign, mortgage, or otherwise dispose of or encumber their properties without obtaining an order from the commission, we render meaningless section 52 (d), providing that "all stock and every stock certificate, and every bond, note or *other evidence of indebtedness*, of a public utility, issued without an order of the commission authorizing the same then in effect shall be void," providing, of course, a deed of trust is an evidence of indebtedness. If, on the other hand, it be held that warehouse companies are not controlled by section 51 (a), but that evidences of indebtedness issued by any character of public utilities are void unless issued in conformity with the other sections of the act, effect is given to each section of the act.

"Evidence of indebtedness" is a generic term. That it is synonymous with securities is so stated by Bouvier in his Law Dictionary, wherein he defines "securities" as "written assurances for the return or payment of money. Evidences of Indebtedness." "Evidence of indebtedness" is defined in Rapalje & Lawrence Law Dictionary, vol. 1, p. 469: "Evidence of debt—a written instrument or security for the payment of money, importing on its face the existence of a debt. Evidence of Indebtedness." In Renton v. Gibson, 148 Cal. 655, 84 P. 188, it is said:

> "'Security' is a word of broad import. Certain trust-deeds in real estate are recognized by our decisions, by which trust-deeds the legal title passes to the trustee, with power of sale. In all respects these deeds and transfers of title are 'security, but they are not mortgages. A mortgage by which no title whatsoever passes, and whereby but a lien upon the property is acquired, is likewise 'security.'"

In Cincinnati, H. & D. Ry. v. Kleybolte et al., 80 Ohio St. 311, 88 N. E. 879, "securities" is held to be synonymous with "evidence of indebtedness." The California Legislature uses the terms "securities" and "evidences of debt" as synonymous as follows:

> "*Pledgee's Sale of Securities.*—A pledgee cannot sell any evidence of debt pledged to him, except the obligations of governments, states, or corporations; but he may collect the same when due." Civ. Code, § 3006.

Under this section it has been held that mortgages are securities or evidences of debt which the pledgee cannot sell. Revert v. Hesse, 184 Cal. 300, 193 P. 943.

[4] The construction placed upon the act by the officers upon whom was imposed the duty of executing it, while not conclusive of the question under consideration, is entitled to great weight. Riley v. Thompson, 193 Cal. 773, 778, 227 P. 772; Riley v. Forbes, 193 Cal. 740, 745, 227 P. 768.

The railroad commission has placed a construction upon the act which gives effect to each section. As warehouse companies are not named in section 51 (a), wherein certain specified corporations may not sell or lease their properties without authorization from the commission, it has held that warehouse corporations may sell or lease their properties without such order. In re Associate Terminals Company, 15 C. R. C. 963; In re Imperial Grain & Warehouse Company, 5 C. R. C. 94; In re Southern California Warehouse & Distributing Company, 23 C. R. C. 362. This holding is not in conflict with section 52 (d), prohibiting the issuing of "evidence of indebtedness" without an order from the commission, nor is it at variance with any other provision of the act.

The railroad commission, however, with but one exception, which will later be noted, has consistently passed upon applications to mortgage and execute trust deeds by warehouse, wharf, and elevator corporations, which are not enumerated in section 51 (a) of the act. In Re Sacramento Warehouse Company, 4 Ops. & Ords. R. R. Com. 949, the opinion recites:

> "Heretofore, on December 26, 1913, applicant executed its two certain promissory notes, one for the sum of $10,000.00 and one for the sum of $50,000.00 payable to the Sacramento Bank, and also its deed of trust to secure the same. The first note was payable on December 26, 1914, and the second on December 26, 1915. As the commission's consent was not secured, the second note and *also the deed of trust* (italics ours) are void, under the provisions of section 52 of the Public Utilities Act."

In Re Los Angeles Warehouse Company, 4 Ops. & Ords. R. R. Com. 1149, the commission authorized the issuance of a note for $150,000, and also authorized the execution of a deed of trust on the corporation's properties. In Re De Fremery Wharf & Land Company, 5 Ops. & Ords. R. R. Com. 382, the commission took jurisdiction over both the note and mortgage and issued its order permitting the execution of the mortgage. In Re Lancaster Feed & Fuel Company, 7 Ops. & Ords. R. R. Com. 880, the commission authorized the purchase of a warehouse and the issuance of a purchase price note and the execution of a mortgage to secure the same, and in the same matter (8 Ops. & Ords. R. R. Com. 19) took jurisdiction of a supplemental application solely to pass upon the form of the mortgage and to direct its execution. In Re Los Angeles Harbor Warehouse Company, 12 Ops. & Ords. R. R. Com. 549, the warehouse company was granted authority to execute a mortgage to secure a promissory note or notes of the face value of $33,000. In Re Hollister Warehouse Company, 16 Ops. & Ords. R. R. Com. 610, permission was granted to the company to issue its one-day note for $25,000 and to secure the note by a mortgage to be substantially in the same form as the mortgage attached to the petition, and in this instance it will be noted the note was payable in less than one year. In Re Grange Warehouse & Storage Company, 16 Ops. & Ords. R. R. Com. 218, permission was granted to execute a deed of trust to secure bonds. In Re Murietta Valley Elevator Company, 26 Ops. & Ords. R. R. Com. 843, the company was granted permission to execute a mortgage to secure its promissory note in the sum of $7,500. In Re Davies Warehouse Company the commission assumed jurisdiction by supplemental order to authorize the execution of a mortgage or deed of trust, and In Re Richards Trucking and Warehouse Company, 28 C. R. C. 377, the company was given authority to execute a first mortgage substantially in the same form as that filed to secure a note in the sum of $35,000 and to execute two deeds of trust substantially in the same form as those filed, to secure notes in the sum of $10,000 and $13,500 for the purpose of paying and refunding its outstanding indebtedness.

As stated, the commission in one warehouse case made the statement that it was not necessary for the warehouse utility to obtain the order of the commission to mortgage its property. This was in respect to the Alpaugh Warehouse & Milling Company, 8 C. R. C. 509, decided in 1915. There the applicant was a very small concern, having issued but 170 shares of stock at $5 per share. It owed $2,700 as a balance due the contractor who built its warehouse at a cost of $3,075 and had borrowed $2,700 on a one-year note to pay this balance. Aside from this one isolated instance, the commission in all warehouse cases has assumed jurisdiction and passed upon the applications to mortgage or execute deeds of trust.

[5] Giving the act as it stood the interpretation placed upon it by the railroad commission—and which interpretation gives effect to each section and which interpretation we think to be correct—public utilities mentioned in section 51 (a) could not sell, lease, assign, mortgage, or otherwise incumber their properties without obtaining the order of the commission. Other public utilities could sell or lease their properties without the order of the commission, but could not without obtaining its consent execute deeds of trust, mortgages, or evidences of indebtedness or issue notes, excepting notes payable at periods of not more than twelve months after the date of issuance, but which notes could not be refunded by other notes or evidence of indebtedness of any character.

[6] Western Milling Company, being a public utility and so declared to be in the Public Utilities Act, and having executed its deed of trust, which is an evidence of indebtedness, without having obtained the order of the commission authorizing its execution, such deed of trust is void, and the sale thereunder passed no title.

[7] The provisions of the Public Utilities Act declaring void evidence of indebtedness issued without the order of the railroad commission, approving the same, were enacted

by the Legislature in response to a public demand and constitute a firm expression of public policy. The rule therefore announced in Berka v. Woodward, 125 Cal. 126, 57 P. 779, 45 L. R. A. 420, 73 Am. St. Rep. 31, is apropos here:

> "This, then, is the undoubted rule, that when a contract is expressly prohibited by law, no court of justice will entertain an action upon it, or upon any asserted rights growing out of it. And the reason is apparent, for to permit this would be for the law to aid in its own undoing. * * * 'If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant.' And this must be so, for, while as a matter of private justice between individuals it would be but fair that one under such an illegal contract should restore the consideration or should make the payment, the rights of the public are superior to any such private considerations, and the public's right is that the fountains of justice shall remain unpolluted."

In view of the foregoing, discussion of the remaining points is unnecessary.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

OAKLAND TERMINAL & ELEVATOR CORPORATION (a Corporation), Plaintiff and Appellant, v. MERCANTILE TRUST COMPANY OF CALIFORNIA (a Corporation), Webster Manufacturing Company (a Corporation) et al., Defendants and Respondents. (Civ. 6265).★

District Court of Appeal, First District, Division 1, California. Oct. 24, 1928.

Rehearing Denied Nov. 23, 1928. Hearing Granted by Supreme Court Dec. 20, 1928.

Appeal by plaintiff from a judgment of the Superior Court of Alameda County, J. D. Murphey, Judge, in an action to declare deed of trust null and void and to enjoin sale thereunder. Reversed.

Robert L. McWilliams, of San Francisco, James F. Peck and Peck, Bunker & Peck, all of Oakland, H. H. McPike, of San Francisco, and Clarence M. Hawkins, of Oakland, for appellant.

Clark, Nichols & Eltse, of Berkeley, for respondent.

Carl I. Wheat, Reginald L. Vaughan, and Roderick B. Cassidy, all of San Francisco, and Arthur T. George, of Los Angeles, for amicus curiæ Railroad Commission of the State of California.

CAMPBELL, Justice pro tem. In this action plaintiff seeks a judgment declaring a certain deed of trust to be null and void, and that Mercantile Trust Company of California, the trustee under the deed of trust, its agents and employés, be restrained and enjoined from selling the property described in such deed of trust. By way of cross-complaint defendants, the Webster Manufacturing Company and Mercantile Trust Company of California, pray for judgment that plaintiff take nothing by its amended and supplemental complaint; that the court adjudge, determine, and declare that the note and deed of trust and sale held thereunder were in all respects valid, and that all the property was by such trustee's sale vested in defendant the Webster Manufacturing Company, and that the Webster Manufacturing Company thereby became and is the absolute owner of the property, and that no other person has any interest therein.

Before the trial the trustee under the deed of trust sold the property at a trustee's sale to the beneficiary the Webster Manufacturing Company. The final judgment, from which the appeal is taken, denies to the plaintiff the relief sought, and determines that the respondent the Webster Manufacturing Company is the owner of the property purchased at the sale held under the deed of trust, and placed it in possession of the property.

It is conceded by respondents that Western Milling Company, later named Oakland Terminal & Elevator Corporation, was a "public utility" as defined by the Public Utilities Act of California (St. 1915, p. 115), and that the railroad commission had never given its consent to the making of the note or deed of trust in question.

This action involves the same deed of trust given to secure the same promissory note which is the subject of the action, Webster Manufacturing Co., Plaintiff and Respondent, v. Charles W. Byrnes et al., Defendants and Appellants; Charles W. Byrnes, Cross-Complainant and Appellant, v. Webster Manufacturing Co. et al., Cross-Defendants and Respondents (No. 6430) 271 P. 771, this day decided by this court, and on the authority of that case the judgment here must be reversed, and it is accordingly so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

OAKLAND TERMINAL & ELEVATOR CORPORATION (a Corporation), Plaintiff and Appellant, v. MERCANTILE TRUST COMPANY OF CALIFORNIA (a Corporation), Webster Manufacturing Company (a Corporation), Defendants and Respondents. (Civ. 6361).★

District Court of Appeal, First District, Division 1, California. Oct. 24, 1928.

Rehearing Denied Nov. 23, 1928. Hearing Granted by Supreme Court Dec. 20, 1928.

Appeal by plaintiff from an order of the Superior Court of Alameda County, J. D. Murphey, Judge, appointing receiver and granting certain injunctive relief. Reversed.

Robert L. McWilliams, of San Francisco, for appellant.

Clark, Nichols & Eltse, of Berkeley, for respondents.

★Rehearing denied. Hearing granted. 280 P. 107.

CAMPBELL, Justice pro tem. The appellant, plaintiff in the action, has appealed from an order appointing a receiver of certain real property and granting certain incidental injunctive relief, the order having been made upon the application of the defendants.

The suit was brought by the plaintiff in possession and involves the determination of title to real property. The title claimed by defendant Webster Manufacturing Company rests upon the validity of the deed of trust executed by Western Milling Company, later named Oakland Terminal & Elevator Corporation, to Mercantile Trust Company of California, in which deed of trust the Webster Manufacturing Company is the beneficiary. It is conceded that the deed of trust was executed without obtaining the consent of the railroad commission, and the Western Milling Company was at the time of its execution a public utility as defined by the Public Utilities Act of California (St. 1915, p. 115). The deed of trust here involved is the same deed of trust that is the subject of the action Webster Manufacturing Co., Plaintiff and Respondent, v. Charles W. Byrnes et al., Defendants and Appellants; Charles W. Byrnes, Cross-Complainant and Appellant, v. Webster Manufacturing Co. et al., Cross-Defendants and Respondents (No. 6430) 271 P. 771, this day decided by this court, and on the authority of that case the order here appealed from must be reversed, and it is accordingly so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

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94 Cal. App. 687

PEOPLE v. BAKER et al. (Cr. 1717.) ★

District Court of Appeal, Second District, Division 1, California. Nov. 7, 1928.

Hearing Denied by Supreme Court Dec. 6, 1928.

1. Robbery 🔑15—Prosecution of person for robbery, who aided and abetted its commission, held justified (Pen. Code, §§ 31, 971).

Though it was not shown conclusively that person convicted of robbery in second degree was actually present at time when robbery occurred, where she was shown to have aided and abetted in its commission, prosecution of her therefor was justified, under Pen. Code, §§ 31, 971.

2. Criminal law 🔑865(1)—Remarks of judge merely suggesting, in prosecution for robbery, that jury, reporting disagreement, give further consideration to evidence, held not prejudicial.

Remarks of judge in prosecution for robbery in the second degree, which merely suggested that the jurors give further consideration to evidence to the end that a verdict be reached, where jury had made two reports of disagreement, *held* not prejudicial.

Appeal from Superior Court, San Diego County; Shelley J. Higgins, Judge.

Sylvia Baker and others were convicted of robbery in the second degree, and the named defendant appeals. Affirmed.

Edgar B. Hervey, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

HOUSER, J. By an information, defendants Sylvia Baker, Frank Kirk, W. O. Schaeffer, and Charles M. Baker (the latter of whom was the husband of defendant Sylvia Baker), were charged with the commission of the crime of robbery. Each of the defendants Kirk and Charles M. Baker pleaded guilty to the charge. On the trial of the action, Schaeffer was convicted of robbery in the first degree, and Sylvia Baker of robbery in the second degree. From the judgment and order denying her motion for a new trial, defendant Sylvia Baker appeals.

It is urged by appellant that the evidence was insufficient to support the verdict. The crime committed was that of robbing employees of a street railway company in charge of a street car barn in the city of San Diego. Approximately $4,000 was taken in the robbery, of which amount $3,000 was in currency and the balance of $1,000 in silver, weighing approximately 25 pounds; checks and 1,466 car tokens, all contained in a tin box, were also taken. Although as to several of the circumstances the evidence was contradictory, nevertheless it is clear that the jury was justified in believing the following facts to have been established: A short time preceding the date of the robbery, defendant Charles M. Baker and appellant reserved and procured for the use of defendants Kirk and Schaeffer a room in a certain hotel in the city of San Diego adjoining a room occupied by defendants Baker therein; following which time, and until after the robbery occurred, all of the defendants daily associated one with the other. In the early evening, as well as toward midnight, preceding the morning of the robbery, the clerk of the hotel saw appellant, her husband and Schaeffer go into and out of the hotel several times. Shortly after midnight the Bakers received a telephone call, and immediately thereafter, accompanied by Schaeffer, left the hotel, at which time they told the clerk they were going out to dinner. Each of defendants Charles M. Baker, Kirk, and Schaeffer was actually present at and participated in the robbery, which occurred at about 2:30 o'clock a. m., at which time an automobile was seen in front of the street car barn, but which automobile left that vicinity immediately thereafter. At about 3 o'clock a. m., appellant was seen walking back and forth in front of the hotel. Shortly thereafter she went to her room, remained there about five minutes, returned to the office of the clerk of the hotel, where she appeared to be anxious regarding her husband, left the hotel, but returned immediately, accompanied by her husband, who carried a

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★Hearing denied by Supreme Court.

package under his arm, wrapped in an overcoat, which package, in the presence of appellant, defendant Charles M. Baker took pains to tell the clerk was a case of whisky. Very soon thereafter appellant again returned to the office of the clerk of the hotel and told him that she was going to the depot to meet a friend. She was gone half an hour, returned alone, and retired to the room occupied by her and her husband. Immediately thereafter defendant Charles M. Baker left the hotel and within five minutes returned thereto accompanied by defendant Schaeffer. At about 6 o'clock in the morning following, all the defendants checked out of the hotel. Two or three days later the tin box containing checks and car tokens which had been stolen in the robbery was found on the roof of the hotel where the defendants had roomed. The box corresponded in size with the package carried by defendant Charles M. Baker into the hotel shortly after the robbery occurred. Following the robbery, Mrs. Baker bought a trunk which she said she gave to defendant Kirk. Kirk packed the trunk during Mrs. Baker's absence from her apartment. However, in order to account for its weight, Mrs. Baker made a statement to the effect that it contained linen and silver. The next morning after the robbery occurred Charles M. Baker left the city of San Diego for Los Angeles, where appellant and Kirk followed within a day or two thereafter. In Los Angeles the Bakers registered at a hotel under assumed names. After her arrest, appellant made contradictory, improbable, and untrue statements concerning her acquaintance with defendants Kirk and Schaeffer; also with reference to her whereabouts and movements on the night preceding, as well as the morning of, the robbery.

[1] Although perhaps it was not conclusively shown that appellant was actually present at the time when and at the place where the robbery occurred, after an examination of the transcript of the evidence, this court is convinced that it was ample to justify the conclusion by the jury that defendant either aided and abetted in the commission of the crime, or, not having been present where the crime was committed, advised, and encouraged its commission—which is sufficient to meet the requirements of the statute. Sections 31, 971, Pen. Code.

[2] Appellant also predicates prejudicial error on certain remarks made by the judge of the trial court to the jury. The particular circumstances appear to have been that, after the jury had been considering its verdict for some hours, at the direction of the trial judge, the jury was called into the courtroom. In answer to an appropriate question the foreman of the jury informed the judge that the jury stood eleven to one—without indicating whether for acquittal or for conviction of defendant. Thereupon the judge remarked: "Well, I think the possibilities are that if you had a little more time out there that you might be able to persuade that one to see the situation." Later, when the jury was again brought into the courtroom, at which time it was disclosed that the same situation obtained, the judge made the statement that "evidently you haven't made any progress"; after which one of the jurors said, "Well, I don't believe, Judge, there is any use going back;" to which the judge responded, "You try it."

Appellant urges that each of such remarks made by the judge of the trial court "had the effect of throwing a weight into the balance in favor of the majority and against the minority." However, it is uncertain which faction of the jury finally prevailed. For aught that appears, the one juror may have succeeded in converting the other eleven jurors to his opinion of the guilt of defendant. But, aside from such consideration, this court is of the opinion that the remarks made by the trial judge present no real ground for complaint. The effect of the entire situation was that, far from any coercion, the judge was merely suggesting that the jurors give further consideration to the evidence, etc., to the end that a verdict be reached.

In the case of People v. Carder, 31 Cal. App. 355, 357, 160 P. 686, 687, where a similar question was involved, in part the court said:

> "* * * It was proper for the presiding judge to admonish the jury of their duty to consult together, to listen to argument, and to endeavor earnestly to reach an agreement. * * *"

In the case of People v. Miles, 143 Cal. 636, 77 P. 666, it appears that the trial judge had strongly urged the jury to agree on a verdict. Attention is directed to some general authorities and the conclusion reached that no error was committed by the trial court. Among other things, the opinion contains the following:

> "The point is, that it was proper for the court to urge the importance of reaching a verdict, and as it intimated no opinion of its own or suggested how the verdict should go, the defendants were not prejudiced."

See, also, People v. Rhodes, 17 Cal. App. 789, 121 P. 935; People v. Cherry, 30 Cal. App. 285, 158 P. 335; People v. Bruno, 49 Cal. App. 372, 379, 193 P. 511; People v. Quon Foo, 57 Cal. App. 237, 241, 206 P. 1028.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

94 Cal. App. 682

GORDON et al. v. HARRIS. (Civ. 5407.)

District Court of Appeal, Second District, Division 1, California. Nov. 7, 1928.

1. Landlord and tenant 🔑184(1)—$5,000 retained by owner from tenant constructing building held not security, but payment of rent for latter's portion of lease; "shall."

Where contract between owner and tenant constructing building provided that $5,000 "shall be left unpaid to contractor as security of said contractor and lessee in lease herein," and that said $5,000 "shall be applied by said owner in payment of last nine months rent," with balance on tenth month, no portion of $5,000 could be looked upon as security for payment of rent which was due at time unlawful detainer action was brought against assignee of lease, but such sum was by way of payment of rent for latter portion of lease; word "shall" in form in which it was used being a positive mandatory statement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Shall.]

2. Landlord and tenant 🔑186(1)—Where receiver is appointed when tenant is in unlawful detainer, and tenant does not retake possession, he need not pay rent during receiver's possession.

When receiver is appointed at plaintiff's instance, and plaintiff recovers final judgment, in which it is held that, at time receiver was appointed, defendant tenant was in unlawful detainer, and tenant does not elect to pay rent found due, and again take possession, so that his tenancy ceased immediately on appointment of receiver, tenant could not be required to pay any part of rental during receiver's possession.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action in unlawful detainer by Morris Gordon and another against Adele Harris. From the judgment, defendant appeals. Cause remanded for amendment of judgment, and judgment, when so amended, affirmed.

Harry Lyons, of Los Angeles, for appellant.

H. B. Cornell and G. C. De Garmo, both of Los Angeles, for respondents.

YORK, J. [1] This is a suit in unlawful detainer, brought against an assignee, who holds under a third assignment of the original lessee, after failure to pay rent after service of a three-day alternative notice to pay rent or quit, the property being then held under such assignment of lease; and originally the only question raised by appellant in this case was, that a sum of $5,000 had been received by the owner of the land by way of security only, and not by way of payment of the rent for the latter portion of the period of the lease.

This case is different from the average case in this regard, in that the sum of $5,000 was not cash paid directly by the original tenant, but was a sum to be deducted from the cost of the construction of the building leased, which building was in course of construction by the original tenant, as a contractor. The phraseology of the lease as to the $5,000 is as follows:

> "It is understood and agreed that heretofore another agreement was entered into between the said parties wherein the said lessee agrees to construct and build for the said lessor a certain building on which building this lease is given, in accordance with the plans and specifications agreed between the parties hereto and which said building shall be of the total amount of forty-five thousand ($45,000.00) dollars, and in a manner as described in said agreement between the contractor and the owner, it is agreed that the sum of five thousand ($5,000.00) dollars shall be left unpaid to the contractor as security of the said contractor, the lessee in the lease herein, shall faithfully and substantially comply with the terms agreed in the said lease, and the said sum of five thousand ($5,000.00) dollars, together with the six per cent. interest, agreed in the said contract to be paid by the said owners to the said contractor, shall be applied by the said owners in payment of the last nine (9) months rent and further apply the balance for that portion of the tenth month of the last year of said tenancy, as the amount will bear."

If it were not for the words "as security" and "shall faithfully and substantially comply with the terms agreed in said lease," there would probably have been no controversy between the parties with reference to what was meant. If the $5,000 had been paid in cash by the lessee instead of paying the sum by deduction in the cost price of the building, and if this action was defended by the original lessee, the matter would be more simple than it is in its present state. However, there is a direct provision that the $5,000 to be thereafter deducted from the contract price, *shall* be applied by the owners in payment of the last nine months' rent, and further apply the balance for that portion of the tenth month of the last year of said tenancy as the remaining amount will bear, the interest of 6 per cent. also to be credited on said tenth month—this provision of the lease therefore leaves *nothing* to be applied as *security* for *any other payments whatever*. Nothing is said about any deductions for any rent due for any of the previous months' rental, and, in case of a deduction in the amount of the rent due at the time this action was brought, there would not be sufficient funds for the payment of but a small portion of the said last months specified, and nothing for application on the tenth month at all.

The trial court must have assumed that

what was meant by the lease was exactly what is stated in a definite and positive portion of said lease as to said $5,000 to wit, "that it shall be applied."

"Shall" is, in the form in which it is used, a positive, mandatory statement; therefore the determination of the trial court in reference to the matter of the $5,000 having been received and credited on account of the rental for the last months, and that therefore, under the authority of the cases hereinafter cited, no portion of the $5,000 could be looked upon as security for the payment of the rent which was due at the time this action was brought, was correct. The words "as security of the said contractor," etc., may have been inserted on the theory that, if the money was actually so applied, then the said *contractor* would be more liable to comply with the other terms of the lease. It might not apply to any one holding under assignment from him.

As quoted in Wetzler v. Patterson, 73 Cal. App. 527, 238 P. 1077:

> "'Provision is sometimes made in a lease for the payment in advance of the rents of the last or later periods of the lease, and such a provision has been held not to be a security merely for the lessee's performance of his agreements in the lease, but purely a payment of rent in advance, and therefore may be retained by the lessor though he terminates the lease for the default of the lessee as provided for in the lease.' (16 R. C. L. 931.)"

In the instant case, we have the words "security" used, and in Wetzler v. Patterson, supra, they had the words "forfeited" and "reserved" to complicate the meaning—but the rule above stated from Ruling Case Law and quoted by the court in the opinion in Wetzler v. Patterson referred to "security." We have attempted to adopt the reasoning used by the court in that case in interpreting the lease in the case now before this court.

[2] At the time of the oral argument, it was suggested to the court for the first time that the rule laid down in the case of Telegraph Avenue Corporation v. Raentsch (Cal. Sup.) 269 P. 1109, should also be considered by this court, and it was practically conceded by respondent, upon the oral argument, that this decision would be determinative of the question as to whether any rents could be charged against the tenant after the time the receiver took possession of the property. The case cited does not seem to us to be as unusual a determination as the attorneys on both sides seemed to feel in their argument, but rather an ordinary common sense rule that, when a receiver is in possession collecting the rents, having been appointed at the instance of the plaintiff, and the plaintiff recovering final judgment in which it is held that, at the time the receiver was appointed, the defendant was in unlawful detainer, that thereafter, if the defendant does not pay up all of the rents found due, and the ouster, which took place when the receiver was appointed, becomes a permanent ouster, that is, that the tenant does not elect to pay the amount of rent found due, and thus again take possession of the property, that his tenancy had ceased immediately upon the appointment of the receiver, then, under such circumstances, all rents received by the receiver, as and for rents during his occupancy, are then to be accounted for, and the net proceeds paid to the owner of the property, and the tenant, having been found in unlawful possession, cannot, of course, be found to be entitled to any part or portion of such rents, and therefore could not be required to pay any part or portion of the rental during the possession of such receiver.

The trial court is ordered to amend its judgment by deducting from the judgment all of that part of the rents which accrued after the date the receiver took possession, November 23, 1925, and the cause is remanded to the trial court for that purpose. It is further ordered that the judgment, when so amended, be affirmed.

I concur: CONREY, P. J.

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94 Cal. App. 663

FARMER v. MOUNTAIN LAKE CLUB.

(Civ. 4942.)

District Court of Appeal, Second District, Division 2, California. Nov. 5, 1928.

Contracts ⚷329—Under contract to pay in installments for services and expenditures, suit to recover amount due, brought before final installment, held not premature.

Where contract acknowledged rendition of services and expenditures of a value of $1,000, which corporation agreed to pay at rate of $50 per week for six weeks, and thereafter $100 per week until fully paid, *held* that, as each installment fell due, it created a cause of action and action to recover amount of such installments, when $600 was due, was not premature.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by M. E. Farmer against the Mountain Lake Club, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

Ira E. Quimby and Irving T. Hagan, in pro. per.

Frank H. Jaques, of Long Beach, for respondent.

CRAIG, J. The respondent instituted an action upon a contract in writing which was made a part of the complaint, and to which pleading a demurrer was interposed. The demurrer was overruled, and, upon the failure of appellant to answer, judgment for $600 with interest and costs was entered by default. The defendant appeals from the judgment.

The contract in question acknowledges the rendition of certain services and expenditures of moneys for the corporation, of a value of $1,000, which the latter therein agreed to pay as follows, to wit:

> "Fifty dollars ($50.00) per week beginning on March 10th, 1924, until six payments have been made, and the balance at the rate of one hundred dollars ($100.00) per week until fully paid."

The demurrer of the defendant was general, and it is here contended that the complaint was filed when but $600 had become due and payable, and that suit was premature, since the contract provided for payment of a fixed sum of $1,000 as a single consideration for said services and expenditures. Respondent contends that each payment of $50 and $100 constituted the basis of a separate cause of action.

While the contract recited a total consideration of $1,000, it was payable in weekly installments, and contained no provision that the whole amount should become due and payable upon a failure to pay any one installment. The plaintiff commenced his suit after the expiration of the ninth week, and prayed judgment for $600, together with interest at the rate of 7 per cent. upon each such installment from the date that it became due under the provisions of the contract, which the trial court allowed. Appellant cites no authority in support of its contention, and we fail to see any difference in this respect between the contract in suit and other installment contracts or promissory notes. The respondent could not have recovered more than the amount aggregating the nine installments, but, as each installment fell due, it created a cause of action, and a suit therefor would not be premature. Compressed Air Machinery Co. v. West San Pedro Land & Water Co., 9 Cal. App. 361, 99 P. 531.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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94 Cal. App. 641

Ex parte BATHURST. (Cr. 1724.)

District Court of Appeal, Second District, Division 2, California. Nov. 1, 1928.

1. Criminal law 🔑260(4)—Municipal court lost all jurisdiction after notice of appeal from judgment of conviction therein (Pen. Code, § 1468, as amended by St. 1925, p. 950, § 3).

Where defendant, after conviction in municipal court on a charge of petty theft, gave notice of appeal, municipal court lost all jurisdiction, without regard to whether appeal was perfected by compliance with Pen. Code, § 1468, as amended by St. 1925, p. 950, § 3, since, after appeal is taken, jurisdiction over cause is vested in appellate court, which is the only forum in which to determine whether the appeal was effective.

2. Criminal law 🔑258(4)—Trial court had no authority after judgment to grant motion for new trial (Pen. Code, § 1450).

Municipal court, after judgment of conviction therein for petty theft, had no authority under Pen. Code, § 1450, to grant motion for a new trial, irrespective of fact that appeal had been taken from judgment prior to presentation of motion.

Original application for writ of habeas corpus by Benjamin Elconin on behalf of Diana Bathurst. Writ granted.

Benjamin Elconin, of Los Angeles, for petitioner.

E. J. Lickley, City Prosecutor, and Joe W. Matherly and F. W. Fellows, Deputy City Prosecutors, all of Los Angeles, for respondent.

THOMPSON, J. This is an application of Benjamin Elconin on behalf of Diana Bathurst for the writ of habeas corpus. From the petition, the return thereto, and the findings of this court upon evidence taken, we may state the following situation: Diana Bathurst was tried upon a charge of petty theft before the municipal court of Los Angeles on July 9, 1928, and there found guilty. The trial court on July 11 sentenced the defendant to 180 days in the city jail, suspending the sentence as to 150 days thereof. The petitioner contends that he presented a motion for a new trial prior to pronouncement of sentence, but from the evidence adduced we have found that the motion for a new trial was not presented until after judgment. Some time subsequent to the pronouncement of sentence, and in the afternoon of the same day, counsel served upon the city prosecutor a written motion for a new trial, which bears no filing mark, and which appears to have been called to the attention of the court on July 13, 1928, at which date it was set for hearing for July 16, 1928. After argument of the motion, it was granted, and the cause was transferred to another division of the court for retrial. When the cause was called for trial on August 15, 1928, the trial judge set aside the order granting the motion for a new trial, on the ground that the motion had not been made until after judgment was pronounced and entered, and ordered the defendant committed. This outlines the facts, except that on July 11, when the defendant was sentenced, her counsel gave oral notice of appeal, bond for the release of defendant pending the appeal was fixed by the court and furnished in the sum of $1,000. No other steps were taken with respect to the appeal. It is conceded by counsel under the authority of Lillywhite v. Superior Court, 80 Cal. App. 533, 251 P. 945, that the oral notice of appeal was sufficient, and therefore we can pass directly to the main question.

[1] The petitioner asserts that the municipal court lost all jurisdiction over the proceeding when the notice of appeal was given, while the respondent points to section 1468 of the Penal Code, as amended by St. 1925, p. 950, § 3, and argues that, by reason of the failure of petitioner to comply with the provisions thereof the appeal was never perfected. Section 1468, Penal Code, reads as follows:

> "The appeal to the superior court from a judgment of a municipal court, or from the judgment of a justice's or police court, shall be heard upon the statement of the case settled by the judge of the municipal court or by the justice or police judge. The statement must contain the grounds upon which the party intends to rely upon the appeal, and so much of the evidence as may be necessary to explain the grounds. The statement must be prepared by the appellant and filed with the court, and a copy served upon the opposite party, within five days after the filing of the notice of appeal. The respondent may, within five days after the service of the copy and the filing of the proposed statement, file amendments thereto, a copy of which must be served upon the appellant. Within five days from the time of the filing and serving of the amendments or if no amendments be filed then within ten days from the time of the filing of the statement, as herein provided, the court must settle the same, and if in the opinion of the court the statement is incorrect or insufficient he shall correct it. If no statement is filed and served as herein provided, the appeal is ineffectual for any purpose, and shall be deemed dismissed, and the judgment or order appealed from shall be enforced as if no appeal had been taken."

Since the amendment of the section to read as quoted above in 1925, it has been analyzed at length and declared to provide for "the equivalent of a bill of exceptions, with the difference, at least, that the statement must contain 'the grounds upon which the party [appealing] intends to rely upon the appeal.'" Garrett v. Superior Court, 79 Cal. App. 273, 249 P. 871. The Garrett Case is also authority for the statement that section 1246 of the Penal Code (in effect at the time of this appeal) is applicable to appeals from the municipal court to the superior court, and that by reason of its terms it is the duty of the clerk of the municipal court to furnish the superior court with the "papers which are the equivalent of the 'judgment-roll alone.'"

We also direct attention to the opening words of the section as follows: "The appeal to the superior court * * *, shall be heard upon a statement of the case," etc. We have had occasion heretofore to note a distinction between a method devised for the taking of an appeal and the manner provided for preparing the record upon which the appeal is to be heard. Not only is mention made of the fact that section 1246 of the Penal Code is ineffective until after the appeal is taken, in the Garrett Case, but also in passing upon a motion to dismiss an appeal to this court in People v. McClellan (Cal. App.) 263 P. 841, we held that section 1247 of the Penal Code requiring the appellant to "present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which" he relies, relates to the time and manner of making up the record and not to the taking of the appeal. It is to be noted that the concluding sentence of the first part of this section is substantially the same as those of the section under consideration. It reads:

> "If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken."

As a matter of pure logic, it must follow that, if the appeal is taken, jurisdiction over the cause is vested in the appellate tribunal. As a matter of sound procedure, it would seem that the appellate tribunal is the only forum in which to determine the appeal to be ineffective. To say that the trial court should have the right to determine whether an appeal from its judgment were effectual would certainly lead to a strange inconsistency and be entirely at variance with a just conception of the right of appeal. In line with this reasoning, we find a statement in Parkside Realty Co. v. MacDonald, 167 Cal. 342–346, 139 P. 805, 807, as follows:

> "The appeal was, of course, in this court from the moment it was perfected, *although the record on appeal* was not filed herein until later. The place then to assail the purported appeal as being ineffectual for any purpose by reason of want of authority of the attorney to take an appeal on behalf of Mrs. Black was this court, and as long as no attack was made here on the same, by motion to dismiss or otherwise, the lower court had no right to regard it otherwise than as a valid appeal, duly authorized by the purported appellant." (Italics ours.)

We also find the same principle announced in the case of In re Howell, 29 Cal. App. 668, 157 P. 553, wherein the court was considering the effect of an appeal prior to the amendment of section 1468. It is there said:

> "The filing of the notice of appeal and furnishing the required bail in an amount as fixed by the Justice had the effect of ousting the jurisdiction of the Justice's Court to act further, and removed the cause to the Superior Court. This, notwithstanding that it might follow that the appeal should be dismissed for lack of a sufficient record upon which to present any available question. Upon this application, however, that question is of no materiality. If the defendant's case was by the appeal taken trans-

ferred to the Superior Court, the Justice of the Peace could not lawfully issue a jail commitment until some order had been made by the Superior Court disposing of the appeal."

The rule is also consonant with the declaration that "the perfection of an appeal divests the Superior Court of jurisdiction as to all matters embraced in the judgment or order appealed from." Eisenberg v. Superior Court, 193 Cal. 575, 226 P. 617. We have not overlooked the force of the language of the section that for failure to file the statement the appeal shall "be deemed dismissed," but, in view of the fact that it would have been just as easy for the Legislature to have provided that the giving of the statement should have been one of the steps in taking the appeal as one of the steps in perfecting the record, we can but conclude that the language used was employed for the purpose of indicating that it should be mandatory upon the appellate tribunal to dismiss the appeal in the event the record was not prepared and perfected, in accordance with the provisions of the section. It has been held many times that substantially the same language found in section 1247 of the Penal Code was mandatory and the appellate tribunal was required to dismiss the appeal for failure to present the statement of the grounds of appeal. Reference may be had to People v. McClellan, supra, for a partial list of these authorities.

It must be obvious from the observations so far made that an appeal once perfected is pending in the appellate tribunal until dismissed by that court. The defendant in the action in the municipal court having given bond to stay the execution of the judgment pending the appeal is therefore entitled to her liberty until some further step is taken.

[2] This would dispose of the present proceeding were it not for the fact that counsel do not agree upon the effect of the order granting the motion for a new trial, which motion, as we have noted, was not filed until after judgment was pronounced; and, inasmuch as that question will probably be argued in subsequent steps to be taken, we ought to announce our opinion thereon. Section 1450 of the Penal Code provides that the defendant may move for a new trial "at any time before judgment." This language is plain and unambiguous. It would seem obvious that once the court has pronounced judgment the time has gone within which the motion may be presented and as completely so as though a motion had been made and denied. It was held in People v. Walker, 142 Cal. 90, 75 P. 658, where a motion was made before judgment and denied and thereafter a second motion was made, that the trial court was right in refusing to entertain the second motion because "the right to move for a new trial had * * * been exercised and exhausted." There was some question concerning when the motion for a new trial was presented in the case of People v. Long, 7 Cal. App. 27, 93 P. 387, whether before probation was granted or after probation was revoked and judgment of imprisonment pronounced, and the court said:

> "If the showing made by appellant had not been contradicted and his motion granted, it would have availed him nothing. The application for a new trial must be made before judgment, and the order granting or denying the same must be immediately entered by the clerk in the minutes."

This quoted language is used by the court with respect to section 1182 of the Penal Code, which for our present purposes is the same as section 1450. We have no doubt that the trial court had no authority to grant the motion for the new trial by reason of the fact that it came too late, and that, irrespective of the fact that an appeal had been taken from the judgment prior to the presentation of the motion.

Diana Bathurst is ordered discharged from custody.

We concur: WORKS, P. J.; CRAIG, J.

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94 Cal. App. 664

SHORT v. SUPERIOR COURT OF STATE OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY. (Civ. 6157.)★

District Court of Appeal, Second District, Division 2, California. Nov. 5, 1928.

Rehearing Denied Dec. 5, 1928. Hearing Denied by Supreme Court Dec. 31, 1928.

1. Divorce ⟹177—Judgment denying divorce held appealable (Code Civ. Proc. § 963, subd. 1).

Judgment denying plaintiff a divorce, which was plain, ordinary and final judgment, under Code Civ. Proc. § 963, subd. 1, *held* appealable.

2. Mandamus ⟹31—Mandamus held not to lie to compel court denying divorce to proceed with trial of all issues (Code Civ. Proc. § 1085).

Writ of mandate should not issue, under Code Civ. Proc. § 1085, to compel court which had denied petitioner divorce to proceed to trial of all issues in the action; only duty of court being to try action and to render judgment.

Application for writ of mandate by Walter S. Short, to be directed to the Superior Court of Los Angeles County to require respondent to proceed with trial of a certain cause. Writ denied.

Shoemaker & Sammons, of Los Angeles, for petitioner.

Clarke & Bowker, of Los Angeles, for respondent.

WORKS, P. J. Walter S. Short, the petitioner in the present proceeding, filed in respondent court his complaint in an action

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★Rehearing denied. Hearing denied by Supreme Court.

against Helen W. Short, his wife. The action was commenced for the purpose of procuring a divorce. The wife interposed an answer in which she alleged that an earlier litigation had occurred between her and her husband in a court of competent jurisdiction in the state of Washington, in which litigation a judgment had been rendered, and that the judgment had become final. It was also alleged in the answer that this foreign judgment had required, among other things, the making of certain payments by the husband to the wife, that he had failed and neglected to make the major portion of the payments and that he was in contempt of the foreign court because of such failure and neglect. The answer prayed that the action in respondent court be abated until the husband should purge himself of the contempt.

Upon this state of the pleadings the action for divorce came on for trial in respondent court. The judgment of the Washington court was received in evidence. Respondent court then gave the wife leave to file an amended answer "to conform to the proof." This pleading was filed, and it prayed that the foreign judgment, because of certain matters adjudged in it which need not be mentioned here, be determined to be res adjudicata of all the matters pleaded by the husband in his complaint for divorce. The husband had objected to the introduction in evidence of the Washington judgment. He also objected to the granting of leave to file an amended answer. These objections were both overruled. The husband also insisted that respondent court hear evidence under the allegations presented by his complaint for divorce, but the court declined to hear further evidence in the cause, and it was ordered submitted for decision. Thereafter respondent court made its findings of fact and rendered its judgment. The judgment was to the effect that plaintiff be denied a divorce and that he take nothing by his action. The plaintiff, the husband, then petitioned this court, upon notice, for a peremptory writ of mandate to require respondent court "to proceed to trial with said cause of action [for divorce] upon the merits of all the issues raised by the pleadings in said action." No alternative writ was ever issued.

[1] Petitioner contends that he has no right of appeal from the judgment rendered by respondent court, but this cannot be true. The judgment was a plain, ordinary, final judgment, and the right to appeal from it is secured by the provisions of subdivision 1 of section 963 of the Code of Civil Procedure. As will appear from what is said below, this point is of interest only because, even at this late day, we might possibly, without deciding whether we could, order a writ of review under the allegations of the petition now before us if there were no right of appeal.

It is further insisted by petitioner that, if he has a right of appeal, the remedy is neither speedy nor adequate. For the reasons to be stated in the next paragraph of this opinion, this question does not arise in the proceeding.

[2] This is not a proper case for the writ of mandate. Except for a certain special purpose which is not presented here, the writ will issue only "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." Code Civ. Proc. § 1085. The law enjoined upon respondent court no duty to receive any particular evidence in petitioner's suit for divorce. The only duty of the court was to try the action and to render judgment. This it has done. If any errors have been committed during the progress of the trial, they cannot be corrected by means of the writ of mandate. This rule is too well settled to require the citation of authority in its support.

A writ of mandate is denied.

We concur: CRAIG, J.; THOMPSON, J.

94 Cal. App. 680

Ex parte CORDISH et al. (Cr. 1472.)★

District Court of Appeal, First District, Division 2, California. Nov. 7, 1928.

Rehearing Denied Dec. 6, 1928. Hearing Denied by Supreme Court Dec. 24, 1928.

1. Habeas corpus 🔑92(1)—Petitioners for habeas corpus, conceding in brief that complaint attempted to charge petitioners with violation of Corporate Securities Act, could not attack complaint (Corporate Securities Act, § 14).

Where petitioners for habeas corpus conceded in their brief that complaint on file in police court was attempt to charge petitioners with violation of Corporate Securities Act, § 14 (Deering's Gen. Laws, Act 3814) complaint may not be attacked in proceedings to secure release from custody of sheriff to whom petitioners were committed by police court.

2. Habeas corpus 🔑92(1)—Court, not having evidence taken in police court properly before it, on application for habeas corpus, could not consult evidence (Pen. Code, § 1484).

Where evidence taken in police court was not properly before District Court of Appeal on application for writ of habeas corpus to secure release from custody of sheriff, appellate court could not consult evidence, under Pen. Code, § 1484.

3. Habeas corpus 🔑92(1)—Court, on application for habeas corpus, cannot weigh evidence before committing magistrate; such function being for jury.

On application for writ of habeas corpus to secure release from custody of sheriff to whom petitioners were committed by police court, attack on evidence taken before committing magistrate does not authorize District Court of

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★Rehearing denied. Hearing denied by Supreme Court.

Appeal to weigh the evidence, but such function will be exercised by jury at proper time.

4. Habeas corpus 🔑97—Court, on application for habeas corpus, must determine whether petitioners are held without reasonable or probable cause, and, if with cause, petition should be denied (Pen. Code, § 1487, subd. 7).

On application before District Court of Appeal for writ of habeas corpus to secure release from custody of sheriff, power of appellate court is to ascertain whether petitioners were held to answer without reasonable or probable cause under Pen. Code, § 1487, subd. 7, and, if there was either reasonable or probable cause, petition should be denied.

5. Habeas corpus 🔑85(1)—Court, on application for habeas corpus, assumes prosecution did not produce all its evidence and that defendants producing no evidence had none to produce.

On application for writ of habeas corpus to secure release from custody of sheriff to whom petitioners were committed by police court, appellate court cannot assume that prosecution produced all of its evidence, and must assume that defendants had none to produce where they produced no evidence.

6. Habeas corpus 🔑92(1)—Court on application for habeas corpus cannot express opinion on evidence, weight of which is for jury.

On application for habeas corpus, District Court of Appeal, if knowing that all of plaintiff's evidence in case had been produced, could not properly express opinion on evidence, since jury must pass on weight of evidence.

Application by Nat Cordish and another for a writ of habeas corpus, prayed to be directed to the Sheriff of the City and County of San Francisco, to secure the release from custody on charges of violating the Corporation Securities Act, § 14. Writ denied.

Phillips & Kendall, of Los Angeles, and G. C. Ringole, of San Francisco, for petitioners.

Matthew Brady, Dist. Atty., and August L. Fourtner, Asst. Dist. Atty., of San Francisco, for respondent.

Louis Ferrari, of San Francisco, appearing specially for district attorney of San Francisco.

Orrick, Palmer & Dahlquist, of San Francisco, amici curiæ, for Investment Bankers' Association, California group.

Heller, Ehrman, White & McAuliffe, of San Francisco, and Loeb, Walker & Loeb, of Los Angeles, amici curiæ, for stock exchanges.

Elliott M. Epsteen, of San Francisco, and Roy E. Nimmo, of Los Angeles, amici curiæ, for Better Business Bureau of San Francisco and Los Angeles.

STURTEVANT, J. This is an application for a writ of habeas corpus. From the sheriff's return it appears that that officer held the petitioners under an order of the police court of San Francisco holding the petitioners to answer upon a charge of felony and committing the petitioners to the custody of the sheriff until they be legally discharged. To the sheriff's return the petitioners did not interpose any answer of any kind or nature. Pen. Code, § 1484.

[1-4] In their brief the petitioners concede that the complaint on file in the police court was an attempt "to charge said petitioners with a violation of section 14 of the Corporate Securities Act." 1 Deering's Gen. Laws, 1399, 1407. If so, the complaint may not be attacked in this proceeding. Ex parte Ruef, 150 Cal. 665, 89 P. 605. They make a meticulous attack on the evidence taken in the police court and contend that the evidence was insufficient to support the order holding the petitioners to answer. On the record as made, the evidence taken in the police court is not properly before this court, and we are not at liberty to consult it. Pen. Code, § 1484. If, however, we pick up that evidence and examine it, we are unable to grant the application of the petitioners. Bearing in mind that this is an application for a writ of habeas corpus, an attack on the evidence taken before the committing magistrate does not authorize this court to weigh the evidence. That function will be exercised by a jury at the proper time. In re Leonardino, 9 Cal. App. 690, 693, 100 P. 708. In this proceeding the power of this court is to ascertain whether the petitioners were held to answer "without reasonable or probable cause." Pen. Code, § 1487, subd. 7. If there was either reasonable or probable cause, the petition should be denied.

[5, 6] There are many reasons why it is unnecessary, and, indeed, improper, to recite and comment on the evidence taken before the committing magistrate. As stated above, our power is not to weigh that evidence. Furthermore, in this case, as in most cases, the prosecution produced some evidence, but we may not assume that it produced all of its evidence, and the defendants produced no evidence, and we may not assume that they had none to produce. Finally, if we knew that all of the plaintiff's evidence in the case had been produced, it would be improper for us to express our opinions when, as stated above, a jury will hereafter pass on the weight of the evidence. It will suffice for us to state that we have examined the evidence, and that we find there was reasonable and probable cause for holding the petitioners to answer before the superior court.

The writ is denied, and the petitioners are remanded to the custody of the sheriff.

We concur: KOFORD, P. J.; NOURSE, J.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

94 Cal. App. 621

CAMPION v. CONTINENTAL CASUALTY CO. (Civ. 6458.)★

District Court of Appeal, First District, Division 1, California. Nov. 1, 1928.

Rehearing Denied Dec. 1, 1928. Hearing Denied by Supreme Court Dec. 31, 1928.

1. Appeal and error ⇨996—Trial court's decision, as between two opposite inferences reasonably authorized by facts, is binding on appellate court.

Where the facts established may reasonably authorize one of two opposite inferences, the trial court's decision adopting one and rejecting the other is binding on the appellate court.

2. Appeal and error ⇨931(1)—Trial court's findings must be liberally construed to uphold judgment.

The findings of the trial court are to be liberally construed so as to uphold, rather than defeat, its judgment.

3. Insurance ⇨665(3)—Evidence held to warrant inference that insured's scoliosis or spinal deformity did not exist when she signed application for indemnity insurance (Civ. Code, §§ 2577, 2580, 2610).

Insured's testimony that she did not know of scoliosis or spinal deformity when she applied for indemnity insurance, and testimony of physician who knew her intimately before application that he did not know of such deformity until he examined her after accident, *held* to warrant inference that such condition did not exist when she signed application stating that she was not crippled, maimed, nor suffering from any mental or bodily defect, and hence made no false representations and violated no warranty within Civ. Code, §§ 2580, 2610, in view of section 2577, though insurer's physicians testified that scoliosis was obvious, old, and definite.

4. Appeal and error ⇨1011(1)—Trial court's finding on conflicting evidence that spinal deformity did not contribute to insured's disability is conclusive.

Trial court's finding on physicians' conflicting testimony, in action on accident policy, that plaintiff's disability was caused solely by accident, and not contributed to by scoliosis or spinal deformity existing when she signed application for insurance, is conclusive on question of preponderance of evidence.

5. Insurance ⇨665(5)—Evidence held to show that insured was under physician's regular care as required by accident policy to recover for full loss of time.

Qualified physician's testimony, in action on accident policy, that insured was under his care regularly since about a month after accident, received treatments by him and masseur in his employ, and was examined by him within week before trial, sufficiently showed that insured was under regular care of legally qualified physician, as required by policy to recover for full loss of time.

6. Insurance ⇨665(5)—Insured's testimony that she did not realize she would be sick for any length of time held not to preclude finding that she was directly disabled as result of accident.

Insured's testimony that she did not realize when hurt that she was going to be sick for any length of time, but expected to be able to return to work, *held* not to preclude finding that she was directly disabled as result of accident within policy sued on.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by Nellie Cecilia Campion against the Continental Casualty Company, a corporation. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

J. E. McCurdy, of San Mateo, for appellant.

C. J. Creegan, of San Mateo, and Jered A. Maguire, of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This is an action to recover certain monthly indemnities alleged to be due plaintiff from defendant corporation on an insurance contract.

On July 19, 1922, defendant issued to plaintiff the insurance policy in question, and on November 4, 1926, plaintiff sustained injuries which resulted in her total disability. Some two months after the accident causing the injury plaintiff made her first claim for compensation. After an investigation the company commenced paying the monthly indemnity called for in the contract of insurance. Four such payments were made, after which defendant company refused further payment, claiming that plaintiff had a very pronounced scoliosis (curvature of the spine), which scoliosis contributed to the disability of plaintiff. The court found in favor of plaintiff, and rendered her judgment in the amount of $130 per month from March 17, 1927, to the date of the judgment, with interest at 7 per cent. per annum until paid. Motion for new trial was made and denied, and defendant has appealed from the judgment and the order denying a new trial.

Appellant urges that respondent made representations in her application for the insurance contract which were false and consequently void the policy; failed to establish her case by a preponderance of the evidence; and the findings of fact are not supported by the evidence. The false representation by respondent in her application for insurance, which appellant claims voids the policy, is:

> "I have not, nor am I now suffering from * * * any chronic or periodic mental or physical ailment or disease, nor am I crippled or maimed, nor have I any defect in hearing, vision, mind or body. No exceptions."

★Rehearing denied. Hearing denied by Supreme Court.

As proof of her statement being false appellant directs us to the testimony of the doctors—five in number—who testified at the trial, who said that respondent did have a pronounced scoliosis. None of them, however, examined her until after the accident, over four years subsequent to the date of her application for a policy, when her statement claimed to be false was made.

In support of its contention that this asserted false statement voids the policy, appellant has cited us to section 2580 of the Civil Code, "If a representation is false in a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time when the representation becomes false," and section 2610 of the same code, "The violation of a material warranty, or other material provision of a policy, on the part of either party thereto, entitles the other to rescind," and to authorities holding the general rule to be that warranties as to health of the insured will be strictly construed, and, if false in any particular, the policy will be voided, regardless of the good faith of the assured.

It is not necessary to review the authorities cited, as the question presented involves not so much the application of legal principles as it does the determination of a question of fact.

It is conceded by appellant that no witnesses, not even the experts produced by it, attempted to say that the scoliosis existed on July 19, 1922, the date of respondent's application for a policy; that such experts could not so testify "for the simple reason that not a single one of the witnesses, least of all the experts produced by appellant, could truthfully testify to such a fact, they not having known respondent or examined her at the time in question." Appellant directs us to the testimony of Dr. Warren, that "she was suffering with an extensive deformity of the spinal column"; and Dr. Ryan, "There was clinically an old scoliosis." Continuing, the doctor testified that lots of us have scoliosis of some kind; some of them are congenital; most scoliosis is acquired by defective posture at a desk; "you can have a scoliosis and you can go on through life quite a way, and the muscles and general bodily activity keep away the symptoms, and compensate for that faulty posture, but when we get towards middle life, or a little beyond and those muscles begin to break down, we begin to get symptoms, begin to get backache; so I would say, with a scoliosis of any degree, that later in life or towards middle life, we will begin to get symptoms." Appellant also directs our attention to the testimony of Dr. Fleming, that in his opinion the scoliosis is not the cause of the present disability inasmuch as she worked steadily for eight years at the arduous work as a nurse without complaints or symptoms referable to her back.

[1, 2] From this testimony, as against the testimony of respondent that at the time she made her application for the policy she did not say anything about having a spinal deformity as she did not know she had one, and the testimony of respondent's witness Dr. Warren, who had known respondent somewhat intimately for eight or nine years, she having been employed by him at different times as nurse, and who testified he did not know that she had a deformity of the spine until his examination of her after the accident, appellant asks us to draw the inference that such scoliosis existed at the time of the injury complained of, contrary to the inference drawn by the trial court. Where the facts established may reasonably authorize one of two opposite inferences and the trial court has adopted one and rejected the other, its decision is binding upon the appellate court, the same as where the trial court decides upon the weight of contradictory evidence. MacDermot v. Hayes, 175 Cal. 95, 170 P. 616. The findings of the trial court are to be liberally construed so as to uphold rather than to defeat its judgment. It is the province of the trial court to make any inference of fact from the evidence or from the facts found by it, and the appellate court will not draw a different inference from that drawn by the trial court to defeat its judgment. Paine v. San Bernardino, etc., Co., 143 Cal. 654, 77 P. 659; Breeze v. Brooks, 97 Cal. 77, 31 P. 742, 22 L. R. A. 257; People's Homes Sav. Bank v. Rickard, 139 Cal. 285, 73 P. 858.

[3] The words descriptive of the scoliosis such as "obvious," "old," and "definite" are relative terms and too indefinite in point of time to support the contention that a condition found to exist subsequent to November 4, 1926, existed on July 19, 1922. Diamond v. Weyerhaeuser, 178 Cal. 540, 543, 174 P. 38. Furthermore, if respondent did not know of the existence of this scoliosis or deformity when she applied for indemnity insurance and such condition was not noticeable to the experienced and practiced eye of a physician who had known her intimately, the court could well draw the inference that such condition did not exist at the time respondent signed the application containing the statement that she was not crippled or maimed, nor suffering from any defects in mind or body. "The completion of the contract of insurance is the time to which a representation must be presumed to refer." Civ. Code, § 2577. Here the contract was completed and the written evidence of it delivered on July 19, 1922.

[4] Appellant's next contention is that respondent failed to establish her case by a preponderance of the evidence—that the evidence does not establish the fact that the disability was caused solely by the accident, but, on the contrary, shows that the scoliosis contributed to the disability. In support of

this contention appellant cites us to the testimony of Drs. Ryan and Catton, called as witnesses by it; the former testifying that the scoliosis found to exist contributed definitely to respondent's disability, and the latter stating that the scoliosis, together with other abnormalities found to be existing in respondent, contributed to her present disability. Dr. Warren, appellant's expert, however, seems to have entertained a contrary opinion; he testified:

> "Well, at the time of the first examination when I found the curvature and thought that she had a dislocation or injury, I thought that possibly it might have had some aggravation, that is, the curvature may have aggravated some of her symptoms or prolonged her trouble, but afterwards we found the trouble was not in the sacro-iliac joint at all and our conjectures in case were wrong. Q. When did you arrive at this latter decision? A. When I saw the X-ray plates made by Dr. O'Neill."

On this conflict the finding of the trial court is conclusive on the question of preponderance of evidence. Still v. San Francisco & Northwestern Ry. Co., 154 Cal. 559, 564, 98 P. 672, 20 L. R. A. (N. S.) 322, 129 Am. St. Rep. 177.

[5] Under appellant's last contention that the findings of fact are not supported by the evidence, it complains of the following findings in this respect: (a) That plaintiff has been under the care of a legally qualified physician or surgeon; (b) that plaintiff has been directly disabled as the result of the accident; and (c) that it is not true that plaintiff and cross-defendant, during the month of December, 1926, and January, February, and March, 1927, or at any other time, was suffering from a disability caused by a preexisting spinal deformity. This last objection has already been discussed. As to the other objections there is no merit in appellant's contentions. As to the first, it may be said that Dr. Markel, whose qualifications were admitted, testified that Miss Campion was under his care since December 3, 1926, and has been under his care regularly; that he straightened her back and ordered a surgical corset for her, which she wore about three weeks, but as she was not relieved he made a plaster of paris jacket for her which she has worn ever since; that aside from his personal treatments she had quite a number of physiotherapy treatments in his office given by a masseur in his employ after an examination given her by him before the treatments; that he examined her within a week of the trial. This sufficiently complies with the clause in the policy requiring that in order to recover for the full loss of time the insured must be under the regular care of a legally qualified physician or surgeon.

[6] In support of the remaining objection that the evidence does not support the finding that plaintiff has been directly disabled as the result of the accident, appellant directs our attention to the following testimony of plaintiff as establishing its contention:

> "When I was hurt I did not realize I was going to be sick for any length of time. I expected to be able to return to my work. It was never my intention to draw on my insurance policy, or ask the company to help me unless it was absolutely necessary."

This statement that she did not realize she was going to be sick for any length of time does not alter the actual situation. The testimony shows that she was directly disabled; that she immediately suffered nausea, sleeplessness; and that severe pain followed her fall and injury. Her belief that her condition would improve and that she could shortly return to work was not justified; she unfortunately continued to be so disabled.

The judgment and order are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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94 Cal. App. 652

CITY OF NORTH SACRAMENTO v. IRWIN, City Clerk. (Civ. 3688.)★

District Court of Appeal, Third District, California. Nov. 1, 1928.

Rehearing Denied Dec. 1, 1928.

Mandamus ⚷73(1)—Ordinance extending statutory time for payment of municipal bonds being invalid, city clerk cannot be compelled to sign them (St. 1901, p. 27, § 5, as amended by St. 1913, p. 30).

Ordinance enlarging by one year time fixed by St. 1901, p. 27, § 5, as amended by St. 1913, p. 30, for payment of municipal bonds and interest, being invalid, council was without authority to issue bonds, and city clerk was justified in refusing to sign them, and cannot be compelled to do so by writ of mandate.

Original application by the City of North Sacramento for a writ of mandate to compel W. O. Irwin, as city clerk, to countersign municipal bonds. Peremptory mandate denied.

Chas. L. Gilmore, of Sacramento, for petitioner.

W. O. Irwin, pro se.

FINCH, P. J. This is an original application for a writ of mandate to compel the respondent, as city clerk, to countersign municipal bonds in the sum of $15,000, alleged to have been duly authorized by the voters of the petitioner at a special election. The ordinance calling the election recites that:

> "It is proposed to incur an indebtedness against the city of North Sacramento in the sum

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★For opinion on rehearing, see 272 P. 767.

of $15,000 for the construction and completion of the outfall sewer pipe line over and across the American river."

Section 2 of the ordinance provides:

> "The term of years the proposed bonds for said improvements are to run shall be as follows: One-tenth part of the whole amount of the principal of said indebtedness created under the said proposition shall be paid each and every year, that is to say: $1,500 of the principal of said bonds shall mature on the 1st day of January of each year beginning with the 1st day of January, 1931, to and including the 1st day of January, 1940."

Section 3 provides:

> "The said bonds and each of them shall bear interest at the rate of four and three-fourths (4¾) per cent. per annum, and said interest shall be due and payable on January 1st and July 1st of each year: Provided, however, that the first interest date shall be January 1st, 1930."

The ordinance directing the issuance of the bonds contains provisions to the same effect as those quoted. The proceedings for incurring the indebtedness were taken under the act of 1901. Stats. 1901, p. 27. Section 5 of that act, as amended in 1913 (Stats. 1913, p. 30) provides:

> "A part to be determined by the legislative body of the municipality, which shall be not less than one-fortieth part of the whole amount of such indebtedness, shall be paid each and every year on a day and date, and at a place or places to be fixed by the legislative body of the municipality issuing the bonds and designated in such bonds, together with interest on all sums unpaid at such date. * * * The bonds * * * shall be payable on the day and at the place or places fixed in such bonds, and with interest at the rate specified in the bonds, which rate shall not be in excess of six per cent. per annum, and shall be payable semiannually."

Adapting the language of the opinion in McAndrew v. Borough of Dunmore, 245 Pa. 101, 91 A. 237, there was no authority in the city council, in disregard of the plain requirements of the statute, to provide that no interest shall be paid prior to January 1, 1930, or that no part of the principal shall be paid prior to January 1, 1931. The departure from the requirements of the statute is substantial and material. If the time of payment fixed by the statute may be enlarged by one year by the ordinance calling the election, it may be extended any number of years, in the discretion of the council. Since the ordinance fails to comply with the requirements of the statute, the council is without authority to issue the bonds. The bonds being invalid, the respondent was justified in refusing to sign them. Hollywood Union High School District v. Keyes, 12 Cal. App. 172, 107 P. 129. See, also, City of San Diego v. Potter, 153 Cal. 288, 296, 95 P. 146; Skinner v. City of Santa Rosa, 107 Cal. 464, 470, 40 P. 742, 29 L. R. A. 512; Norton v. Dyersburg, 127 U. S. 160, 8 S. Ct. 1111, 32 L. Ed. 85; Barnum v. Okolona, 148 U. S. 393, 13 S. Ct. 638, 37 L. Ed. 495; National Bank of Commerce v. Town of Granada (C. C.) 48 F. 278; 18 Cal. Jur. 1060.

Peremptory mandate denied.

We concur: PLUMMER, J.; HART, J.

94 Cal. App. 703

MAY v. FARRELL et al. (Civ. 6287.)★

District Court of Appeal, First District, Division 1, California. Nov. 9, 1928.

Rehearing Denied Dec. 8, 1928. Hearing Denied by Supreme Court Jan. 7, 1929.

1. Pleading 🔑8(18)—Allegations to effect that while F. was in employment of defendant, and while he was acting in scope of employment, F. negligently operated automobile injuring plaintiff, held to sufficiently show F. was acting within scope of employment.

In action for injuries caused by automobile, allegations that F. was at all times mentioned in complaint an employé and servant of defendant corporation in acting within scope of his employment, and that while he was in employment of defendant, and while he was acting in scope of employment, he was operating upon and along public highway one Chrysler automobile, and that F., while so acting in scope of his employment, so carelessly and negligently drove and operated automobile as to collide with automobile in which plaintiff was riding, *held* to sufficiently allege that F. was acting within scope of contract of employment.

2. Pleading 🔑8(18)—Terms "scope of employment" and "course of employment" are generally regarded as conclusions of facts, and complaint containing such allegations is sufficient.

Terms "scope of employment" and "course of employment" are generally regarded as conclusions of facts, and, under liberal rules of pleading, complaint containing such allegations is sufficient to justify admission of evidence in support thereof.

3. Appeal and error 🔑197(3)—Where evidence supplying omissions from complaint was received without objection and issue was submitted, objection to complaint cannot be urged for first time on appeal.

Where evidence tending to supply any omissions from complaint was received without objection and issue was submitted by court's instructions to jury, objection to complaint cannot be urged for first time on appeal.

4. Master and servant 🔑316(1)—"Independent contractor" is one who exercises independent employment and represents employer only as to results.

An "independent contractor" is one who, in rendering services, exercises an independent employment or occupation and represents his

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★Rehearing denied. Hearing denied by Supreme Court.

employer only as to results of his work, and not as to means whereby it is to be accomplished.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

5. Master and servant 🔑318(1)—In absence of stipulation regarding employer's right to control manner of doing work by employé injuring third party, existence of right must be determined by reasonable inferences from circumstances.

In absence of stipulation as to employer's right to control mode and manner of doing work by employé injuring third party, existence or nonexistence of right must be determined by reasonable inferences to be drawn from circumstances shown from evidence.

6. Master and servant 🔑318(1)—Employer's right to terminate employment is circumstance tending to negative independence of employé injuring third party.

Right of employer to terminate employment at any time is circumstance tending to negative independence of employé injuring third party, for which injury employer is sought to be held liable.

7. Automobiles 🔑197(7)—That salesman causing automobile accident furnished his own transportation did not affect his status as defendant's employé.

That salesman causing automobile accident in which plaintiff was injured furnished his own transportation did not affect his status as an employé of defendant.

8. Master and servant 🔑332(3)—Where relation of employer and employé causing injuries to third party is not created by writing and evidence is conflicting, question whether right to direct manner of doing work was reserved by employer is for jury.

Where relation between employer and one causing injuries to third person is not created by writing and evidence is conflicting or consists of circumstances from which different conclusions might be reasonably drawn, question whether right to direct mode and manner of doing work was reserved by employer is one for jury.

9. Master and servant 🔑316(1)—Where employment contract is ambiguous as to whether party injuring third person was independent contractor, resort may be had to parties' construction subsequent to its execution.

Where contract of employment is ambiguous as to whether party employed who injured third person was an independent contractor or an employé, resort may be had to construction put upon it by conduct of parties subsequent to its execution.

10. Automobiles 🔑244(26)—Evidence supported jury's finding that salesman injuring third person with automobile was employé of defendant.

In action for injuries caused by automobile, evidence *held* sufficient to support jury's finding that relation of master and servant existed between defendant and salesman operating automobile at time of injury.

11. Master and servant 🔑302(1)—To hold master liable for servant's acts, servant need not be engaged in direct performance of thing which is ultimate object of employment.

In order to hold master liable for servant's acts, it is not necessary that servant be engaged in direct performance of thing which is ultimate object of employment, since included within its scope are those acts which incidentally or indirectly contribute to service.

12. Master and servant 🔑302(1)—It was immaterial, in determining question of agency of salesman injuring third person, whether he was going on or returning from master's errand.

Where service was not performed at fixed place, it was immaterial, in determining question of agency of salesman injuring third person, whether he was going upon or returning from an errand undertaken in pursuit of his master's business.

13. Master and servant 🔑332(2)—Where evidence raises question whether employé injuring third person was doing acts contributing to service, issue is for jury.

Where evidence raises question whether employé injuring third person was engaged in acts contributing to service, issue is one for jury.

14. Appeal and error 🔑1066—Instruction that under statute no one under influence of liquor, or using drugs, shall drive vehicle, held not prejudicial error, where there was evidence of intoxication (Vehicle Act, § 112, as amended by St. 1927, p. 1421, § 29).

In action for damages for personal injuries caused by automobile, instruction read from Vehicle Act (St. 1923, p. 517) § 112, as amended by St. 1927, p. 1421, § 29, to effect that no person under influence of intoxicating liquor, or who is an habitual used of narcotic drugs, shall drive vehicle on public highway, *held* not prejudicially erroneous, where evidence tended to show driver's actions were influenced by liquor but there was no evidence that he was user of drugs.

15. Trial 🔑296(9)—Instruction that jury might consider plaintiff's health before injury, as compared with present condition, held not erroneous as assuming health was impaired by injuries, in view of other instructions.

In action for injuries caused by automobile, instruction that, in determining amount of damages, jury might consider plaintiff's health and condition before injury as compared with his present condition, *held* not erroneous as assuming that his health had been impaired by injuries, where court also told jury not to construe instructions as indicating court's view of facts, as those were for jury's determination exclusively.

16. Damages 🔑216(6)—Instruction jury could consider plaintiff's health before and after accident in determining damages held warranted.

In action for injuries caused by automobile, instruction that, in determining damages, jury might consider plaintiff's health and condition before injury as compared with his present condition, *held* proper, where both plaintiff and his wife testified regarding an impairment of plaintiff's health since the accident, and therefor it was question for jury whether his condition was caused by injuries.

17. Damages 🔑53—In action for injuries, plaintiff's worry over inability to pursue customary avocation was element of damages.

In action for personal injuries, plaintiff's worry over inability to pursue customary avocation was an element of damages which jury might consider.

18. Evidence 🔑570—Jury was not concluded by physician's expert testimony, but could consider his attitude (Code Civ. Proc. § 1847).

In action for personal injuries, jury was not concluded by testimony of physician testifying as an expert regarding plaintiff's injuries, but could take attitude of witness into consideration under Code Civ. Proc. § 1847.

19. Evidence 🔑570—Weight of expert witness' testimony was for jury.

In action for injuries, it was for jury to determine weight to be given testimony of physician testifying as expert regarding plaintiff's injuries.

20. Appeal and error 🔑1004(1)—Jury's verdict cannot be set aside on subject of damages unless it was result of passion or prejudice.

Verdict of jury cannot be set aside on subject of damages, unless so plainly excessive on face of record as to warrant conclusion that it was result of passion or prejudice.

21. Appeal and error 🔑1004(1)—Awards for personal injuries cannot be held excessive as matter of law because amount is larger than is usually allowed.

Awards for personal injuries cannot be held excessive as matter of law simply because amount may be larger than is ordinarily allowed in such cases.

22. Appeal and error 🔑932(1)—In considering attack on verdict as excessive, reviewing court must treat conflicts in evidence as resolved in plaintiff's favor.

In considering an attack on verdict as excessive, reviewing court must treat every conflict in evidence as resolved in favor of plaintiff and give him benefit of every inference that can be reasonably drawn in support of his claim.

23. Damages 🔑132(8)—$10,000 to carpenter 32 years of age receiving injuries making him unable to close hand, causing severe pain, necessitating operation, and affecting his health, held not excessive.

Verdict for $10,000 to plaintiff 32 years of age following trade of carpenter and earning $9 per day before injuries *held* not excessive, where he sustained, in addition to minor injuries, injuries to hand which made him unable to close his hand because tendons had become shortened and stiff, so that he could not work with safety on roofs or scaffoldings or use hand in nailing or other work necessary in his trade, and where he was confined to hospital for 18 days and suffered severe pain and had operation on hand and wrist and his health deteriorated after accident.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action for damages for personal injuries by Curtis W. May against J. W. Emerson Farrell and the Edwards-Merritt Company. From a judgment for plaintiff, the Edwards-Merritt Company appeals. Affirmed.

J. C. Hizar and E. S. Torrance, both of San Diego, for appellant.

P. M. Andrews and Allen E. Rogers, both of San Diego, for respondent.

CASHIN, J. An action against defendants J. W. Emerson Farrell and Edwards-Merritt Co., a corporation, to recover damages for personal injuries. After a trial by a jury on the issues presented by the answer of the corporation, defendant Farrell having failed to answer, a verdict was returned against both defendants, and from the judgment entered thereon the corporation has appealed.

The testimony shows that at 5 o'clock p. m. on March 27, 1925, the plaintiff was injured while riding in an automobile owned and operated by L. E. Ryan. The injuries complained of were brought about by an automobile operated by defendant Farrell, which approached from the rear, striking the Ryan car, and caused the same to overturn.

It was claimed by the plaintiff that at the time of the accident Farrell was employed by appellant and acting within the scope of his employment. Appellant, which was a dealer in automobiles with its place of business in San Diego, denied the employment, and sought to show that for some time previous to the accident Farrell's only connection with the company had been that of an independent contractor, and that this relation ceased on the morning of the day the accident occurred.

[1-3] As ground for reversal it is first claimed that the complaint failed to state a cause of action against the corporation, in that no facts are pleaded showing that Farrell was acting within the scope of any contract of employment. In this connection it was alleged that Farrell was at all the times mentioned in the complaint an employé and servant of the corporation and acting within the scope of his employment, and, further, that—

> "While he was in the employment of Edwards-Merritt Co., the said corporation, and while he was acting in the scope of said employment, he was operating and driving upon and along the said public highway one Chrysler automobile, and that said J. W. Emerson Farrell while so acting in the scope of his employment so carelessly and negligently drove and operated said Chrysler automobile" as to collide with the automobile in which the plaintiff was riding, causing the injuries and damage complained of.

We think the allegations were sufficient. No cases holding otherwise have been called to our attention except those instances where the acts charged, being ordinarily outside the scope of the servant's employment, were presumptively independent torts; for example, assaults upon third persons (Letts v. Hoboken R. W. & S. C. Co., 70 N. J. Law, 358, 57 A. 392; Thomas v. McGuinness, 94 Ill. App. 248; Davis v. Houghtellin, 33 Neb. 582, 50 N. W. 765, 14 L. R. A. 737; Campbell v. Northern Pac. Ry. Co., 51 Minn. 488, 53 N. W. 768; Smith v. Louisville, E. & St. L. Ry. Co., 124 Ind. 394, 24 N. E. 753); or, as in Snyder v. Hannibal & St. Joseph R. R. Co., 60 Mo. 413, cited by appellant, where children were invited and permitted to jump on and off the cars of a railway company, in which cases it was held that responsibility is not made to appear merely by an allegation that the servant in doing the act was acting within the scope of his authority. As held in Kuhl v. U. S. Health & Accident Ins. Co., 112 Minn. 197, 127 N. W. 628, the terms "scope of employment" and "course of employment," like negligence, are now generally regarded as conclusions of fact, and under liberal rules of pleading a complaint containing such allegations is sufficient to justify the admission of evidence in support thereof. As was said in Hains v. Parkersburg, M. & I. Ry., 71 W. Va. 453, 76 S. E. 843, "to require a specification * * * of * * * the particular duties with which" the servant "is charged, would impose upon the plaintiff more than is necessary for the accomplishment of the office and purpose of the" complaint—a "duty to allege matters lying peculiarly within the knowledge of the defendant and often beyond that of the plaintiff." And as held in Goldstein v. Healy, 187 Cal. 206, 201 P. 462, less particularity is required where the defendant, from the nature of and his relation to the facts, has full information concerning them. Moreover, in the present case no question as to the sufficiency of the complaint in this or other respects was raised by demurrer or at the trial. Evidence tending to supply any omissions from the complaint was received without objection, and the issue was submitted by the court's instructions to the jury. Under such circumstances an objection to the complaint cannot be urged for the first time on appeal. Greiss v. St. Investment & Ins. Co., 98 Cal. 241, 33 P. 195; Treanor v. Houghton, 103 Cal. 53, 36 P. 1081; Abner Doble Co. v. Keystone, etc., Co., 145 Cal. 490, 495, 78 P. 1050; Northwestern Mut. Fire Ass'n v. Pacific Wharf & Storage Co., 187 Cal. 38, 200 P. 934; Stewart v. Erskine-Bolst, 66 Cal. App. 461, 226 P. 644.

It is further contended that the evidence was insufficient to support a finding that the relation of master and servant existed. The evidence shows without conflict that Farrell, who was a salesman, had up to the day of the accident been engaged in selling automobiles for appellant. It was testified by him that at the time of the accident he, with Ray Harrison, who had also been appellant's salesman, were returning to San Diego from Pacific Beach, where they had gone for the purpose of visiting prospective customers. He further testified that he was then in the employ of the appellant, receiving for his services as a salesman both a salary and a commission, and denied that he was discharged therefrom until after the accident. According to its president, Farrell upon the day of the accident had been employed by appellant as a salesman on commission only, and was discharged from his employment on the morning of that day. The testimony of its sales manager was to the same effect, each of these witnesses testifying that Farrell had previously received a salary, which ceased on March 1, 1925, and that after his discharge he was reemployed on April 10 of the same year. It further appears that Farrell with other salesmen was required to report at a fixed hour each morning and attend a daily sales meeting at the office of the company. In this connection the president of appellant, in response to a question on cross-examination as to whether Farrell in the conduct of his work could use his own time, gave the following answer: "No. All of our men have to report every morning to the sales manager just the same as if they are working on salary," and further stated that if they failed to report they would be discharged. According to these statements, in addition to requiring reports and attendance at sales meetings, appellant further sought to control the conduct of its salesmen in other respects; the grounds for the action taken in Farrell's case, according to the testimony, being his failure to report and also his indulgence in intoxicants on occasions immediately preceding his discharge. It was further shown from the record sheet produced by the sales manager that but one commission was earned by Farrell during the month of March, and that this was paid. In addition to this, however, the payment to him of additional sums was shown which, according to the witness, were loans or advances. One of these amounts was paid on April 4, 1925, after the date when it was claimed that Farrell was discharged and before the date of his claimed re-employment. In his work Farrell used for demonstration purposes an automobile which he had purchased and partially paid for under a sales agreement with appellant, the title to the car being retained by the latter.

[4] The above comprises substantially the evidence from which the jury concluded that Farrell was a servant and not an independent contractor. An independent contractor is one who in rendering service exercises an independent employment or occupation, and represents his employer only as to the results of his work and not as to the means whereby it is to be accomplished (Green v. Soule, 145 Cal. 96, 78 P. 337; Moody v. Ind. Acc. Comm.

[Cal. Sup.] 269 P. 542); and when the essential object of the employment is the performance of the work the relation of master and servant does not exist unless the employer retains the right to direct the mode and manner in which the work shall be done (Western Indemnity Co. v. Pillsbury, 172 Cal. 807, 159 P. 721). As was held in Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491, Ann. Cas. 1917E, 390, the real test is to ascertain whether the employé was subject to the employer's orders and control and was liable to be discharged for disobedience or misconduct; and the fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it. Cameron v. Pillsbury, 173 Cal. 83, 159 P. 149; Sumner v. Nevin, 4 Cal. App. 347, 87 P. 1105.

[5] In the present case the contract of employment was oral, and, so far as shown, no express stipulation as to the right of the employer to control the mode and manner of doing the work was made. In the absence of such stipulation the existence or nonexistence of the right must be determined by reasonable inferences to be drawn from the circumstances shown by the evidence (Press Pub. Co. v. Ind. Acc. Comm., 190 Cal. 114, 210 P. 820); and in that connection certain facts have been held to possess an inferential significance. While the tendency of modern decisions is not to regard the manner of paying for the work done as decisive, this nevertheless is a circumstance bearing upon the question. Corbin v. American Mills, 27 Conn. 274, 71 Am. Dec. 63; Ruehl v. Lidgerwood, 23 N. D. 6, 135 N. W. 793, L. R. A. 1918C, 1063, Ann. Cas. 1914C, 680; Indiana Iron Co. v. Cray, 19 Ind. App. 565, 48 N. E. 803; Williams v. National Cash Register Co., 157 Ky. 836, 164 S. W. 112; Buckley v. Harkens, 114 Wash. 468, 195 P. 250; Dishman v. Whitney, 121 Wash. 157, 209 P. 12, 29 A. L. R. 460; 1 Thompson, Negligence, §§ 579, 626. As said in the note to Chicago, R. I. & Pac. Ry. Co. v. Bennett, 36 Okl. 358, 128 P. 705, 20 A. L. R. 678:

> "It has been laid down that 'the manner of payment of the contractor, whether it be by the day, or in a lump sum, is not a material factor in determining the relation between the parties,' and that it does not matter 'whether the contractor is to be compensated by a lump sum, or a commission on the cost, or a per diem payment.' But it is manifest from the decisions that these sweeping statements need some qualification. The correct doctrine, so far as it can be expressed in general phraseology, is this: That the mode of payment is an element which has some bearing upon the question whether the person employed was an independent contractor, but does not afford a decisive test of the nature of his relationship to the employer."

[6-8] Another circumstance tending to negative the independence of the employé is the right of the employer to terminate the employment at any time. Press Pub. Co. v. Ind. Acc. Comm., supra; Brown v. Ind. Acc. Comm., 174 Cal. 457, 163 P. 664. The fact that the salesman furnished his own transportation did not affect his status as an employé (Press Pub. Co. v. I. A. C., supra; Eng-Skell v. I. A. C., 44 Cal. App. 210, 186 P. 163); and where the relation is not created by a writing and the evidence is conflicting or consists of circumstances from which different conclusions might reasonably be drawn, the question whether the right to direct the mode and manner of doing the work was reserved by the employer is one for the jury (Perkins v. Blauth, 163 Cal. 782, 127 P. 50; Sacchi v. Bayside Lumber Co., 13 Cal. App. 72, 108 P. 885).

[9, 10] In Barton v. Studebaker Corporation, etc., 46 Cal. App. 707, 189 P. 1025, it was held that an automobile salesman employed on a commission basis with no salary and no fixed hours, and over whom the company exercised no authoritative control, was an independent contractor for whose negligent acts the company was not liable. In the present case, however, there was testimony—which other evidence tended to corroborate—that at the time of the accident a salary as well as a commission was being paid, and evidence that the hours of the salesman were regulated to the extent which the character of the employment made reasonably possible. It also appears that the employer with the acquiescence of the salesman claimed and exercised the right of discharge. Where a contract of employment is ambiguous as to whether the party employed was an independent contractor or an employé, resort may be had to the construction put upon it by the conduct of the parties subsequent to its execution (Porter v. Withers Est. Co., 201 Mo. App. 27, 210 S. W. 109); and from all the circumstances shown an inference was not unreasonable that, subject to the freedom of action inherent in the nature of the work, it was understood that the right to direct the manner in which the same should be done was reserved by the employer. The question was properly submitted to the jury (Buckley v. Harkens, supra; Dishman v. Whitney, supra; Majors v. Connor, 162 Cal. 131, 121 P. 371), and we cannot say that its conclusion was unsupported.

[11-13] It is further claimed that the evidence was insufficient to show that Farrell at the time of the accident was performing a service for appellant. According to his testimony he was returning to San Diego after a visit to a prospective customer at Pacific Beach. It is not contended that the trip to the latter place would not have been within the course of his employment as a servant, but that the accident having occurred while returning to San Diego he was not then representing or engaged in the business of his employer.

In order to hold a master liable it is not necessary that his servant should be engaged in the direct performance of the thing which is the ultimate object of the employment, for also included within its scope are those acts which incidentally or indirectly contribute to the service. Kish v. Cal., etc., Auto Ass'n, 190 Cal. 246, 212 P. 27. Where the service is not performed at a fixed place, it might properly be held, as was suggested in the above case, that the day's employment commenced at the hour in the morning when the servant reported for duty, and terminated upon his return in the evening; and it is immaterial in determining the question of agency whether he was going upon or returning from an errand undertaken in pursuit of his master's business (Brimberry v. Dudfield Lumber Co., 183 Cal. 455, 191 P. 894; Jedlicka v. Shackelford [Mo. App.] 270 S. W. 125), it being sufficient, as above stated, that he was engaged in acts contributing to the service; and where the evidence raises the question whether he was so engaged the issue is one for the jury (Tuttle v. Dodge, 80 N. H. 304, 116 A. 627; J. R. High Hardware Co. v. Garlitz [Tex. Civ. App.] 265 S. W. 1059; Dillon v. Prudential Ins. Co., 75 Cal. App. 266, 242 P. 736).

[14] Appellant also contends that certain of the court's instructions were prejudicially erroneous. The court read to the jury that portion of the Vehicle Act (St. 1923, p. 517, § 112, as amended by St. 1927, p. 1421, § 29) which provides that—

> "No person who is under the influence of intoxicating liquor or who is an habitual user of narcotic drugs shall drive a vehicle on any public highway within this state. * * *"

It is urged that none of the evidence tended to show that Farrell at the time of the accident was under the influence of liquor or was a user of drugs. This is true as to the use of drugs, but evidence was adduced by appellant by which it sought to show the use of intoxicants during the several days immediately preceding the accident, and Farrell on cross-examination admitted such use on the evening previous to the accident. This, with evidence showing his reckless driving on the latter occasion, tended in some degree to show that his actions were influenced by liquor. These facts were relevant on the question of negligence, and the first portion of the instruction was not improper. While the latter portion was inapplicable, it cannot reasonably be said to have confused the jury to the prejudice of appellant. Dillon v. Prudential Ins. Co., supra.

[15, 16] Appellant further complains that the instruction by which the jury was told that, in determining the amount of damages, they might consider plaintiff's health and condition before the injury as compared with his present condition, assumed as a fact that his health had been impaired by the injuries alleged; and, further, that the instruction was improper in that no evidence was adduced from which the fact might reasonably be found. While such assumption might be implied if the instruction stood alone, the jury was also told not to construe the instructions as indicating the court's view of the facts, as these were for their determination exclusively. Furthermore, there was testimony by both the plaintiff and his wife indicating an impairment of his health since the accident. Whether this condition was caused thereby was a question for the jury, and the instruction was properly given.

[17] The giving of the following instruction is also assigned as error:

> "You are instructed that worry over inability to pursue a customary avocation is an element of damages which may be taken into consideration."

That mental suffering occasioned by plaintiff's apprehension of future disability was caused by the injury was shown by his testimony and that of his wife. In view of such evidence the instruction was proper. Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; Boa v. San Francisco, etc., Rys., 182 Cal. 93, 187 P. 2; Ryan v. Oakland Gas, etc., Co., 21 Cal. App. 14, 26, 130 P. 693.

[18-23] It is further claimed that the amount awarded as damages, viz., $10,000, was excessive, and shows that the verdict was the result of passion or prejudice. The testimony discloses that the plaintiff was 32 years of age, that he had a wife and family and was by trade a carpenter, which calling he had followed for some years, his wages at the time of the accident being $9 a day. By reason of the accident, in addition to minor injuries, all of the extensor tendons connecting with the thumb and fingers of his left hand, with the exception of the two connecting the small finger, were severed. He was confined to the county hospital for 18 days, during which time he suffered severe pain, and an operation on his hand and wrist was performed. According to his testimony and that of his wife, his health deteriorated after the accident, and he has since suffered from an affection of the heart, in addition to which, as stated above, the evidence shows that mental suffering was occasioned by his apprehension of future disability. The plaintiff further testified that he was unable to close his hand, owing to the fact that the tendons had become shortened and stiff; it being for that reason impossible for him with safety to work upon roofs or scaffoldings, or to use his hand in nailing or other work necessary in his trade. A physician, who was in attendance upon plaintiff at the county hospital, testified that the hand had 90 per cent. flexion, that the plaintiff had practically full use of the wrist and 70 to 80 per cent. use of the thumb, but that in his opinion the thumb

would cause disability as a carpenter, and the hand as a unit would never be as good as before the injury. The last witness was the only physician who testified as to conditions existing at the time of the trial or whose opinion was asked as to the probable outcome of the injury. It is apparent from the record that his testimony was given reluctantly, and the conclusion was not unreasonable that with respect to the plaintiff he was not altogether a friendly witness. The jury was entitled to take the attitude of the witness into consideration (Code Civ. Proc., § 1847), and although testifying as an expert, the jury was not concluded thereby (Spencer v. Collins, 156 Cal. 298, 307, 104 P. 320, 20 Ann. Cas. 49; Linforth v. San Francisco Gas & Electric Co., 156 Cal. 58, 103 P. 320, 19 Ann. Cas. 1230; In re Redfield, 116 Cal. 637, 48 P. 794); and it was for them to determine the weight to be given his testimony (Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230; Barnum v. Bridges, 81 Cal. 604, 22 P. 924). It is the rule that the verdict of the jury cannot be set aside on the subject of damages unless so plainly excessive on the face of the record as to warrant the conclusion that it was the result of passion or prejudice. Perry v. Angelus Hospital Ass'n, 172 Cal. 311, 156 P. 449; Anstead v. Pac. Gas. & Elec. Co. (Cal. Sup.) 265 P. 487. There is no absolute rule for determining whether a verdict is excessive (Morgan v. Southern Pac. Co., 95 Cal. 501, 30 P. 601), and awards for personal injuries cannot be so held as a matter of law simply because the amount may be larger than is ordinarily allowed in such cases (James v. Oakland Traction Co., 10 Cal. App. 785, 103 P. 1082). As was said in Zibbell v. Southern Pacific Co., 160 Cal. 237, 254, 116 P. 513, 520:

> "The only means of discovering the existence of passion and prejudice as influencing a verdict is by comparing the amount of the verdict with the evidence before the trial court. To say that a verdict has been influenced by passion and prejudice is but another way of saying that the verdict exceeds any amount justified by the evidence."

The question in the first instance is for the trial court, which in the present case denied a motion for a new trial on the above ground; and "in considering an attack upon a verdict as excessive, the [reviewing] court must treat every conflict in the evidence as resolved in favor of the respondent, and must give to him the benefit of every inference that can reasonably be drawn in support of his claim." Kimic v. San Jose-Los Gatos, etc., Ry. Co., 156 Cal. 273, 104 P. 312.

The injuries in the present case were similar in character, and extent to those received by the plaintiff in Perry v. Angelus Hospital Ass'n, supra., wherein an award of $11,500 was sustained; and after a review of the evidence before us we cannot say that they were not in view of the circumstances such as to justify the verdict of the jury. Furthermore, no error has been shown which supports the conclusion that the trial resulted in a miscarriage of justice.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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94 Cal. App. 720

TRIPP v. BOARD OF FIRE AND POLICE PENSION COM'RS OF CITY OF FRESNO et al. (Civ. 6441.)

District Court of Appeal, First District, Division 2, California. Nov. 9, 1928.

1. Mandamus 🔑174—In proceeding to compel payment of fireman's pension, finding regarding plaintiff not being injured in discharge of duties held broad enough to cover matter of foot infection.

In proceeding for writ of mandamus to compel payment of pension to disabled fireman, finding that plaintiff's physical disability was not caused by reason of any bodily injury received in, or by any sickness caused by or result of any bodily injury received in discharge of duties as fireman *held* broad enough to cover matter of foot infection, if incorporated in petition by amendment, which, however, was never actually prepared and filed.

2. Municipal corporations 🔑200—Under charter provision, fireman held not entitled to pension where disability occurred during time he was fireman, but not by reason of employment.

Under charter provision, providing for pension for firemen "who have been disabled or become superannuated in services of city," fireman was not entitled to pension where disability occurred during period of time he was employed as fireman, but not by reason of such employment.

3. Municipal corporations 🔑200—Ordinance relating to firemen's pensions held not to illegally restrict provisions of city charter on subject; "disabled in service of city;" "superannuated in service of city."

Ordinance providing pension for firemen who shall become physically disabled by reason of bodily injury received in, or by reason of, sickness caused by discharge of duties of such person, *held* not to illegally restrict Fresno charter provision, section 26, providing for pension for firemen "who have been disabled or become superannuated in service of city," since phrase, "disabled in service of city," means "disabled by reason of bodily injuries received in or by reason of sickness caused by discharge of duties of such person," and "superannuated in service of city" includes age one acquires during his daily off duty periods as well as his hours of labor.

[Ed. Note.—For other definitions, see Words and Phrases, Superannuated.]

4. Municipal corporations ⚷58—Language of charter must be interpreted in its ordinary meaning and in accordance with legislative intention.

Language of charter must be interpreted in its ordinary meaning, and in accordance with legislative intention.

5. Municipal corporations ⚷200—Radical departure from ordinary pensioning laws in charter provision is not to be assumed to be legislative intent, without direct language to that effect.

Radical departure from ordinary pensioning laws in charter provision is not to be assumed to be legislative intent, without direct language to that effect.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action for a writ of mandate to compel payment of a pension by W. F. Tripp against the Board of Fire and Police Pension Commissioners of the City of Fresno, County of Fresno, and others. From the judgment, plaintiff appeals. Affirmed.

Gallaher & Jertberg, of Fresno, for appellant.

Loren A. Butts, City Atty., of Fresno, for respondents.

KOFORD, P. J. Appellant prosecuted this proceeding in the superior court for a writ of mandamus compelling respondents to allow and pay appellant a pension as a disabled fireman of the city of Fresno. The petition alleged that appellant had been a regular member of the fire department from 1918 to 1927; that, under the terms of the city charter and ordinance passed in pursuance of said charter, appellant was entitled to a pension because his duties as a fireman exposed him to smallpox in the neighborhood of the firehouse to which he was assigned in 1924, and exposed him to influenza in 1925 and again in 1927, both of which diseases he contracted, and by reason of having contracted said diseases appellant was rendered physically unable to discharge his duties as fireman. At the trial in the superior court, appellant also testified that, while fighting a fire in 1926, he injured his foot, which resulted in a serious infection. Upon objection being made that this was outside the pleadings, appellant's counsel stated:

> "Mr. Gallaher: I ask at this time to amend by inserting in connection with the paragraph that recites infection from smallpox and influenza, also an injury received to the left foot which resulted in an infection."

The court stated: "Very well, you may amend."

No actual written amendment was made, filed, or presented.

The superior court made its findings and judgment in favor of respondents, specifically finding, following the language of the petition, that the influenza and smallpox attacks which appellant had suffered were not contracted by him in the performance of his duties as fireman. The court also found in finding No. VI:

> "The court further finds that plaintiff's physical disability was not caused by reason of any bodily injury received in, or by any sickness caused by, or the result of any bodily injury received in, or the result of any sickness caused by, the discharge of the duties of plaintiff as a member of the Fire Department of the City of Fresno."

[1] Appellant claims the court erred in not making a finding concerning the foot infection above referred to. We see no merit in this contention. If it be conceded that the court was obliged to make a finding on an amendment that was never actually prepared and filed, still the court could not be expected to be more specific than the amendment itself. Finding No. VI, however, is broad enough to cover the matter if incorporated in the petition by amendment, and finds upon the material and ultimate facts thus alleged.

Appellant apparently recognizes as binding on us the findings and decision of the court to the effect that appellant's disability was not caused by or in the performance of his duties as a fireman. The testimony showed his disability was caused by a hypertrophic attack of arthritis of the spine, and, while the cause of this was a matter of some conflict in the testimony of the expert witnesses, the court evidently took the view that it was caused by focal infection of the teeth or tonsils or by causes having no relation to or bearing upon his occupation or duties as fireman.

[2-5] Appellant upon this appeal contends that under the provisions of the city charter the pension should be forthcoming because it is undeniable from the evidence that his disability occurred, if not by reason of his employment, nevertheless while or during the period of time he was in such employment. Section 3 of the city ordinance, which is alleged and relied on in the petition of the appellant, provides a pension for any fireman who "shall become physically disabled by reason of bodily injuries received in, or by reason of sickness caused by, the discharge of the duties of such person," etc. It is claimed that this ordinance illegally restricts and limits the provisions of the city charter under which it was enacted; that the ordinance should not say "received in or caused by the discharge of duties" when the charter says "disabled or become superannuated in the service of the city." Section 26 of the Fresno Charter provides:

> "The City Commission shall by ordinance provide for and establish a fund or funds for the

relief and pensioning of members of the Police and Fire Departments who have been disabled or become superannuated in the service of the city, and shall provide for the administration of such fund or funds."

It is pointed out that section 2 of the same ordinance provides old age pensions under the authority of this same charter provision after 20, 25, and 30 years' service, respectively, in the department, without providing that such superannuation shall be caused by such service.

We do not see the same inconsistency in this that appellant professes to see. The language in the charter must be interpreted in its ordinary meaning and in accordance with the legislative intention. Black on Interpretation of Laws, c. V. The contention is for an interpretation which would entitle a fireman of one day's service to be retired upon a pension for permanent disability caused by sickness having no relation whatever to his employment, because disabled or superannuated while in the service. Such a radical departure from ordinary pensioning laws is not to be assumed to be the legislative intent without direct language to that effect. "Disabled in the service of the city" is properly understood to mean "disabled by reason of bodily injuries received in, or by reason of sickness caused by the discharge of the duties of such person." "Superannuated in the service of the city" is properly understood to include the age one acquires during his daily off duty periods as well as his hours of labor.

In State v. Board of Trustees, 192 Mo. App. 583, 184 S. W. 929, the expression "while in such service" was held not to mean "while a member of the fire department," so that, where a fireman was killed while off duty, his widow was not entitled to a pension under similar laws.

The appellant, having failed to prove a case within the terms of the ordinance pleaded, was properly denied the writ.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

205 Cal. 476

PEOPLE v. HODGES et al. (L. A. 10777.)

Supreme Court of California. Nov. 10, 1928.

1. Appeal and error 🔑125—Judgment against surety on forfeiture of bail bonds, providing for summary judgment, held consent judgment, and not appealable (Pen. Code, §§ 1305, 1306, amended by St. 1927, pp. 1385, 1386; § 1278, amended by St. 1927, p. 1387).

Judgment entered in accordance with Pen. Code, §§ 1305, 1306, amended by St. 1927, pp. 1385, 1386, following on forfeiture of bail bonds furnished by surety company under St. 1927, p. 1387, amending Pen. Code, § 1278, to secure release of defendants, which bond provided for summary judgment against surety on forfeiture, *held* consent judgment, from which an appeal will not lie.

2. Bail 🔑77(2)—Judgment against surety under certified copy of minutes of court forfeiting bail bond held properly entered in name of county without notice (Pen. Code, § 1278, amended by St. 1927, p. 1387; §§ 1305, 1306, amended by St. 1927, pp. 1385, 1386).

Where defendant surety furnished bail bonds under Pen. Code, § 1278, amended by St. 1927, p. 1387, to secure release of defendants, which bonds provided for summary judgment against surety on forfeiture of bonds, judgment entered without notice in name of real party in interest, county of Los Angeles, following forfeiture of bond, was properly entered under Pen. Code, §§ 1305, 1306, amended by St. 1927, pp. 1385, 1386, where certified copy of minutes of forfeiting court was introduced before court entering judgment which was sufficient without formal written order of forfeiture.

3. Bail 🔑90—After judgment on forfeited bail bond, it is presumed order of forfeiture was regularly entered; surety being required to move to discharge forfeiture within 90 days (Pen. Code, §§ 1305, 1306, amended by St. 1927, pp. 1385, 1386).

Where judgment was entered against surety on bail bonds after forfeiture in accordance with Pen. Code, §§ 1305, 1306, amended by St. 1927, pp. 1385, 1386, it is presumed in support of judgment that order of forfeiture was regularly entered, and surety could not complain that bonds were improperly forfeited, but should have moved within 90 days allowed by section 1305 to discharge order of forfeiture if improperly made.

In Bank.

Action by the People against W. P. Hodges and others. Judgment for plaintiff, and defendant Seaboard Surety Corporation of America appeals. On motion to dismiss appeal. Appeal dismissed.

Arthur T. Stollmack, of Los Angeles, for appellant.

Everett W. Mattoon and S. V. O. Prichard, both of Los Angeles, for the People.

PER CURIAM. [1] This is a motion to dismiss an appeal prosecuted by the defendant surety company from a judgment entered in accordance with the provisions of sections 1305 and 1306 of the Penal Code as amended in 1927 (Stats. 1927, pp. 1385, 1386), following upon the forfeiture of certain bail bonds furnished by the appellant under the provisions of section 1278 of the same Code (Stats. 1927, p. 1387), to secure the release of the defendants Hodges and Loeb. Each of the bonds so forfeited provided that:

> "If the forfeiture of this bond be ordered by the court, judgment may be summarily made and entered forthwith against the said Seaboard Surety Corporation of America and the said defendant, if he be a party to the bond, for the amount of their respective undertakings herein, as provided by sections 1305 and 1306 of the Penal Code."

Respondent moves to dismiss the appeal on the ground that the judgment from which it is attempted to be taken is a consent judgment, from which an appeal will not lie. With this contention we are in complete accord. Hotchkiss v. Superior Court (Cal. Sup.) 269 P. 524; Erlanger v. S. P. Co., 109 Cal. 395, 42 P. 31; La Société Française, etc., v. Beardslee, 63 Cal. 160; Judnick v. Judnick, 47 Cal. App. 380, 382, 190 P. 480; People v. Pernetti, 95 App. Div. 510, 88 N. Y. S. 714. The case of People v. Pernetti, supra, presented a situation practically identical with the one now before us, and the court there held that an appeal would not lie.

[2, 3] Appellant's contention that the judgment was irregularly entered is without merit. It was properly entered, without notice, in the name of the real party in interest, viz., the county of Los Angeles (People v. De Pelanconi, 63 Cal. 409), and finds ample support in the minutes of the court declaring the forfeiture, a certified copy of which was introduced before the court entering the judgment. The introduction of a certified copy of the minutes or docket of the forfeiting court constituted, in our opinion, a sufficient compliance with the provisions of sections 1305 and 1306 of the Penal Code, for neither section requires the making of a formal written order of forfeiture. It is now too late for the appellant to complain that the bonds were improperly forfeited. People v. Pernetti, supra, p. 717 of 88 N. Y. S. (95 App. Div. 510). Appellant should have moved, within the 90-day period allowed by section 1305, to discharge the order of forfeiture if improperly made. It will now be presumed in support of the judgment that the order was regularly entered.

The appeal is dismissed.

205 Cal. 787

The PEOPLE of the State of California, Plaintiff and Respondent, v. W. P. HODGES, H. W. Loeb and Ray Honeywell, Defendants; Seaboard Surety Corporation of America, Defendant and Appellant. (L. A. 10778.)

Supreme Court of Californa. Nov. 10, 1928.

In Bank.

Motion to dismiss appeal by defendant from a judgment of the Superior Court of Los Angeles County, Elliot Craig, Judge, entered pursuant to sections 1305 and 1306, Penal Code (Stats. 1927, pp. 1385, 1386), following upon the forfeiture of certain bail bonds. Appeal dismissed.

Arthur T. Stollmack, of Los Angeles, for appellant.

Everett W. Mattoon and S. V. O. Prichard, both of Los Angeles, for the People.

PER CURIAM. This case does not materially differ from People v. Hodges, L. A. 10777, 271 P. 897, this day decided, and, upon the authority of that case, the purported appeal herein must be dismissed.

The appeal is dismissed.

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205 Cal. 496

SMITH v. ANGLO-CALIFORNIA TRUST CO. et al. (S. F. 12685.)★

Supreme Court of California. Nov. 16, 1928.

Hearing Denied in Bank Dec. 13, 1928.

1. Mortgages 🔑151(3)—Trust deed securing land purchaser's note for building loan, held prior to mechanics' liens for work done and materials furnished after deed was recorded.

Securities company, granting real estate purchaser's application for building loan in certain sum, accepting his promissory note in such amount secured by trust deed to take precedence of purchase-money deeds of trust, and opening building loan account in his name, *held* to have obligated itself to advance or pay to him or on his behalf the full amount thereof, so as to give priority to such deed over mechanics' liens for work commenced and materials furnished after recording deed.

2. Mortgages 🔑151(3)—Trust deed, recorded before commencement of work and furnishing of materials, for consideration passing thereafter, is superior to mechanics' liens, where advances are obligatory.

Where consideration for mortgage or deed of trust, recorded before commencement of work or furnishing of materials for which mechanics' liens are claimed, does not pass until afterward, and making of advances by mortgagee or beneficiary is obligatory, the lien of such instrument is prior and superior to mechanics' liens; it being a lien for whole sum advanced from time of its execution and recordation, not for each separate advancement from time thereof.

3. Trusts 🔑1—Mechanics' lien claimants cannot enforce on theory of trust pro tanto payment from undisbursed balance of building loan by lender not obligated to see to application of money advanced.

Security company being under no obligation by virtue of its contract with purchaser of realty to see to application of money advanced by it for building purposes, mechanics' lien claimants, knowing or charged with knowledge of recorded incumbrances, cannot enforce payment of their claims pro tanto from undisbursed balance in building loan account by virtue of any declared or implied trust, though loan was obtained for express purpose of improving property according to plans submitted with application, as they must have relied on such agreement as to amount to be advanced.

4. Contracts 🔑187(1)—Promisor must clearly manifest intent to benefit third party to entitle latter to sue on promise (Civ. Code, § 1559).

To give a third party, who may derive a benefit from the performance of a promise, an action thereon, there must have been an intent clearly manifested by promisor to secure some benefit to the third party, under Civ. Code, § 1559.

5. Liens 🔑7—Mechanics' lien claimants held equitably entitled to liens on undisbursed balance of building loan secured by trust deed prior to trust deeds securing entire purchase price of land.

Parties performing labor and furnishing materials for construction of houses, completed in substantial compliance with plans and specifications submitted to securities company with application by purchaser of realty for loan obtained only by giving trust deed prior to deeds of trust securing entire purchase price, *held* equitably entitled to lien on undisbursed balance in building loan account, especially where realty proved of but little value on sale under purchase-money deeds.

6. Estoppel 🔑52—Object of equitable estoppel is prevention of unconscientious and inequitable assertion or enforcement of claims.

The foundation of equitable estoppel is justice and good conscience; its object being to prevent unconscientious and inequitable assertion or enforcement of claims or rights, which might have existed or been enforceable by other rules of law unless prevented by estoppel, and its effect to create and vest opposing rights in party benefited from motives of equity and fair dealing.

7. Executors and administrators 🔑38—Undisbursed balance of building loan held not part of deceased borrower's estate but disbursable pro rata among mechanics' lien claimants.

Undisbursed balance of building loan to purchaser of realty did not become part of his estate at his death, so as to charge it with claims of general creditors, but should be paid into court for disbursement pro rata among persons legally and satisfactorily establishing their mechanics' lien claims against realty.

★Hearing denied in bank.

8. Estoppel 🔑110—Equitable estoppel need not be specially pleaded.

The rule that estoppel, to be available as defense, must be specially pleaded, does not apply, where agreed statement of facts discloses special circumstances giving rise to equitable estoppel.

9. Appeal and error 🔑1173(2)—Nonappealing mechanics' lien claimants cannot benefit from partial reversal of adverse judgment on other claimants' appeal.

Mechanics' lien claimants, not appealing from judgment adversely disposing of asserted severable rights and interests of respective claimants in certain fund by separate paragraphs, are in no position to derive any benefit for reversal of judgment in part, as appealing claimants could appeal only from portions of judgment affecting them, despite statement in notice of appeal that appeal is from whole judgment.

Department 2.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Mary H. Smith, administratrix of the estate of Calvin M. Smith, deceased, against the Anglo-California Securities Company, in which the Anglo-California Trust Company, J. H. McCallum and others, doing business under the name and style of the Western Furniture Manufacturing Company, and others, were made parties defendant on defendant's motion. From the judgment rendered, defendants McCallum and others appeal. Affirmed in part, and reversed in part, with directions.

B. S. Gregory, Sullivan & Sullivan and Theo. J. Roche and Harry F. Sullivan, all of San Francisco, for appellants.

Milton Marks, of San Francisco, for respondent.

PER CURIAM. This is an appeal by certain of the above-named defendants from a judgment entered for the plaintiff in an action instituted to recover the sum of $4,090 from the defendant Anglo-California Securities Company. The action was tried upon an agreed statement of facts and upon the testimony of but one witness. It appears that Calvin M. Smith, now deceased, had entered into an agreement on or about May 10, 1926, with the A. J. Galbraith Realty Company, wherein and whereby the former agreed to purchase and the latter to sell for a total purchase price of $4,500 five lots or parcels of real property situate in the city and county of San Francisco. On June 26, 1926, and in furtherance of said agreement, the purchaser took title and executed and delivered to the seller, in payment of the agreed purchase price of said lots, his five several promissory notes, each in the sum of $900. As security for these purchase-money notes Smith, at the same time, executed and delivered five separate deeds of trust covering the lots so purchased by him. In the interim between Smith's agreement to purchase and the final consummation of the transaction, application was made by him to the Anglo-California Securities Company for a building loan with which, if granted, it was intended to improve the property. The securities company, after investigation and appraisement by its agent, granted to Smith a loan of $20,000. He gave to the securities company his promissory note in such sum, and, as security therefor, executed and delivered a deed of trust covering the five lots. This latter deed of trust, which named the Anglo-California Trust Company as trustee, was thereafter recorded on the same day as the several trust deeds executed and delivered as security for the payment of the purchase price of the lots. In the agreed statement of facts upon which, as we have said, the cause was tried, it is conceded by all parties to the action that the purchase-money trust deeds were intended to be, and are, subordinate to the trust deed delivered to the securities company as security for its loan granted for improvement purposes. It might also be said in passing that the securities company, upon the granting of the loan, opened in Smith's name a building loan account in the sum of $20,000, against which, as disclosed by the testimony of the sole witness in the case, checks were drawn and issued to Smith as the improvement work progressed. The construction of the buildings upon the five lots was practically completed on or about October 10, 1926, at which time there remained undisbursed in the building loan account the sum of $4,090. Within a few days after the completion of the buildings, Smith died, and his surviving widow, the plaintiff herein, was duly and regularly appointed administratrix of his estate. Several mechanics' lien claims, totaling approximately $5,633.30, were filed against the property for labor and materials furnished in the course of the construction work. The claimants of such liens made demand upon the securities company, after Smith's death, to withhold from the undisbursed funds in the building loan account sufficient to pay and discharge their claims. Proceedings looking to the foreclosure of such mechanics' lien claims were thereafter instituted and are apparently still pending and undisposed of. On April 9, 1927, the five lots were sold to the defendant Roth under and by virtue of the power of sale contained in the deeds of trust delivered to secure the several promissory notes executed by Smith in payment of the purchase price. After such sale there remained a deficiency upon the purchase-money notes totaling $2,441.75. By an assignment, the defendant McCallum is now the owner of all rights under the purchase-money notes and deeds of trust.

The instant action was brought by the administratrix of Smith's estate to recover from the securities company the balance of $4,090 remaining undisbursed in the building loan account existing in her intestate's name. Upon motion of the defendant Anglo-California Trust Company an order was made by the trial court, bringing into the action as parties defendant all persons asserting any interest in or lien upon the real property or advancing any claim to the money balance remaining in the building loan account. Each of the many defendants answered, and, as already stated, the cause went to trial upon an agreed statement of facts and the testimony of one witness.

The court below found the facts substantially as stated herein, and as conclusions of law therefrom declared that the plaintiff, as administratrix, was entitled to judgment against the Anglo-California Securities Company in the sum of $4,090; that the defendants Anglo-California Securities Company and Anglo-California Trust Company were entitled to a judgment and decree declaring the deed of trust delivered to the latter as trustee for the former to be a first charge or lien upon the real property and superior to the adverse claims of all the other defendants. It was also decreed that such other defendants were not entitled to a lien upon the sum of $4,090, for which amount judgment was directed for the plaintiff, remaining undisbursed in the building loan account. Thereafter judgment was entered in conformity with these findings of fact and conclusions of law. The defendants Anglo-California Securities Company and the Anglo-California Trust Company and several of the mechanics' lien claimants have not appealed. However, the appeal of the other defendants presents for consideration the correctness of the trial court's determination of the issues presented by this litigation.

[1, 2] An examination of the authorities satisfies us that the court below did not err when it decreed the trust deed in favor of the Anglo-California Securities Company to be a first and prior charge upon the property described therein. It was apparently agreed by those concerned that this instrument was to take precedence over the purchase-money deeds of trust recorded concurrently therewith. In our opinion, the securities company, by granting Smith's application for a building loan in the sum of $20,000, accepting his promissory note in that amount secured by deed of trust, and opening in his name a building loan account, became obligated to advance or pay to Smith, or on his behalf, the full sum of $20,000. Valley Lumber Co. v. Wright, 2 Cal. App. 288, 290, 291, 84 P. 58. In other words, the amount payable by the securities company under the terms of the loan agreement was not an undetermined or optional amount, but was at all times capable of definite ascertainment. The authorities, both in this state and elsewhere, are legion to the effect that, where a mortgage or deed of trust has been recorded prior to the commencement of work or the furnishing of materials, but the consideration therefor has not passed until after work has commenced or materials have been furnished, the lien of the mortgage or deed of trust is prior and superior to the mechanics' lien claims where the making of the advances is obligatory on the part of the mortgagee or the beneficiary. Fickling v. Jackman (Cal. Sup.) 265 P. 810; Tapia v. Demartini, 77 Cal. 383, 19 P. 641, 11 Am. St. Rep. 288; Hall v. Glass, 123 Cal. 500, 56 P. 336, 69 Am. St. Rep. 77; Valley Lumber Co. v. Wright, supra; Fuller v. McClure, 48 Cal. App. 185, 191, 191 P. 1027; Home Savings & Loan Ass'n v. Burton, 20 Wash. 688, 56 P. 940, 943; Blackmar v. Sharp, 23 R. I. 412, 50 A. 852, 855; Moroney's Appeal, 24 Pa. 372, 377. In other words, the mortgage or deed of trust, as against subsequent incumbrancers or mechanics' lien claimants, becomes a lien for the whole sum advanced from the time of its execution and recordation, and not for each separate amount advanced from the time of such advancement, although the right to enforce the collection thereof can only arise upon each advancement being made. A different rule prevails, however, where the advances are optional with the mortgagee or beneficiary and the lien of the mortgage or deed of trust is, in such case, postponed to the date or dates respectively as of which the advances actually are made. Fickling v. Jackman, supra; Fuller v. McClure, supra. These authorities, in our opinion, amply sustain the trial court's decision giving priority, as against the real property involved, to the trust deed securing the loan made to Smith by the Anglo-California Securities Company. The judgment of the court below, in so far as it declares the claims and liens of the several other defendants inferior and subordinate to the charge upon said real property created by the deed of trust executed and delivered to the defendant Anglo-California Trust Company, as trustee. for the defendant Anglo-California Securities Company, will, therefore, have to be affirmed.

[3] This conclusion does not, however, dispose of the principal issue presented by this litigation, which has to do with the respective rights or interests of the parties in and to the sum of $4,090 remaining undisbursed in the building loan account. Our research has failed to disclose a case directly in point either in this state or in other jurisdictions. In a situation such as confronts us herein it seems but reasonable to conclude that the mechanics' lien claimants, knowing or being charged with knowledge of the incumbrances of record against the real property, must have relied upon, excluding the possibility of the

security ordinarily afforded by the filing of mechanics' liens, the agreement between Smith and the defendant securities company as to the amount to be advanced for building purposes. It is true, of course, that, although the loan was obtained by Smith for the express purpose of improving the property according to plans and specifications submitted with the application therefor, there is nothing in the nature of the agreement, or in its terms, that made it obligatory upon the securities company to see that the money advanced thereunder was, in fact, applied to payments for labor and materials furnished in the construction work. Hence, any payments made to or on behalf of Smith were in discharge of the agreement of the securities company and brought it under no liability to the lien claimants. It follows, therefore, that the right, if there be such right, to have the sum of $4,090 applied pro tanto in payment of the mechanics' lien claims cannot be enforced by virtue of any declared trust or one to be implied from the terms and conditions of the loan agreement. This conclusion necessarily flows from the proposition, just stated, that the securities company was under no obligation by virtue of its contract or agreement to see to the application of the money advanced.

[4] Nor do we think the lien claimants can assert such right solely by virtue of the agreement of the securities company to advance the full sum of $20,000, for it is now well settled in this state that to give a third party, who may derive a benefit from the performance of a promise, an action thereon, there must have been an intent clearly manifested by the promisor to secure some benefit to the third party. In other words, the promise or contract must have been one "made expressly for the benefit of a third person." Section 1559, Civ. Code, 6 Cal. Jur. 473, § 280, and authorities there cited.

[5] What we have said, however, need not necessarily prove fatal to the cause of the appealing mechanics' lien claimants if there exist any special circumstances warranting the imposition in their favor of a charge or lien upon the fund now in dispute. We are of the view that the money remaining undisbursed in the building loan account opened in Smith's name by the securities company should, in accordance with established principles of equity, be so charged. And this by reason of those special circumstances and conditions consisting of representations and conduct upon one side and of action founded thereon upon the other. That the lien claimants must have relied upon the fund to be advanced to Smith by the securities company, and not alone upon the individual capacity of Smith or their right to a last lien upon the premises, as a means of obtaining payment for their labor and materials, is supported by every reasonable inference deducible from the surrounding circumstances. Smith was engaged in building upon land for which he had not paid the purchase price and which was charged with and subject to the several deeds of trust executed and delivered to secure the entire purchase-money. The incapacity of Smith to build without a prearranged loan was emphasized by the existence of these purchase-money incumbrances and attested by the agreement with the securities company for a loan to be used expressly for building purposes. It is also reasonably apparent from the record herein that this loan could not have been obtained without giving the deed of trust for its security priority over the purchase-money deeds of trust. Moreover, the record tends to show that the houses for the construction of which the building loan account was opened have been completed in substantial compliance with the plans and specifications submitted to the securities company in connection with the application for the loan. It requires very little showing, therefore, to produce the conclusion that, without confidence in the payment to Smith of the full amount of the loan contracted for, the lien claimants would not have extended credit for their labor and materials. The reasonableness of such expectations on the part of the lien claimants must naturally have suggested itself both to Smith and the securities company. They should have known that the consummated agreement for the money to be advanced to or on behalf of Smith as the buildings progressed, under a deed of trust taking priority over the statutory liens available to those contracting with him or the general contractor, would constitute a material inducement to them in supplying labor and materials. As if in express recognition of the reasonableness of these expectations, the practice was to make payments from, or withdrawals upon, the building loan account only as the work progressed and after the appraiser for the securities company had, in the line of his duty, reported progress warranting a payment.

[6] To concede, therefore, as has been done, that there was no intention on the part of Smith or the securities company to create a trust in favor of the lien claimants by the terms of the agreement for the loan, and that this agreement made it no wrong, actionable on behalf of such lien claimants, for the securities company to withhold the money, or any part thereof, does not, in our opinion, answer the conditions presented by the special facts and circumstances stated. Smith and the securities company by their conduct may be said to have induced, or contributed to induce, the lien claimants to enhance the value of the real property by their labors and materials, and it would be inequitable and unjust, it seems to us, to permit Smith or his personal representative to withhold, at this time, any part of the fund upon which

the lien claimants must surely have relied for reimbursement. The fact that the real property itself has proved of but little value upon sale under the purchase-money deeds of trust lends added support to this conclusion. The foundation of equitable estoppel is justice and good conscience. As stated in 2 Pomeroy's Equity Jurisprudence (4th Ed.) p. 1636, § 802:

> "Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel."

[7] To permit of an appropriation by the personal representative of Smith of the $4,090 in dispute would, by reason of the circumstances attending the transaction, work a grevious wrong to the appealing lien claimants having an equity therein and give such personal representative an unconscientious advantage over such lien claimants. Nor do we think this sum of money should become a part of Smith's estate and thus become charged with the claims of general creditors. The court below should have, in our opinion, ordered and directed the securities company to pay this amount into court, to be thereafter disbursed, pro rata, among those persons having legally and satisfactorily established their lien claims against the parcels of real property hereinabove referred to.

[8] In announcing our conclusion in this case, we are not unmindful of the rule which requires that an estoppel, to be available as a defense, must be specially pleaded. This rule is not, however, without its exceptions. It has been held, for instance, that the rule is without application where the complaint discloses a state of facts which amount to an equitable estoppel. Haynes v. Indio Levee District, 46 Cal. App. 436, 440, 189 P. 475. The agreed statement of facts upon which the instant case was tried discloses, as we have already shown, certain special circumstances which, in our opinion, give rise to what might well be termed an equitable estoppel. In view of this situation, the rule above stated may properly be said to be inapplicable herein.

[9] For the guidance of the court below it is proper to state herein that the nonappealing lien claimants are not in a position to derive any benefit from the reversal in part of the judgment. Lake v. Superior Court, 187 Cal. 116, 118–120, 200 P. 1041, 1042. In the cited case it is declared that:

> "An appeal by only a portion of the defendants, however broad in terms the notice of appeal may be, is, in legal effect, an appeal only from a portion of the judgment affecting them and gives jurisdiction to the appellate court to reverse or modify the judgment only in so far as it affects the interests of the appellants."

The judgment in the instant case by separate and numbered paragraphs adversely disposes of the asserted severable rights and interests of the respective lien claimants in and to the sum of money in dispute. It necessarily follows, therefore, that the respective appealing lien claimants could prosecute an appeal only from such portions of the judgment as affect them, and this despite the statement in their notice of appeal that the appeal is "from the whole and from each and every part of that certain judgment given and made herein. * * *"

In accordance with the views herein expressed, that part of the judgment appealed from which declares the trust deed executed and delivered to the Anglo-California Trust Company as trustee for the Anglo-California Securities Company to be a first charge or lien upon the real property described therein, is hereby affirmed. That part of the judgment awarding the sum of $4,090, remaining undisbursed in the building loan account, to the plaintiff Mary H. Smith, as administratrix of the estate of Calvin M. Smith, deceased, is reversed, with directions to the court below to proceed, as suggested herein, so as ultimately to cause said sum of $4,090 to be applied in liquidation of the liens of the appealing lien claimants.

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205 Cal. 534

Ex parte ROSENCRANTZ. (Cr. 3157.)

Supreme Court of California. Nov. 20, 1928.

1. Criminal law 🔑1213—Provision authorizing life imprisonment, without right to parole, on fourth conviction for felony, held not cruel and unusual punishment (Pen. Code, § 644, as amended by St. 1927, p. 1066; Const. Cal. art. 1, § 6; Const. U. S. Amend. 8).

Provision of Pen. Code, § 644, as amended by St. 1927, p. 1066, for life imprisonment, without eligibility to parole, on conviction of any felony after three previous convictions, *held* not to constitute such cruel and unusual punishment, under Const. Cal. art. 1, § 6, and Const. U. S. Amend. 8, as to invalidate law; the deprival of right to parole being neither cruel nor unusual, being simply a favor granted by the people to those committed to penal institutions as punishment for crime.

2. Criminal law 🔑1201—Law providing for life imprisonment, without right to parole, on fourth conviction for felony, held not unconstitutional as authorizing unreasonable punishment (Pen. Code, § 644, as amended by St. 1927, p. 1066).

Pen. Code, § 644, as amended by St. 1927, p. 1066, providing for life imprisonment, without eligibility to parole, on conviction for a felony after three previous convictions therefor, *held* not unconstitutional as providing a punishment beyond the bounds of reason, in view of offense committed.

3. Constitutional law 🔑203—Law providing for life imprisonment, without right to parole, on fourth conviction for felony, held not unconstitutional as ex post facto (Pen. Code, § 644, as amended by St. 1927, p. 1066).

Pen. Code, § 644, as amended by St. 1927, p. 1066, providing for life imprisonment, without right to parole, on conviction for felony after three previous convictions therefor, *held* not unconstitutional and void as being ex post facto by reason of application to crimes committed prior to its enactment or conviction before such time.

4. Constitutional law 🔑250—Law providing for life imprisonment, without right to parole, on fourth conviction for felony, held not denial of equal protection (Pen. Code, § 644, as amended by St. 1927, p. 1066; Const. art. 1, § 11).

Pen. Code, § 644, as amended by St. 1927, p. 1066, providing for life imprisonment, without right to parole, on conviction for felony after three previous convictions therefor, *held* not in violation of Const. art. 1, § 11, requiring all general laws to have a uniform operation; such provision affecting alike all offenders similarly situated, and therefore not depriving any one of the equal protection of the laws.

5. Habeas corpus 🔑50—Excessiveness of sentence under statute providing for life imprisonment will not be considered on habeas corpus until expiration of term for which applicant might have been lawfully imprisoned (Pen. Code, § 476a; § 644, as amended by St. 1927, p. 1066).

Excessive sentence, under Pen. Code, § 644, as amended by St. 1927, p. 1066, providing for life imprisonment on fourth conviction for felony, without right to parole, even assuming such provision to be unconstitutional and void, will not be considered on habeas corpus until after expiration of term for which applicant might have been lawfully imprisoned after conviction of fraudulently making and uttering a check, without sufficient funds to meet same, in violation of Pen. Code, § 476a.

In Bank.

Original application for habeas corpus by Evelyn Rosencrantz. Writ denied.

Howard K. James, of Alameda (W. L. Albert, of Oakland, of counsel), for petitioner.

U. S. Webb, Atty. Gen., and Emery F. Mitchell and Wm. F. Cleary, Deputy Attys. Gen., for respondent.

CURTIS, J. The petitioner is held in custody by the warden of the state prison at San Quentin under and by virtue of a commitment issued out of the superior court of the county of Alameda. This commitment was issued upon a judgment of conviction of petitioner of the crime of fraudulently making and uttering a check upon a bank without sufficient funds to meet the same, a felony, as defined by section 476a of the Penal Code, after three prior convictions of a felony. The first of said prior convictions was for fraudulently issuing a fictitious check on or about March 8, 1916; the second, for fraudulently drawing a check on or about January 12, 1920, without sufficient funds to meet said check; and the third, for making and passing a fictitious instrument on or about April 15, 1923. The judgment of imprisonment, which was dated June 8, 1928, directed that:

> "Whereas E. Rosencrantz had been duly convicted in this Court of the crime of Felony, to-wit: a violation of Section 476a of the Penal Code and three prior convictions of Section 476a of the Penal Code of California, she therefore be confined in the state prison of the State of California at San Quentin, as prescribed by law, and that she be remanded to the custody of the Sheriff of the County of Alameda and be by him taken and delivered to the Warden of the state prison of the State of California at San Quentin."

In 1923, the Legislature of this state enacted a new section to the Penal Code of this state, to be known as section 644, which section, in part, read as follows:

> "Every person convicted in this state of any felony who shall previously have been three times convicted, whether in this state or elsewhere of the crime of robbery, burglary, rape with force and violence, arson or any of them, shall be punished by imprisonment in the state penitentiary for not less than life. * * *"

In 1927 this portion of said section was amended to read as follows:

> "Every person convicted in this state of any felony, who shall have been previously three times convicted, either in this state or elsewhere, of any felony, shall be punished by imprisonment in the state prison for not less than life and shall not be eligible to parole. * * *" St. 1927, p. 1066.

It is contended by petitioner that she is imprisoned in the state prison at San Quentin by virtue of the provisions of section 644 of the Penal Code, as amended in 1927; that said section of the Penal Code is unconstitutional and void, and therefore and for these reasons her imprisonment and restraint is illegal.

The grounds upon which petitioner bases her contention that said section 644 is unconstitutional and void are: (1) That the punishment of life imprisonment without the privilege and right of parole is cruel and unusual; (2) that section 644 of the Penal Code is unconstitutional and void, in that it not only prescribes a greater punishment for a subsequent offense, but the extent of the punishment prescribed for a subsequent offense by said section after prior conviction goes beyond the bounds of reason, in view of the offenses committed; (3) that said section 644, in so far as it relates to the charge against petitioner, is unconstitutional and void as being ex post facto.

We will consider these grounds in the order in which they are presented by petitioner.

[1] First. Cruel and unusual punishment is in contravention both of the Federal and State Constitutions. Amendment 8 of the U. S. Constitution; section 6 of article 1 of the Constitution of California. Life imprisonment in the state prison cannot be said to be either cruel or unusual. It has been in use not only since the foundation of our state, but ever since the formation of our national government such punishment has been employed both by the several states and the federal goverment as one of the penalties imposed upon those who have been found guilty of crime. Neither can it be said that the deprival of petitioner of the right to parole is either cruel or unusual. It has only been at a comparatively recent date in the history of our state that any prisoner has been granted the favor of parole. The right to parole is simply a favor granted by the people of the state to those committed to our penal institutions as punishment for crime. The withholding of this favor by the Legislature from any particular class of criminals cannot be said to inflict upon those from whom the privilege has been denied a punishment either cruel or unusual. The granting or withholding of the privilege of parole to any particular class of prisoners is largely a matter of expediency which is left to the lawmaking branch of our government, and the courts will not interfere with the Legislature in the exercise of such power. People v. Oppenheimer, 156 Cal. 733, 106 P. 74; McDonald v. Massachusetts, 180 U. S. 311, 21 S. Ct. 389, 45 L. Ed. 542; People v. Stanley, 47 Cal. 113, 117, 17 Am. Rep. 401.

[2] Second. The second ground upon which petitioner bases her right to be released from her imprisonment is that the extent of such punishment prescribed for the subsequent offense, after three prior convictions of a felony, goes far beyond reason and therefore the imprisonment imposed upon her is illegal. In support of this contention, petitioner refers to Cooley on Constitutional Limitations (8th Ed.) p. 1231, where we find the following statement:

> "A police measure must fairly tend to accomplish the purpose of its enactment, and must not go beyond the reasonable demands of the occasion."

Immediately following this sentence is the following:

> "But a large discretion is necessarily vested in the Legislature, to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests."

We think these two sentences taken together on the whole contain a correct statement of the law upon the subject. A statute like that enacted by section 644 of the Penal Code is frequently referred to as habitual criminal legislation and such legislation has been generally upheld by the courts of this and other jurisdictions.

> "An habitual criminal statute is a thing of modern creation, and while there are many rules of law which may seem inconsistent with its purpose and the procedure adopted to compass it, it is nevertheless sound in principle and sustained by reason. Aside from the offender and his victim there is always another party concerned in every crime committed—the state; and it does no violence to any constitutional guaranty for the state to rid itself of depravity when its efforts to reform have failed. The true ground upon which these statutes are sustained is, that the punishment is awarded for the second offense only, and that in determining the amount or nature of the penalty to be inflicted, the Legislature may require the courts to take into consideration the persistence of the defendant in his criminal course." 8 R. C. L. p. 284.

In McDonald v. Massachusetts, supra, a statute was sustained providing for punishment of imprisonment for the term of 25 years of any person convicted of a felony after such person had been twice previously convicted of crime. In the case of People v. Oppenheimer, supra, the defendant while undergoing a sentence of imprisonment in the state prison of this state was charged with an assault with a deadly weapon under section 246 of the Penal Code, making such offense committed by one imprisoned in a state prison of the state punishable with death. He was found guilty as charged and the extreme penalty imposed upon him. The judgment against him was affirmed by this court. A statute even inflicting the death penalty will be declared invalid only in those cases where the punishment is "so disproportionate to the offense for which it is inflicted as to meet the disapproval and condemnation of the conscience and reason of men generally, 'as to shock the moral sense of the people.'" People v. Oppenheimer, supra. Can it be said that a statute or a section of the Code prescribing a punishment of life imprisonment, without the right of parole, for those found guilty of the commission of a felony, after they have been three times previously convicted of a felony, is so disproportionate to the offense for which it is inflicted that it shocks the moral sense of the people? We think not. Society is not only entitled to be protected from the depravity of those criminally inclined, but it is the first and highest duty of government to secure to its citizens the enjoyment of their lives and property against the unlawful aggression of the criminal class, who, if unrestrained, would despoil the law abiding both of life and property. When a person has proven himself immune to the ordinary modes of punishment, then it becomes the duty of government to seek some other method to curb his criminal propensities that he might not continue to further inflict himself upon law-abiding members of society. This we think may be done even to the extent of depriving him permanently of his liberty. We have been cited to no authority by petitioner which would make it illegal to impose a life sentence upon her as punishment for her fourth conviction of a felony, and we doubt whether any exist. The state of Kentucky has enacted a statute providing that the punishment of one convicted for a third time of felony shall be fixed at confinement in the penitentiary for life, and the same has been sustained by the Supreme Court of that state. Herndon v. Commonwealth, 105 Ky. 197, 48 S. W. 989, 88 Am. St. Rep. 303. A similar statute was enacted by the Legislature of the state of Ohio and was sustained by the Supreme Court of that state. Blackburn v. State, 50 Ohio St. 428, 36 N. E. 18. With these authorities supporting the validity of enactments similar to section 644 of the Penal Code, and with none to the contrary, we are unable to agree with petitioner that the extent of her imprisonment is beyond reason and therefore illegal. In our opinion, the judgment of life imprisonment imposed upon petitioner finds support both in law and in reason.

[3] Third. It will be observed that the three prior crimes with which petitioner was charged and convicted were committed by her prior to the amendment of section 644 of the Penal Code, under which petitioner was prosecuted and the sentence of life imprisonment imposed. For this reason the petitioner contends that said section of the Code, as amended, in so far as it applies to the crimes committed prior to its enactment, or to prior convictions rendered before its passage, is objectionable as being ex post facto. This same question has frequently been before the courts of this state, and they have uniformly upheld such legislation as not being subject to said objection. The following statement from Cooley on Constitutional Limitations (8th Ed.) p. 553, has been either directly cited, or in principle approved by the decisions of this court:

> "And a law is not objectionable as ex post facto which, in providing for the punishment of future offenses, authorizes the offender's conduct in the past to be taken into the account, and the punishment to be graduated accordingly. Heavier penalties are often provided by law for a second or any subsequent offense than for the first, and it has not been deemed objectionable that in providing for such heavier penalties the prior conviction authorized to be taken into account may have taken place before the law was passed. In such cases it is the second or subsequent offense that is punished, not the first. * * *" Ex parte Gutierrez, 45 Cal. 429, 432; People v. King, 64 Cal. 338, 30 P. 1028; People v. Smith, 36 Cal. App. 88, 90, 171 P. 696; People v. Camperlingo, 69 Cal. App. 466, 471, 231 P. 601; People v. James, 71 Cal. App. 374, 378, 235 P. 81.

We do not regard this to be an open question any longer in this state.

[4] It is intimated in some of the briefs filed on behalf of petitioner that section 644 of the Penal Code is in contravention of section 11 of article 1 of the Constitution of the state requiring that all general laws shall have a uniform operation. There is no merit in such a contention, as the section of the Code in question affects alike all offenders similiarly situated, and therefore does not deprive any one of the equal protection of the laws. McDonald v. Massachusetts, 180 U. S. 311, 313, 21 S. Ct. 389, 45 L. Ed. 542; People v. Smith, 36 Cal. App. 88, 89, 171 P. 696; People v. Finley, 153 Cal. 59, 61, 94 P. 248; People v. Carson, 155 Cal. 164, 169, 99 P. 970.

[5] A further point is made by the Attorney General against the release of petitioner from her imprisonment, and that is that, even assuming section 644 of the Penal Code to be unconstitutional and void, still she would not be entitled to such release until the expiration of the time for which she could be lawfully confined by virtue of her conviction under section 476a of the Penal Code. This point is well taken. The commitment shows that petitioner was convicted of the crime denounced in section 476a, and the judgment is that she be confined in the state prison as prescribed by law. Even if we disregard that portion of the commitment, referring to the prior convictions of felony, we still have a valid commitment under section 476a against the petitioner, and not until the expiration of the term for which she may be lawfully imprisoned for the violation of said section 476a, would petitioner be entitled to release from her imprisonment. In re Morck, 180 Cal. 384, 181 P. 657. In that case this court said:

> "It is the established practice of the supreme court not to consider any question of excess of sentence until the expiration of the time for which the prisoner may be lawfully confined. * * * It is clear, therefore, that a writ should not be granted at this time."

The application for a writ of habeas corpus is denied.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

205 Cal. 525

In re SCOTT.

SCOTT v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY et al.

(S. F. 13073.)

Supreme Court of California. Nov. 20, 1928.

1. Mandamus 🔑166—Applicant for writ of mandate had right to file reply or answer to return, though it might have but little evidentiary value (Code Civ. Proc. § 1091).

Under Code Civ. Proc. § 1091, authorizing applicant for writ of mandate to countervail answer by proof either in direct denial or by way of avoidance, applicant for such writ had right to file a reply or answer to return, though it might have but little evidentiary value in controverting allegations thereof.

2. Attorney and client 🔑75(1)—Client had right to change attorneys having no relation to subject-matter of action whether or not valuable services were rendered or moneys advanced.

In absence of any relation of attorney to subject-matter of action other than arising from employment, client had absolute right to change attorneys at any stage of action, without regard to whether attorney had rendered valuable services under his employment or that client might have been indebted to him therefor or for moneys advanced.

3. Attorney and client 🔑76(1), 148(2)—Attorney did not, by virtue of contingent fee agreement, acquire interest in subject-matter of action, preventing client from revoking employment; "power coupled with interest" (Civ. Code, § 2356).

Attorney did not, by virtue of employment contract providing for compensation by payment of one-half of net recovery of money and property obtained, acquire such interest in subject of agency or subject-matter of the action within the meaning of Civ. Code, § 2356, as to prevent client from revoking his employment as attorney in proceeding, since a "power coupled with an interest" must be an interest in the thing itself, and the power must be ingrafted on an estate in the thing, and power and interest must be united in same person.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Power Coupled with an Interest.]

4. Attorney and client 🔑75(1)—Laywoman is not estopped from changing attorneys because of having misstated legal effect of employment contract to one of original attorneys.

Laywoman, having executed agreement with attorney providing for compensation to attorney by the payment of one-half of amount recovered, is not estopped from thereafter changing attorneys by reason of having misrepresented to another attorney subsequently associated therewith the legal effect of such written instrument as creating interest in subject-matter of action.

5. Attorney and client 🔑75(1)—Delay of seven months in applying for mandate to compel substitution of attorney held not such laches as precluded relief.

Delay of seven months in applying for writ of mandate to compel court to substitute attorneys following the denial of a motion therefor in the lower court *held* not such laches as precluded relief, in absence of showing any injury or disadvantage had resulted because of delay.

In Bank.

Original application for writ of mandate by Maud Scott, also known as Marion Scott against the Superior Court in and for the County of Alameda and another. Writ granted.

Wm. J. Cullinan and Stanley C. Burke, both of San Francisco, for petitioner.

Leo R. Friedman and Robert E. Fitzgerald, both of San Francisco, for respondents.

WASTE, C. J. Petitioner seeks a writ of mandate to compel the respondent court and judge to grant a motion, duly made in the court below, for substitution of attorneys in proceedings relating to the probate of the last will and testament of Leon Morrison, deceased. An alternative writ was granted, and the respondents interposed a general and special demurrer to the petition, and, at the same time, filed an answer by way of return to the writ. Petitioner thereupon asked leave to file a reply or answer to the return. It was received over the objection of the respondents, subject to a reserved decision whether or not it should be filed.

[1] The right of the petitioner to file such a reply or answer to the return is well settled. In a proceeding for mandamus, "on the trial, the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof either in direct denial or by way of avoidance." Code Civ. Proc., § 1091; McClatchy v. Matthews, 135 Cal. 274, 67 Pac. 134. Petitioner's reply to the answer and return is therefore ordered filed. It may have little "evidentiary value" in controverting the allegations of the return, as is contended by the respondents, but that fact does not prevent its consideration by the court for whatever it may be worth.

[2] We deem it unnecessary to specially consider the contentions raised by the specifications of the special demurrer that the petition here is uncertain, ambiguous, and unintelligible. The points thus raised which are worth considering relate to matters reached by the general demurrer. The others relate to facts, some of which are matters of record, and all of which are easily ascertainable, if an amendment were deemed necessary. They do not appear of sufficient importance to prevent an immediate consideration of the application on its merits. Much of the discussion by the respondents would be far

more effective and persuasive if this were an appeal from an order of the lower court instead of an application for the exercise of the discretionary power of this court in issuing an original writ. The petitioner has an absolute right to change her attorneys, in the absence of any relation of the attorneys to the subject-matter of the action, and it is necessary only for her to request such change in order to justify the court in making an order therefor. Code Civ. Proc., § 284; Woodbury v. Nevada, etc., Ry. Co., 121 Cal. 165, 53 P. 450. We are therefore but little concerned over the effort of the respondents to prevent a consideration of the application on its merits, which consideration primarily needs to be addressed to the legal effect of a purported assignment made by petitioner to H. L. Hagan, one of the attorneys who formerly represented her in certain litigation concerning the estate of Leon Morrison, deceased.

Leon Morrison died in the county of Alameda on or about the 20th day of June, 1921, leaving a considerable estate. By his last will and testament, made a few days before his decease, but not discovered until some time later, his estate was devised and bequeathed to Maud Scott, also known as Marion Scott, the petitioner in this matter. Before the discovery of the will, Marion Scott entered into a written agreement with H. L. Hagan, an attorney at law, in which agreement, after reciting that Marion Scott had certain claims against the estate of Leon Morrison, deceased, and the administrator of his estate, based upon promises and agreements made prior to the death of the deceased, Marion Scott agreed to employ Hagan as her attorney to prosecute said claims for her. By further provisions she agreed to give Hagan, "as compensation for said services, one-half of the net recovery of money and property obtained by judgment or compromise of the said claims." By the further terms of the agreement Hagan accepted the employment, and it was stipulated that, as the attorney in the prosecution of the claims and in the management of any litigation based thereon, he should "have the powers and duties prescribed for an attorney at law by the laws of the state of California."

Pursuant to his employment, Hagan commenced a proceeding in equity in the superior court, in and for the county of Alameda, wherein Maud Scott, this petitioner, was plaintiff, for the purpose of compelling the production of the last will and testament of Leon Morrison. Surety after the relation of client and attorney was entered into, as set out in the agreement above referred to, Maud Scott executed and delivered to Hagan a writing, by the terms of which she assigned and set over to Hagan "one-half of the net recovery of all money and property received" by her from the estate of Leon Morrison, deceased. Subsequent to the execution and delivery of this assignment, the will of Leon Morrison was filed in the respondent court. Opposition to the petition was filed by the Attorney General in behalf of the people of the state of California, and by two groups of persons claiming to be the surviving heirs of the decedent Morrison. The proceedings resulting in the admission of the will to probate are reviewed in the decision of this court in Estate of Morrison, 198 Cal. 1, 242 P. 939.

Subsequent to the employment of Hagan by the petitioner, she requested Hagan to associate Milton T. U'Ren with himself as an attorney in the proceedings. It is alleged in the answer of the respondents in connection with that request that petitioner stated to U'Ren that she desired to associate him with Hagan as her attorney, and that she had theretofore transferred and set over to Hagan a one-half interest in and to all the property constituting the estate of the decedent, Morrison, and that Hagan was then the owner and possessed of such one-half interest; and that she further stated to U'Ren that Hagan had agreed that, if U'Ren would associate himself as attorney for petitioner, Hagan would, by written instrument, transfer to U'Ren a one-half interest in and to the assignment from petitioner to Hagan. The respondents allege that it was upon these representations that U'Ren associated himself with Hagan as attorney for petitioner in the proceedings in the probate court.

In this connection, it is alleged in the reply of petitioner to the return that the purported assignment to Hagan, entered into 1½ months after the relation of attorney and client between petitioner and Hagan began, was executed at the special instance and request of Hagan, and that at the time of its execution petitioner was without the aid and assistance of separate counsel, and executed the assignment without knowing the true nature of its purpose or its effect, and was without knowledge of the terms of the assignment and without freedom of action in the matter, until the attorneys Cullinan and Burke, whom she now seeks to have substituted, called her attention to the terms of the purported assignment.

Hagan made an assignment to U'Ren of one-half of whatever interest he had acquired by virtue of the assignment from petitioner to himself, and thereafter Hagan and U'Ren represented the petitioner in matters relating to the estate of Morrison. It is alleged by the respondents that Hagan and U'Ren, as attorneys for petitioner, performed a vast amount of labor in the matter, and, relying upon the statements and representations of petitioner that the assignment made by her conveyed to Hagan a one-half interest in petitioner's interest in Morrison's estate, expended more than $1,300 in petitioner's behalf, and that certain proceedings by way of contest of the will of Morrison are still pending before the superior court.

The petitioner, on or about September 8, 1927, employed William J. Cullinan and Stanley C. Burke, attorneys at law, to represent her in all matters relating to the estate of Morrison, deceased, giving them full power as attorneys "to prosecute and collect any right, title, interest or claim" she might have in and to the estate. With matters in this shape, the petitioner requested Messrs. Hagan and U'Ren to agree to the substitution of attorneys. They refused, upon the ground that Hagan held "a fifty per cent. contingent contract from Miss Scott." Petitioner thereupon applied to Judge Church, of the respondent court, to make an order substituting Messrs. Cullinan and Burke as her attorneys in all matters connected with the estate of Leon Morrison, deceased. According to the answer and return, the motion was considered on the affidavits and other documents set forth in the petition for writ of mandate filed here, and other and additional testimony and evidence, upon which Judge Church decided and held that the expression, "one-half of the net recovery of all money and property received by said party of the second part from the above-named estate," set forth in the assignment from Marion Scott to Hagan, was intended to mean by the parties, and did mean in said instrument, one-half of the interest of said Scott in and to said estate of said Leon Morrison, deceased, and that said instrument created in Hagan a power coupled with an interest, and that the subsequent employment by Marion Scott of U'Ren, together with the assignment by Hagan to U'Ren at the direction of Marion Scott, created in U'Ren a similar power coupled with an interest. It is also alleged that the judge decided and determined from the evidence that the petitioner here was estopped and precluded, as against Hagan and U'Ren, and particularly as against U'Ren, from claiming that the assignment from her to Hagan was not an assignment of one-half of the interest of petitioner in and to the estate of Leon Morrison, deceased, and did not create a power coupled with an interest.

The order denying the motion for substitution was made on or about the 10th day of November, 1927. Application to this court for a writ of mandate was not made until 7 months later. During the intervening period, Hagan and U'Ren, it is alleged, have continued to act as petitioner's attorneys in the estate of Morrison. These facts are pleaded by the respondents in support of the further allegation that petitioner has been guilty of laches and has caused an estoppel to arise which prevents the commencement, at such a late date, of any proceeding to substitute attorneys in the place of Hagan and U'Ren.

This is not an appeal from Judge Church's ruling, and, unless it be determined that petitioner transferred and assigned to attorney Hagan an interest in the property involved in the estate of Leon Morrison, deceased, petitioner is clearly entitled to a writ directing the respondents to make the order of substitution of attorneys prayed for. Section 284 of the Code of Civil Procedure provides that the attorney in an action or special proceeding may be changed at any time upon the order of the court upon the application of either client or attorney, after notice from one to the other.

> "The rule must be considered as settled in this state, under the above provision of the code, that in the absence of any relation of the attorney to the subject-matter of the action, other than that arising from his employment, the client has the absolute right to change his attorney at any stage in the action." Gage v. Atwater, 136 Cal. 170, 172, 68 P. 581, 582.

The same decision lays down the further rule that:

> "The fact that the attorney has rendered valuable services under his employment, or that the client is indebted to him therefor, or for moneys advanced in the prosecution or defense of the action, does not deprive the client of this right. Section 1021 of the Code of Civil Procedure provides that the mode and measure of compensation of attorneys is left to the agreement of the parties, and in the absence of any other agreement in reference thereto there arises the ordinary money obligation which exists upon the employment of one person in the service of another."

Therefore, in this case, the facts that Hagan and U'Ren performed a "vast amount of labor" and expended for and in behalf of petitioner several hundred dollars, pass out of our consideration.

[3] We are of the view that Hagan did not acquire such an interest in the "subject of the agency," or subject-matter of the action, within the meaning of section 2356 of the Civil Code, as to prevent petitioner from revoking his employment as an attorney in the proceeding. A power coupled with an interest must be an interest in the thing itself; the power must be ingrafted on an estate in the thing, and the power and interest must be united in the same person. Hunt v. Rousmanier's Administrator, 8 Wheat. 174, 5 L. Ed. 589. By the terms of the first agreement between petitioner and Hagan, petitioner employed Hagan in his capacity as an attorney at law to prosecute certain claims against the estate of Leon Morrison, deceased, and agreed to give him "as compensation for said services one-half of the *net recovery of money and property obtained" for her by his services* [italics added], giving to Hagan the powers and duties prescribed for an attorney at law by the laws of the state. It cannot be successfully argued that this transaction amounted to the assignment to Hagan of an interest in the subject of the action. By the second agreement or assignment, petitioner set over and assigned to Hagan merely "one-half of the net recovery" of money and property re-

ceived by her from the estate of Morrison. By virtue of that assignment, Hagan had no more than an interest in enforcing the claims of the petitioner against the Morrison estate, for upon his efforts depended his compensation as attorney for his client, the claimant. But the interest which he had in the money or property secured for his client, a part of which he was to get as compensation for his services, was an interest in that which was to be produced by the exercise of his power as attorney for his client, and did not amount to an interest in "the subject of the agency" within the meaning of section 2356 of the Civil Code, supra, which acts to prevent the revocation by the principal of the power of an agent coupled with an interest in the subject of the agency. Boehm v. Spreckels, 183 Cal. 239, 247, 191 P. 5; Flanagan v. Brown, 70 Cal. 254, 259, 11 P. 706. Hagan's interest was only a right to share the proceeds which might result from the execution of his power. He did not have a power coupled with an interest. In the case last noted the court cited the case of Hartley and Minor's Appeal, 53 Pa. 212, 91 Am. Dec. 207, as being "instructive in this connection." In that case a party gave to Hartley and Minor a power of attorney to collect and receive all money and property coming to her as an heir of a deceased person, with power to convey her interest in the real estate of the decedent, etc., the said Hartley and Minor to receive for their services one-half of the net proceeds of her interest in said estate which might be collected or received by them as her attorneys. Litigation arose over the transaction, and Hartley and Minor claimed the power was irrevocable by their principal, under the theory that it was a power coupled with an interest. The trial court decided against their contention, and on appeal the Supreme Court held that the power and the interest could not co-exist. The court said:

> "The interest the appellants would have would be in the net proceeds collected under the power, and the exercise of the power to collect the proceeds would ipso facto extinguish it entirely, or so far as exercised. Hence the appellants' interest would properly begin when the power ended."

We conclude, therefore, that petitioner's assignment to Hagan did not raise an agency coupled with an interest within the meaning of section 2356 of the Civil Code. U'Ren acquired no greater interest in the transaction than Hagan had. Neither of these attorneys is therefore in position to resist the desire of petitioner for a substitution of attorneys on the ground of a power or agency coupled with an interest, and the respondents, answering for them, should grant her motion.

[4] We are not strongly impressed with the contention of the respondents that petitioner is estopped from seeking a substitution of attorneys by her representations to U'Ren concerning the purported assignment of an interest to Hagan. According to the records of this court Mr. U'Ren was admitted to practice law in this state many years ago. The volumes of the decisions of this court disclose that he has been prominent in the conduct of many important cases. We are not prepared to hold that a professional nurse, a laywoman, is estopped from exercising her legal right to change her counsel for the alleged reason she may have misstated to a practicing attorney of experience the legal effect of an existing written instrument prepared by another attorney.

[5] Neither are we in sympathy with the contention of the respondents that the relief sought here should be denied on the ground of the laches of the petitioner in making the application, following the denial of her motion in the court below. It is true that petitioner waited several months, but it is not shown in the return that any injury or disadvantage has been wrought to the respondents by the delay. In her reply to the return, petitioner, by her counsel, alleges that she did not know the true extent of the assignment prepared by Hagan until she received the independent advice of the counsel she is now seeking to have substituted for her former attorneys.

The conclusions we have reached render it unnecessary to consider the further contentions of the petitioner.

Let a peremptory writ of mandate issue as prayed for.

We concur: PRESTON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

94 Cal. App. 724

DEMOCRAT-HERALD PUB. CO. v. PETTIT et al. (Civ. 5772.)★

District Court of Appeal, First District, Division 2, California. Nov. 9, 1928.

Rehearing Denied Dec. 5, 1928.

1. Sales 🔑243—Proof of defendant's acquisition of title from plaintiff's vendee, given possession with power of disposition, held admissible under simple denial without pleading estoppel (Civ. Code, § 1142).

In action by vendor to recover printing press from good-faith purchaser from vendee, engaged in business of buying and selling printing machinery, defendant was entitled to introduce proof of acquisition of title by purchase from one having possession and power of disposition, under Civ. Code, § 1142, under simple denial of plaintiff's title and right of possession without necessity of pleading estoppel, though statute is based fundamentally on principles of estoppel which prevent seller from rescinding after buyer has disposed of the property.

2. Sales 🔑234(8)—Vendee's authority to sell property purchased so as to invest title in subvendee may be implied (Civ. Code, § 1142).

Vendee's authority from his vendor to sell property purchased so as to invest subvendee with title under Civ. Code, § 1142, may be implied as well as expressed.

3. Sales 🔑234(8)—Seller, delivering printing press to vendee in business of buying and selling printing machinery, and permitting vendee to retain possession, impliedly authorized resale (Civ. Code, § 1142).

Seller of printing press, delivering possession of press to vendee engaged in business of buying and selling printing machinery, impliedly authorized resale under Civ. Code, § 1142, permitting vendee, who has possession and power of disposition to transfer title to subvendee, notwithstanding vendor's rescission, in view of original seller's permission to vendee to retain property in return for postdated check.

4. Sales 🔑234(8)—Sale by vendee, engaged in selling printing machinery, of press delivered to him by seller, passed title to bona fide subvendee, notwithstanding seller's rescission (Civ. Code, § 1142).

Seller of printing press, who delivered possession thereof to vendee engaged in business of selling new and secondhand printing machinery and permitted vendee to retain it on condition that he would forward postdated check, *held* not entitled to recover the press as against bona fide subvendee, since vendee's sale thereof passed title under Civ. Code, § 1142, as sale by one having possession with power of disposition, notwithstanding seller's rescission.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the Democrat-Herald Publishing Company against Raymond C. Pettit, the Pacific Printing Machinery Company, and J. De Menezes & Son, etc. Judgment for plaintiff, and defendants, except the two first named, appeal. Reversed, and new trial ordered.

A. Q. Lomba and G. E. Jackson, both of Oakland, for appellants.

Herbert Choynski, of San Francisco, for respondent.

KOFORD, P. J. Defendant Pettit was the sole proprietor or manager of the Pacific Printing Machinery Company, engaged in the business of buying, repairing, reconditioning, and reselling new and secondhand printing machinery. Appellants purchased from said Pettit, May 29, 1925, at his place of business in San Francisco, a certain printing press, paid for it, and had it delivered and set up in their place of business in Oakland, on or before June 27, 1925. Thereafter, in August, 1925, respondent commenced this action against appellants and defendants for the recovery of the said press, claiming that it had never parted with title to the same, but that the press had been delivered to Pettit upon a conditional sale agreement, reserving title in respondent until full payment of the sale price, which had not been made. The complaint alleged ownership and right of possession, and the answer of appellants contained only denials. Defendants Pettit and Pacific Printing Machinery Company were not served with summons, and were not parties to the trial.

The transactions between respondent and Pettit accompanying and following the delivery of the printing press to Pettit are outlined as follows: Pettit wired to respondent "an offer on the press on a 30 day basis," asking respondent to ship it if satisfactory. Respondent answered that it would accept his offer upon deposit of $100 and the signing of a contract. A contract was prepared by respondent and sent to Pettit for his signature about May 6, 1925. It provided for payment of the balance of the purchase price in 30 days and that the title should remain in respondent until paid. Pettit replied by sending $100 and a $700 promissory note payable in 30 days and the agreement signed with changes or a new agreement to some different effect but resembling the one received by him in form and color. The alteration or change in the contract made by Pettit was not noticed by respondent. It shipped the press directly to Pettit, and forwarded a uniform straight bill of lading, dated May 15, directly to Pettit, who received the bill of lading and the press about May 29. This is the same date as the contract of sale from Pettit to appellants. On June 10, Pettit wired respondent:

"Will you supply bill of sale on Huber Press in return for postdated check payable July

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★Rehearing denied.

first, cannot finance sale to our customer otherwise."

Respondent replied to this wire as follows:

> "If you will send certified check for seven hundred five dollars and forty four cents, principal and interest to July first, with check dated July first by your banker, and authorize our changing agreement to eliminate motor as stated in our last letter, we will forward bill of sale on receipt of your voucher."

Following this, respondent heard nothing more from Pettit, but Pettit completed the resale of the press to appellants. He retained all the purchase price paid by appellants and failed to pay to respondent the amount he had promised to pay for the purchase of the press. At the trial, his whereabouts was unknown. The evidence also disclosed that respondent, as well as appellants, knew that Pettit was in the business of buying and selling used machines.

Appellants contend that they obtained a good title by their purchase from Pettit under several rules, including the rule laid down in Civil Code, § 1142, which reads:

> "Where the possession of personal property, together with a power to dispose thereof, is transferred by its owner to another person, an executed sale by the latter, while in possession, to a buyer in good faith and in the ordinary course of business, for value, transfers to such buyer the title of the former owner, though he may be entitled to rescind, and does rescind the transfer made by him."

The principle embodied in this section is well established (Estrich on Installment Sales, § 151), and has been the guiding rule in many decisions in this state. In applying this principle, these decisions have often treated the facts as an equitable estoppel. Sometimes they seem to be based chiefly on Civil Code, § 3543, which provides:

> "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

In some cases they are based solely on the principle of law stated in Civil Code, § 1142, meaning that title actually not fictitiously passed by reason of this principle. Among this last-named group of decisions are Carter v. Rowley, 59 Cal. App. 486, 211 P. 267; Commercial Acceptance Trust v. Bailey (Cal. App.) 261 P. 743; Wright v. Solomon, 19 Cal. 64 (1861).

Respondent's answer to this contention is that appellants did not plead estoppel in their answer as a defense and that the case was not tried as though this point were an issue. Most of the time at the trial was devoted to identifying the press and to ascertaining the exact transaction between the respondent and Pettit as if to determine whether title had passed between these two. Appellants' counsel, however, did bring out evidence of all the elements essential to the operation of Civil Code, § 1142. Some but not the greater part of the evidence came in over the objection that it was immaterial, but at no time was any objection made that expressly directed attention to the necessity of pleading such facts as an estoppel. The record does not show that appellants' counsel at the trial claimed an estoppel by name, but it does show that he put forward the claim of title by reason of the provisions of Civil Code, § 1142.

[1] It is held in this state that an equitable estoppel as a defense must be pleaded, but there seems to be no good reason why this rule of decision should be applied to Civil Code, § 1142. While the rule of that section may be said to be based fundamentally on the principles of equitable estoppel, its language does not say that the owner of the property shall be estopped under the named conditions from asserting his title against the innocent buyer, but it says that the owner's title itself is transferred to such buyer under the named conditions. This section is found in an article of the Code named "What Operates as a Transfer," and in a chapter named "Transfer of Personal Property." This being one method of transferring title prescribed in the Code, a simple denial of plaintiff's title and right of possession should permit proof to be given of the acquisition of title by this method as well as by the method of acquiring property by a direct transfer from the original owner. Furthermore the operation of the rule of that section may as well be called a sale by agent as a sale by estoppel. See Carter v. Rowley, 59 Cal. App. 486, at 491, 211 P. 267.

[2-4] The original owner's authority to sell, mentioned in Civil Code, § 1142, may be implied as well as expressed. Carter v. Rowley, 59 Cal. App. 486, at 489, 211 P. 267; State Finance Co. v. Isaacson (Cal. App.) 260 P. 580; Wright v. Solomon, 19 Cal. 64; Spooner v. Cummings, 151 Mass. 313, 23 N. E. 840; Gump Investment Co. v. Jackson, 142 Va. 190, 128 S. E. 506, 47 A. L. R. 82, at page 94; Estrich on Installment Sales, § 151.

> "The consent of the owner to a disposition of his property may be inferred from acts, as well as given in direct terms. It may be inferred when the owner gives such evidence of the authority of disposal as usually accompanies such authority according to the custom of trade and the general understanding of business men. Thus, the delivery of goods to a merchant, engaged in the sale of articles of a similar kind, is such evidence of the bestowal of the right to dispose of the same, as to protect the purchaser from the possessor. The possession under such circumstances is evidence, not that the possessor is owner, but that he has received authority from the owner to sell." Wright v. Solomon, 19 Cal. 64, at 76, 79 Am. Dec. 196.

Respondent knew that Pettit was in the business of selling presses, knew that he intended to offer for sale this press, both from knowing the nature of his business and from the exchange of telegrams. Respondent must therefore be held to have authorized a resale by Pettit. Whatever may be said about whether respondent transferred the title of the press to Pettit, it undoubtedly transferred the possession which is the thing mentioned in Civil Code, § 1142.

It follows, therefore, that the judgment appealed from should be reversed. A new trial is ordered.

We concur: STURTEVANT, J.; NOURSE, J.

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94 Cal. App. 755

HARKER v. RICKERSHAUSER et al.

(Civ. 3234.)

District Court of Appeal, Third District, California. Nov. 14, 1928.

1. Evidence ⇨383(7)—Recitals of trustee's deed that mortgagors had defaulted held not conclusive against mortgagors' claim that condition rendering trust deed void had been performed.

Where deed of trust given to protect mortgagees against levy of execution on realty received in trade with mortgagors recited that, if mortgagors paid judgment, or caused execution to be released from property, deed of trust should be void, and that recitals respecting default contained in trustee's deed on sale thereunder should be conclusive, recitals of mortgagors' default in making payments contained in trustee's deed to mortgagees was not conclusive against mortgagors' claim that execution had been released to mortgagees' knowledge before trustee's deed was executed and that trustee's deed was therefore void.

2. Mortgages ⇨209—Trustee under deed of trust is agent of both parties.

A trustee under a deed of trust is the common agent of both parties.

3. Mortgages ⇨101—Word "or" in deed of trust reciting it should be void on happening of specified contingencies held not construable as "and."

Where deed of trust given to protect mortgagees against levy of execution on realty received in trade with mortgagors recited that, if mortgagors paid judgment or caused execution to be released from property, deed of trust should be void, mortgagees' contention that word "or" should be read as "and" could not be sustained, since trust deed clearly indicated that performance of either condition would be sufficient; word "or" usually implying an alternative.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Or.]

4. Mortgages ⇨101—Whether "or" should be read as "and" in deed of trust depends primarily on parties' intent.

Question whether the word "or" should be read as "and" in a deed of trust is one primarily of ascertaining parties' intention, and substitution of one for the other is, in effect, relief against mistake.

5. Mortgages ⇨97—Precise language of deed of trust will be altered by construction only if it sets at naught parties' obvious intent.

The precise language of written agreements, such as deeds of trust, will be altered or modified by rules of construction only where, if allowed to stand, it would set at naught obvious intention of parties.

6. Ejectment ⇨139—Mortgagees' expenditures on mortgaged property, after condition rendering trust deed void was performed by mortgagors, held not recoverable as voluntary.

Where deed of trust was rendered void by mortgagors obtaining release of execution on realty traded in exchange for realty with mortgagees, and to secure the obtaining of which release the trust deed was executed, mortgagees' expenditures on property covered by trust deed and purporting to be authorized thereby, with knowledge of such release, were voluntary and not recoverable.

7. Ejectment ⇨84(2)—In action for possession, proof that trustee's deed under which defendants claimed was void, though not pleaded in complaint, held admissible in avoidance of defense.

In action to recover possession of land in which defendants' answer claimed title under sale by trustee under deed of trust held by defendants, proof that trustee's deed was void was admissible in avoidance of such defense, though such invalidity was not pleaded in complaint.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by Mabel E. Harker against F. J. Rickershauser and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Schweitzer & Hutton, of Los Angeles, Harding & Monroe, of San Francisco, and Huston, Huston & Huston, of Woodland, for appellants.

John Cooper Packard, of Los Angeles, and S. W. Packard, for respondent.

TUTTLE, Justice pro tem. This is an action brought to recover possession of 350 acres of land in Yolo county. The complaint alleges that plaintiff is now, and ever since the 7th day of February, 1922, has been, the owner thereof; that defendants, on or about the 8th day of May, 1923, entered into said land and ousted plaintiff therefrom; and that defendants now wrongfully withhold possession of said premises. Judgment for possession is prayed for. The answer denies the ownership by plaintiff. As a further defense, defendants set up the execution of a certain deed of trust by plaintiff, covering said property; that a default occurred on behalf of plaintiff in the performance of certain condition therein; that a sale of said property under said trust deed was had; and that defendant F. J. Rickershauser purchased the same, and that he is now the owner thereof.

The trial court found that said trust deed was null and void, and judgment was entered for plaintiff, decreeing her to be the owner of said property, and that she recover possession thereof. From this judgment defendants appeal.

It appears from the record that in the month of January, 1922, plaintiff was the owner of certain real property in Los Angeles, which she agreed to trade with defendants for the 350 acres of land in Yolo county, above referred to. Pursuant to said agreement, plaintiff executed and delivered to defendants a deed to her said property, and defendants conveyed said Yolo county property to plaintiff. The whole transaction appears to have been consummated by March 1, 1922, on which date the deed to plaintiff was recorded. During the negotiations between said parties, it developed that there was outstanding a judgment against J. B. Harker, husband of plaintiff, in the sum of $7,200 or thereabouts, and that execution had theretofore been levied against the interest of said Harker in the Los Angeles property involved in said trade, said property standing on the records at the time of said levy in the name of plaintiff. For the purpose of protecting defendants from the levy of said execution, a trust deed was executed by plaintiff and her said husband, covering said Yolo county property, and containing the following provision:

> "In the execution, delivery and acceptance of this trust deed it is expressly understood and agreed between all parties hereto, that if the parties of the first part pay said judgment or cause the said execution to be released from said property first herein described, then the said note and this trust deed to become null and void and of no effect."

A note for $7,200, due six months after date, was executed in connection with said trust deed.

Plaintiff introduced in evidence her deed from defendant, testified that defendants were in possession of the premises described therein, and rested. Defendants thereupon introduced in evidence the said trust deed and a deed from the trustee named therein, and given pursuant to a sale had under the provisions thereof, and rested. Plaintiff, in rebuttal, then introduced in evidence a certified copy of the release of the levy of execution above referred to, dated February 27, 1922. There is also testimony to the effect that the judgment under which said execution was levied was satisfied September 30, 1922. The facts above recited with reference to the release of the levy of the execution were found by the court to be true. The court also found that said sale under the trust deed was made after defendants knew that said execution had been released and the judgment under which the same was levied had been satisfied.

[1] It is first contended by appellants that the trustee's deed and the recitals therein were a conclusive and complete defense to the action, and "that said deed and its recitals in this action could not be attacked, qualified or disproved by plaintiff." The trust deed contained the following provision:

> "And in the event of the sale of said property, or any part thereof, and the execution of a deed or deeds therefor under these trusts, then the recitals therein of default, that the beneficiary or holder of the note had given notice of the default and election to sell the described premises under the powers of the deed of trust, to satisfy the debt, was duly recorded in the office of the county recorder for three months prior to the notice of sale, due publication of the notice of sale, due and proper posting of the notice of sale, and also publication of notice of postponement, if the sale was postponed; that the sale was made to the highest bidder; that the purchase-money was paid; and any such deed or deeds with such recitals shall be effectual and conclusive, as against the said parties of the first part, their heirs or assigns, and all other persons; and the recital of the receipt of the purchase-money contained in any deed executed to the purchaser, as aforesaid, shall be a sufficient discharge to such purchaser from any obligation to see to the proper application of the purchase-money, according to the trusts provided in this instrument."

The deed of the trustee contained recitals of all the facts referred to in the foregoing provision.

The trust deed also contained the following references to the judgment and execution levied pursuant thereto:

> "This deed of trust, made this 11th day of February, 1922, between Mabel E. Harker and J. B. Harker, of the first part, D. K. Gault, party of the second part, and F. J. Rickershauser, party of the third part, witnesseth:
>
> "That whereas, Ward Rice has heretofore obtained judgment against Mocalwa Investment Company and J. B. Harker, upon which said judgment there is now due $7,200.00, or thereabouts; and
>
> "Whereas, an execution has heretofore been issued on said judgment and levied upon all of the interest of J. B. Harker in the following described property, to wit:
>
> "Lot 122, Westlake Park Tract, as per map recorded in book 12, page 15, miscellaneous records of the county of Los Angeles, state of California, which third party is about to purchase; and
>
> "Whereas, J. B. Harker disclaims any interest in said described land and Mabel E. Harker claims to be the sole and exclusive owner thereof as her separate property; and
>
> "Whereas, J. B. Harker and Mabel E. Harker are both desirous of selling said property to third party subject to said execution and the claims of Ward Rice arising therefrom; and
>
> "Whereas, by reason of the premises and the hereinafter contained covenants on third party's part, the said Mabel E. Harker and J. B. Harker have agreed to pay to said party of the third

part the amount of the balance due on said judgment, in gold coin, with interest, according to the terms of one certain promissory note executed and delivered by the said party of the first part, said note being in words and figures as follows:

"7200.00

Los Angeles, Cal. February 1, 1922.

"Six months after date, for value received, we, and each of us, promise to pay F. J. Rickershauser, or order, at 1225 Citizens National Bank Building, Los Angeles, California, the sum of seven thousand two hundred and no/100 dollars, with interest at the rate of one per cent. per annum from date until paid, interest payable at maturity, and if not paid to be compounded and bear the same rate of interest as the principal; and should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States. This note is secured by a deed of trust to D. K. Gault, of Los Angeles, California.

Mabel E. Harker.

"J. B. Harker.

"This trust deed may be used as security for any additional sums coming due under said judgment in favor of said Ward Rice."

* * * * * * * * *

"In the execution, delivery and acceptance of this trust deed it is expressly understood and agreed between all parties hereto, that if the parties of the first part pay said judgment or cause said execution to be released from said property first herein described, then the said note and this trust deed to become null and void, but if said first parties fail to pay said judgment or cause the release of said execution within six months from date hereof, then third party assumes and agrees to pay said judgment, or so much thereof as at said time remains due and unpaid, on or before one year thereafter.

"The payment of said judgment by third party shall not be a prerequisite to the foreclosing of this trust deed."

The trustee's deed does not refer in any manner or particular to the last-mentioned provisions. It recites that "there has been a default in the payment of money advanced in accordance with the provisions of said trust deed." The whole intent and purpose of executing said trust deed was, as both parties admit, to secure the payment of the judgment *or* the release of the execution levied pursuant thereto. It was given as security for the performance of either of said acts by the first party named therein, and upon such performance it is expressly provided that the instrument shall "become null and void."

As there were clearly no recitals contained in the trustee's deed with reference to the said judgment and execution, there is little or no force in the contention made by appellants. Even assuming that such recitals could be established by inference, they would not be conclusive in an action between the parties to the trust deed.

[2] A trustee under a deed of trust is the common agent of both parties (Ainsa v. Mercantile T. Co., 174 Cal. 504, 163 P. 898), and the theory upon which the courts have proceeded in construing recitals in trustee's deeds is that the grantor under the trust deed is bound by the delegation of such authority as is given to the trustee in the exercise of his trust. This includes the execution of a deed pursuant to a sale, and the inclusion in said deed of such recitals as the parties may agree upon, and may include a clause relative to the conclusiveness of such recitals as to truth of the facts stated therein. Such recitals are conclusive where an innocent third party is the grantee in the trustee's deed (Jose Realty Co. v. Pavlicevich, 164 Cal. 613, 130 P. 15), but they are not conclusive as between the parties to the trust deed. (Seccombe v. Roe, 22 Cal. App. 139, 133 P. 507). In the instant case the trust deed was given as security for the performance of either of two acts upon the part of the trustor. It is admitted by both parties that one of said acts, to wit, the release of the levy of execution, was performed sixteen days from the date of the said trust deed, and the court found, upon sufficient evidence, that the beneficiary knew of the performance at or about the date it took place. If, notwithstanding such knowledge, defendant proceeded to have a sale made of the premises under such trust deed, this was palpable fraud upon the trustor, and under such circumstances plaintiff was entitled to go behind the recitals of the trustee's deed and prove the facts, even though they might be inconsistent or contradictory to such recitals. Jose Realty Co. v. Pavlicevich, supra. The court did not err in permitting plaintiff to prove these facts.

A number of cases have been cited by appellant upon the question of the conclusiveness of the recitals in the trustee's deed. None of these referred to construed a provision that upon the performance of a certain act by the trustor the trust deed shall become null and void. In the cases cited, the trustee's deeds were, at the most, merely voidable in an action between the parties. Hence they would pass title, though subject to direct attack by one of the parties. This is clearly set forth in Seccombe v. Roe, 22 Cal. App. 139, 133 P. 507. The case of Jose Realty Co. v. Pavlicevich, supra, involves facts similar to the case under consideration. The complaint was an ordinary one to quiet title. The defendant set up a deed to himself from a trustee and executed in pursuance of a sale had under a trust deed. Fraud was not pleaded, but the Supreme Court held that plaintiff was permitted to introduce evidence upon the question as to whether there had been a default under the trust deed, if such proof established fraud.

Appellants contend that this action is one brought to recover *possession* merely, and is in the nature of ejectment, and that under such circumstances the recitals in the trustee's deed are conclusive, citing Seccombe v.

Roe, supra, and other cases. What was said by the court in the case last mentioned on this question was quoted from Mersfelder v. Spring, 139 Cal. 593, 73 P. 452, where plaintiff sued in ejectment and defendant appeared with a general denial. Plaintiff relied upon a deed executed by a trustee under a deed of trust. This deed contained recitals similar to these in question, and the court held that the deed passed the legal title and plaintiff had made out a case in ejectment. The court proceeded to add, however, that these recitals did not preclude the inquiry, in an equitable proceeding, into the fairness of the sale or other matters which on equity principles might entitle the injured party to relief.

[3] It is next urged by appellants that the clause found in the trust deed in question "that if the parties of the first part pay said judgment *or* cause said execution to be released from said property first described herein, then the said note and this trust deed become null and void," is to be so construed that the word "or" is to be read as "and." Usually, the copulative "or" implies an alternative, and in the instant case, should either of the contingencies occur, the note and trust deed become null and void. The rule which should guide the court in this connection is clearly set forth in 2 C. J. 1388, subd. 2, and is as follows:

> "Ordinarily these words are in no sense interchangeable terms, but, on the contrary, are used in the structure of language for purposes entirely variant. In order to effectuate the intention of the parties to an instrument, a testator, or a Legislature, as the case may be, the word 'and' is sometimes construed to mean 'or.' This construction, however, is never resorted to except for strong reasons and the words should never be so construed unless the context favors the conversion."

[4, 5] The question is primarily one of ascertaining the intention of the parties. The substitution of one of these words for the other is, in effect, affording relief upon the ground of mistake. In this case we cannot say that there was any mistake in the use of the word "or" as it appears in the instrument. On the contrary, the preamble to the trust deed indicates clearly that the release of the execution was of far more importance than the payment of the judgment. If the payment of the judgment was the prime and only consideration, why was mention made of the release of the execution, when it is elemental that the payment of the judgment would operate, ipso facto, to release the levy of the execution? In the matter of altering or modifying, by rules of construction, the solemn engagements of parties, our courts uniformly have acted with reluctance and hesitation, and it is only where, if the precise language were allowed to stand, it would set at naught the obvious intention of the parties, have they substituted, by construction, one word for another. See City of Corona v. Merriam, 20 Cal. App. 232, 128 P. 769; Robinson v. S. P. Co., 105 Cal. 526, 38 P. 94, 722, 28 L. R. A. 773.

[6] Appellants contend that they are entitled to reimbursement for money they have expended in connection with the property in Yolo county. This was done, they claim, under the provisions of the trust deed. The court found that these expenditures were made subsequent to February 27, 1922, the date when the Los Angeles property was released from the levy of the execution, and at a time when defendants knew of said release. The findings of the court, which are sustained by ample evidence, are as follows:

> "That it is true that defendant F. J. Rickershauser paid moneys due on taxes and also moneys due under said agreement made by him with adjoining landowners, for alleged reclamation purposes, and also paid money to make said land productive; that each and every one of said payments so made by defendant F. J. Rickershauser were made by him without the consent, knowledge or authority of plaintiff or of her husband, J. B. Harker; and all of which payments were made subsequent to the 2nd day of March, 1922, and after the trust deed above set out had become null and void and of no force or effect; that it is true that defendant F. J. Rickershauser did not receive back any of the moneys so paid out by him directly from plaintiff or from J. B. Harker, but it is true that he did receive certain moneys as rent for said property, which said moneys he never paid, nor offered to pay to plaintiff."

It also appears that the rental from said Yolo county property, subsequent to the date last mentioned, and up to the date of the trial, was used to defray a considerable part of this expense. The release of the execution was placed on record in the office of the recorder of Los Angeles county on said date, and thereafter, as expressly provided in the trust deed, said instrument was null and void. If defendants made expenditures purporting to be authorized by said trust deed, they must be held to be voluntary in character, and not recoverable. 30 Cyc. 1298-A. It will be observed that the answer does not contain any specific prayer for relief in respect to this matter, nor is there any defense or counterclaim based upon such expenditures.

[7] In the instant case, plaintiff, in making out her case, rightly ignored the trust deed, and simply proved the deed to her from defendants. The trust deed was void, and had been from and after February 27, 1922, and a trustee's deed thereunder passed no title whatever. When defendants introduced their trustee's deed and rested, plaintiff was entitled, and had the right, to attack the same upon legal or equitable grounds. No other or further pleading was required, as such matter could be proved in avoidance of the defense set up in the answer. Jose Realty Co. v. Pavlicevich, supra.

Numerous other points are urged as

grounds for reversal. We have carefully examined each of them, but find them lacking in substantial merit. On the question of the sufficiency of the evidence to support the findings, we are of the opinion that the record is sufficient in this respect.

We are satisfied that the learned trial judge was correct in his conclusions, and that the judgment should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; HART, J.

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94 Cal. App. 691

MORRIS et ux. v. TURLEY. (Civ. 5158.)

District Court of Appeal, Second District, Division 2, California. Nov. 7, 1928.

1. Forcible entry and detainer 🔑29(4)—Evidence held to support finding of forcible entry, where fence defendant constructed encroached on plaintiff's property, and its construction damaged plaintiff's sidewalk and building (Code Civ. Proc. §§ 1159, subd. 1, 1160, subd. 1).

In action for forcible entry and detainer, where defendant erected fence which encroached on plaintiff's property, and which resulted also in damage to plaintiff's sidewalk and house during its construction, evidence *held* to support finding of forcible entry under Code Civ. Proc. §§ 1159, subd. 1, 1160, subd. 1, providing, respectively, that person is guilty of forcible entry who by any kind of violence or circumstances of terror enters on real property, and that person is guilty of forcible detainer who, either by force, menace, or threats of violence, unlawfully holds or keeps possession of real property acquired peaceably or otherwise.

2. Forcible entry and detainer 🔑24(1)—Forcible entry is gist of action, and detainer averment is stated as mere continuation or consequence of first act.

In action alleging forcible entry and detainer, the forcible entry is the gist of the action, and the averment of forcible detainer is not stated as an independent ground for relief, but as a mere continuation or consequence of the first act.

3. Appeal and error 🔑1071(1)—Finding sufficient as to forcible entry in action also alleging detainer held not reversible error, allegation of detainer being surplusage (Code Civ. Proc. § 633).

In action for forcible entry and detainer, though there was confusion of findings of fact and conclusions of law, contrary to Code Civ. Proc. § 633, such did not constitute ground for reversal; finding of forcible entry alone being sufficient to allow recovery, allegation of detainer being mere surplusage.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Herman R. Morris and wife against Dora A. Turley. Judgment for plaintiffs, and defendant appeals. Affirmed.

Superseding opinion in 268 P. 441.

Frank G. Tyrrell, of Los Angeles, for appellant.

Thomas S. Bunn, of Los Angeles, and W. Blair Gibbens, of Ocean Park, for respondents.

CRAIG, J. In 1923 the parties to this action constructed a division fence between their adjoining residence properties, of which they were in actual peaceable possession until and including January 21, 1925. On the date last mentioned four or five men employed by the appellant entered respondents' premises and removed said fence, and in so doing broke and removed a portion of a concrete walk, and cut off and removed part of a composition arch which formed a portion of respondents' house. Although disputed by the parties, it was alleged by the plaintiffs, and the trial court found, that in rebuilding the fence the defendant deprived plaintiffs of a portion of their property. This proceeding was thereafter instituted against the defendant under subdivision 1 of section 1159 and subdivision 1 of section 1160 of the Code of Civil Procedure, alleging forcible entry and forcible detainer. Judgment was rendered in favor of the plaintiffs, and the defendant appeals.

The portion of said sections relied upon by the plaintiffs provide, respectively, that:

> "Every person is guilty of a forcible entry who either—
>
> "1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror enters upon or into any real property. * * *"
>
> "Every person is guilty of a forcible detainer who either—
>
> "1. By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise. * * *"

Appellant insists that the evidence presented did not justify a finding of forcible entry or forcible detainer. The findings of the trial court recite:

> That "while the plaintiffs were so in possession of said land and premises, the defendant, with violence and a strong hand, and by the assistance of four or five men, entered upon the property in the possession of the plaintiffs and in a forcible manner removed the above mentioned fence from its then position and rebuilt it upon a new straight line; * * * that by the removal of said fence the defendant deprived the plaintiffs of, and the defendant did herself take, the possession of a wedge-shaped strip of land, having as its apex the point constituting the northwesterly corner of the above described lot; * * * and that the defendant in the same manner and at the same time re-

moved a portion of plaintiffs' building, and caused other portions of the said walk to be cracked and broken, and scattered débris over plaintiffs' lawn, impairing the appearance of plaintiffs' premises; and at the same time and in the same manner cut off and removed a portion of the composition arch forming a part of plaintiffs' building; and that the defendant unlawfully withholds and keeps possession of the strip of land above described and has so held possession thereof at all times since January 21, 1925."

It was adjudged that the plaintiffs recover possession of the strip of land so taken, and the sum of $300 damages, with their costs. The substance of this finding and judgment is that the defendant forcibly entered, and that she unlawfully retains possession of a portion of the plaintiffs' premises. It is not seriously contended that there is a forcible detainer thereof.

[1] Resolving all intendments in favor of the judgment below, and accepting as true the plaintiff's evidence, it appears that between 8 and 9 o'clock in the morning several men moved the party fence about 8½ inches onto plaintiffs' property, and that in so doing they sawed off 10½ inches of the arch, cut about 8 feet from a pipe which was embedded in cement, and chopped 8 or 10 inches off of the concrete sidewalk to a distance of about 90 feet from the front of the building, breaking roof drains and obstructing drainage. Plaintiff H. R. Morris testified that "it looked just like a cyclone struck through there, carrying mud and stuff, and cement that they left there." Another witness swore that he "saw a gang of men just naturally heaving the fence up, and tearing down the arch"; that "they pulled up the fence, and it fell down, and in a few minutes I saw them with the other men on the ladder cutting the arch." A builder testified that it would be necessary to rebuild the entire walk for a distance of 40 feet, to bond a new arch to the building, embed the post in cement, and replaster and restucco a considerable area, which would first require the tearing off of other plaster and stucco work, and that the cost of reconstruction would be $300. The plaintiff Morris testified that he was over sixty years of age, and that his health was "not very good"; that he forbade them to move the fence, but did not say more because they were young men, and he feared trouble with them.

We think the evidence amply supports the finding of forcible entry. As was held in Knowles v. Crocker Estate Co., 149 Cal. 278, 86 P. 715:

> "When a person enters upon land in the actual peaceable possession of another, with a number of men acting under his direction and control, with such a display of force and accompanied by such instant acts as are calculated to intimidate the occupant from resisting their intrusion and maintaining his possession, such conduct is sufficient to constitute a forcible entry within the purview of the statute."

[2] It is conceded that the evidence does not warrant a finding, nor did the court find, that there was a forcible detainer, and appellant argues that the finding that defendant "unlawfully withholds and keeps possession of the strip of land," being silent as to force, is insufficient and therefore mere surplusage, and that in any event it is but a conclusion of law. As to the first objection, it has been held that in an action alleging forcible entry and forcible detainer, the forcible entry is the gist of the action, and the averment of forcible detainer is not stated as an independent ground for relief, but as a mere continuation or consequence of the first act. Preston v. Kehoe, 15 Cal. 318; Thompson v. Smith, 28 Cal. 532; McMinn v. Bliss, 31 Cal. 122. And our Supreme Court, in Adams v. Helbing, 107 Cal. 298, 40 P. 422, quoting from Brison v. Brison, 90 Cal. 323, 27 P. 186, said:

> "If the complaint, as in the present instance, sets forth two or more grounds for relief, either of which is sufficient to support a judgment in favor of the plaintiff, a finding upon one of such issues is sufficient, and a failure to find upon the other does not constitute a mistrial, or render the decision 'against law.'"

[3] Confusion of findings of fact and conclusions of law contrary to the provisions of section 633 of the Code of Civil Procedure, is not a ground for reversal, if the judgment is manifestly right. Spencer v. Duncan, 107 Cal. 423, 40 P. 549; Butler v. Agnew, 9 Cal. App. 327, 99 P. 395. And where the findings are otherwise sufficient, they will not be held defective by the inclusion of matter which may be rejected as surplusage. Hopkins v. Warner, 109 Cal. 133, 41 P. 868. The findings and judgment in the instant case do not contemplate or require any active compliance upon the part of appellant. The fact is obvious that by her forcible entry and moving of the fence onto the respondents' premises they were damaged, and in removing the fence and reconstructing the arch, fence, sidewalk, etc., they must necessarily incur an expense of $300. Hence, if the disputed finding be disregarded, the finding and judgment as to forcible entry and the damage incident thereto are sufficient, and are supported by the record before us.

The judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

94 Cal. App. 765

WISE v. MAXWELL HARDWARE CO.

(Civ. 6259.)

District Court of Appeal, First District, Division 1, California. Nov. 15, 1928.

1. Municipal corporations 🔑821(17)—What is temporary and reasonable use of sidewalk by abutting owner for reception of merchandise is fact question for jury.

Though an abutting owner has right to a temporary and reasonable use of sidewalk in front of his premises for the reception of merchandise, what is a temporary and reasonable use, and the manner of its exercise, are questions of fact depending on circumstances of particular case, to be determined by jury.

2. Trial 🔑142—Only where deduction to be drawn from evidence, even if undisputed, is inevitable, is court authorized to withdraw question of negligence from jury.

If conceded facts are such that reasonable minds may differ on question of negligence, question is one of fact for jury, and it is only where deduction to be drawn is inevitably one way or the other that court is authorized to withdraw question from jury.

3. Municipal corporations 🔑821(17)—Evidence held to require submission to jury of abutting owner's reasonable and safe use of sidewalk as to pedestrian injured by falling over merchandise thereon.

In action for injuries to pedestrian by falling over merchandise left on sidewalk in front of defendant's place of business on direction of defendant's receiving clerk, evidence *held* sufficient to take case to jury on question of defendant's reasonable and safe use of sidewalk.

4. Municipal corporations 🔑808(2)—Defendant, whose clerk instructed independent contractor to deposit goods on sidewalk, held liable for injuries to pedestrian.

Rule that abutting property owner is not ordinarily liable for injuries resulting from obstructions on sidewalk created by independent contractor *held* not applicable, where goods delivered to defendant were left on sidewalk in front of defendant's place of business on instructions of defendant's receiving clerk, who receipted therefor, and pedestrian fell over goods so deposited.

5. Municipal corporations 🔑821(25)—Pedestrian's failure to see merchandise on sidewalk over which she fell held not contributory negligence as matter of law, but presented jury question.

The mere fact that pedestrian, who had on other occasions seen goods piled on sidewalk in front of defendant's premises, failed to see merchandise over which she stumbled because she was not looking where she was going, *held* not to constitute contributory negligence as matter of law, but question was for jury to determine under evidence.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by Anna M. Wise against the Maxwell Hardware Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Breed, Burpee & Robinson and Bestor Robinson, all of Oakland, for appellant.

Eugene K. Sturgis and Cyril W. McClean, both of Oakland, for respondent.

TYLER, P. J. Action for damages for personal injuries. Defendant, a corporation, is engaged in the business of selling hardware and other goods to the general public. It maintains a store in the city of Oakland, the main entrance to which faces on Washington street, a busy retail district, and the merchandise in which it deals is received and delivered by trucks and other vehicles in front of such entrance. On December 23, 1925, about 12:30 p. m., a truck belonging to the Madewell Manufacturing Company, operated by one of its employés, arrived at the sidewalk elevator of defendant company with certain hardware to be delivered to it. The driver of the truck made his presence known to defendant's receiving clerk, who was in the basement of defendant's store at the time. Because of orders of the police department, requiring sidewalk elevators to be closed during the midday rush hours, and by reason of the fact that the streets were crowded with Christmas shoppers, and also because certain employés of the company were absent, the driver was requested to put the goods on the sidewalk. Included in the merchandise so delivered was a pile of roof capping. It consisted of pieces of galvanized iron, V-shaped, about 10 or 12 feet in length and 8 or 10 inches in height, wired together. It was not crated or protected in any manner, and its color was almost the same as that of the sidewalk. The merchandise was placed parallel to the curb of the street and at a distance variously estimated at from 4 to 18 inches from the outer edge thereof. Between the hours of 1 and 2 o'clock p. m. of the day mentioned, plaintiff was walking along the outer edge of the sidewalk within 18 inches of the curb when she tripped over the capping and fell, sustaining injuries consisting of contusions, lacerations, and a fracture of the bones of the forearm which required treatment for a period of over six months. The injury is permanent in character. Trial was had by jury, which resulted in a verdict for plaintiff in the sum of $3,000. From this judgment defendant appeals. As ground for reversal it is first claimed that defendant was not guilty of negligence as the mere placing of goods near the curb of a street for a short period of time constitutes neither negligence nor the creation of a nuisance, and that there is no evidence to sustain the implied finding of the jury on these two questions. It is further claimed that even assuming there was negligence in leaving the roof capping on the sidewalk, such negligence was that of an independent contractor for which defendant could not be held liable.

[1, 2] While it is true that an abutting owner on a street has the right to a temporary and reasonable use of the sidewalk in front of his premises for the reception of merchandise, the question of what is a temporary and reasonable use and the manner of its exercise are questions of fact depending upon all the circumstances of the particular case, to be determined by the jury under proper instructions. Fisher v. Los Angeles Pacific Co., 21 Cal. App. 677, 681, 132 P. 767; 19 Cal. Jur., p. 139. It is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has or has not been shown, and it is only where the deduction to be drawn is inevitably one way or the other, that the court is authorized to withdraw the question from the jury. This is true even where there is no conflict in the evidence if different conclusions on the subject can be rationally drawn therefrom. If the conceded facts are such that reasonable minds might differ upon the question as to whether or not one was negligent, the question is one of fact for the jury. Seller v. Market-Street Ry. Co., 139 Cal. 268, 72 P. 1006; Johnson v. Southern Pacific R. R. Co., 154 Cal. 294, 97 P. 520. It is a question of law only when the evidence is of such a character that it will support no other legitimate inference. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513.

[3] Here there was evidence to show that defendant company maintained two sidewalk elevators in front of the entrance to their premises, one of which was open at the time of the accident. It also appears that the street was a busy shopping district and the goods had remained on the sidewalk for over two hours. There was also evidence to show the manner in which the merchandise was arranged, its character, and the likelihood of it being seen and of pedestrians falling over it. These and all the other facts and circumstances were proper for the jury to consider in determining the question of the reasonable and safe use of the sidewalk.

[4] Nor is there any merit in the claim that the negligence was that of an independent contractor. There can be no question that an abutting property owner is not ordinarily liable for injuries resulting from obstructions created by an independent contractor. Where, however, he knows of the dangerous condition, or as a careful, prudent man should have known of it, the rule is otherwise. Frassi v. McDonald, 122 Cal. 400, 55 P. 139, 772; Wile v. Los Angeles Ice Storage Co., 2 Cal. App. 190, 83 P. 271; Heath v. Manson, 147 Cal. 694, 82 P. 331; 19 Cal. Jur., p. 138. Here there was evidence to show that the receiving clerk receipted for the goods and gave instruction for their deposit on the sidewalk.

[5] The further claim is made that plaintiff was guilty of negligence as a matter of law. In this connection it is claimed the evidence shows that plaintiff had at other times seen goods piled on the sidewalk, and at the time of the accident she was not looking where she was going, but was paying attention to children and passers-by, near the center of the sidewalk. Plaintiff had a right to a safe sidewalk; she also had a right to be where she was, and the mere fact that she failed to see the merchandise did not constitute contributory negligence on her part as a matter of law. There was evidence to show that the merchandise was of a low height and the same color as the sidewalk, which facts might account for lack of visibility. Mere abstraction on her part did not constitute contributing negligence. Du Val v. Boos Bros. Cafeteria Co., 45 Cal. App. 377, 187 P. 767; Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 103 P. 190. The question of contributory negligence was one for the jury to determine. Whether or not plaintiff was guilty of contributory negligence is similar to the question relating to plaintiffs' negligence. From the facts as presented reasonable men might draw different inferences. Under such circumstances the question becomes one of fact. It is a question of law only when the evidence is of such a character that it will support no other legitimate inference but that defendant was guilty of contributory negligence. Zibbell v. Southern Pacific Co., supra.

And, finally, it is claimed that the court erred in the giving and refusing to give certain instructions. We have examined the instructions and they fully and fairly state the law upon the issues involved.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

94 Cal. App. 738

PEOPLE v. STANICH. (Cr. 1715.)

District Court of Appeal, Second District, Division 1, California. Nov. 13, 1928.

1. Chattel mortgages 🔑230—Removing mortgaged personal property from county without written consent of mortgagee is felony (Pen. Code, § 538).

Removal of mortgaged personal property from county without written consent of mortgagee constitutes a felony, under Pen. Code, § 538.

2. Criminal law 🔑970(7)—Defendant, not having raised by demurrer questions, which could have been so raised, cannot raise such questions for first time on motion to strike judgment of conviction from record.

Where defendant did not raise objections that statute of limitations had run, or that there was misjoinder, in that two felonies were charged, or technical objection regarding phraseology of information on demurrer at time of trial, he cannot be heard to raise such questions for first time on motion to strike judgment of conviction from record.

3. Indictment and information 🔑59—Where acts constituting offense are sufficiently stated, failure to name offense does not vitiate.

Where acts constituting offense are sufficiently stated, failure to give name to offense, or failure to give its proper legal appellation, is merely defect of form, and does not vitiate.

Appeal from Superior Court, Los Angeles County; Eliot Craig, Judge.

Enid Stanich pleaded guilty to charge of committing a felony, and afterwards filed a motion to strike from the record the judgment of conviction. From an order denying the motion, defendant appeals. Affirmed.

Josiah Coombs, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

YORK, J. [1] Several years ago the defendant was in court to answer to a felony information, which was at least not a model information. It started out with an attempt to charge "incumbering mortgaged property, a felony," but failed to allege that such incumbrance was made without giving notice in writing to the person holding the mortgage, or to whom the second mortgage was to be given. However, the information also did allege the removal of the same mortgaged personal property from the county wherein the first mortgage was given, without the written consent of the mortgagee, which fact as alleged constituted a felony. Pen. Code, § 538.

The information was sufficient as to the removal charge, even if it was defective as to the first charge; and it was misleading and subject to demurrer for uncertainty as to which of the two alleged charges of felony was to be relied on, and as to whether it was meant to be made on two counts or on one count only. However, the record discloses the fact that no demurrer of any kind was ever filed, and the defendant pleaded "guilty as charged in the information," was sentenced to the penitentiary as for one offense only, has served his sentence, was released upon parole, and, his term of parole having then expired, his attorney on May 26th last, for the first time, made an objection to the form of the information by filing a notice of motion to, and did appear in the superior court to make a motion to, strike from the record the judgment of conviction, on the ground that the court did not have jurisdiction of the offense, basing such motion on the ground that the information failed to charge an offense under the statute at the time the defendant was convicted.

The superior court denied the motion, and the matter comes to this court on appeal from such order denying the motion of the defendant. None of the cases cited cover a similar record or situation, unless we can consider decisions rendered when the question of the sufficiency of the information is raised in hearings on petitions for writs of habeas corpus filed when the defendant is still in custody serving his term.

The rule laid down in the habeas corpus cases, which we will hereafter quote, seems to be applicable because in the instant case no question was raised in the superior court as to the sufficiency of the information. As was said in Ex parte Grenall, 153 Cal. 767, quoting from page 770, 96 P. 804, 806:

> "Counsel for respondent contends that, if there is in this state such an offense or crime as that of which petitioner was convicted, the insufficiency of the complaint is immaterial on habeas corpus, citing Ex parte Ruef, 150 Cal. 665, 89 P. 605. The rule of the Ruef Case has never been applied by this court to proceedings in courts of inferior, as distinguished from courts of general, jurisdiction. To the contrary, it has been the uniform practice to consider on habeas corpus the question of the sufficiency of the complaint in such inferior courts, and to discharge the prisoner where such complaint failed to show a public offense under the laws of the state. This matter was fully considered in Ex parte Kearny, 55 Cal. 212, where the distinction between the two classes of courts was stated, and where the prisoner was discharged solely because of the insufficiency of the complaint in this regard. That decision has never been modified. In the Ruef Case we were considering the question with relation to a proceeding pending in a court of general jurisdiction, the superior court of the city and county of San Francisco, while here we have a proceeding in a court which has uniformly been treated as an inferior court, a justice's court. Ex parte Kearny, 55 Cal. 212."

As was said in Kitts v. Superior Court, 5 Cal. App. 469, 90 P. 980, and in the opinion by the court in the case of Harris v. Superior Court, 51 Cal. App. 15, quoting from page 31, 196 P. 895, 901:

> " 'We think the true rule is that where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on habeas corpus. Here the indictments clearly attempt to charge extortion, a crime defined by section 518 et seq. of the Penal Code, and within the jurisdiction of the superior court.' "

Quoting further from Harris v. Superior Court, supra:

> "The rule so declared in the Ruef Case has since been uniformly followed by this court. See, also, In re Hughes, 159 Cal. 360, 362, 113 P. 684. It was expressly held to apply in regard to the remedy by prohibition in Whitney v. Superior Court, 182 Cal. 114, 187 P. 12. In the case at bar the indictment clearly attempted to charge the offense on the part of an executive officer of agreeing to receive a bribe, a crime defined by section 68 of the Penal Code, and it was for the superior court, in the exercise of its jurisdiction and subject to review on appeal from the judgment, to determine as to the sufficiency of the facts stated to show such crime. The alleged defect in the indictment is not available as a ground for prohibiting the superior court from proceeding with the trial of the cause."

[2, 3] The judgment on the plea of guilty is just as good as on a plea of not guilty and verdict against the defendant. Although it is true that the defendant does not waive jurisdiction by a plea of guilty if the court never acquired jurisdiction, however, it appears to this court upon an examination of the entire record that the defendant could have demurred at the time of the trial upon any of the grounds which he has raised at this time, and that he cannot now be heard to raise for the first time on this motion the questions, first, that the statute of limitations had run against the crime charged; or, second, that there was a misjoinder in that two felonies were charged in the information; or, third, that the phraseology of the information was such that it might be construed so that the defendant would be charged with a felony in an allegation in which was commingled an allegation of an act which was not a felony, there being no separate count setting forth the charge that the defendant removed mortgaged property out of the county where the property had been mortgaged. The allegation was that he had incumbered mortgaged personal property with intent to defraud, etc. These objections would not, of course, be on the ground that the information did not state facts sufficient to constitute a public offense, but would be technical objections to the phraseology of the information, in that it was uncertain or did not give the defendant a chance to prepare his defense. There is no question but that it was a felony to remove mortgaged personal property from the county as alleged in the information, and it may be that the court considered his plea of guilty only as a plea to this charge as he was sentenced as for one offense only. "Where the acts constituting an offense are sufficiently stated, a failure to give any name to the offense, or a failure to give its proper legal appellation is merely a defect of form which does not vitiate." 14 Cal. Jur. p. 54; People v. Izlar, 8 Cal. App. 600, 604, 97 P. 685.

There being nothing in the record to show otherwise, the order of the trial court denying the motion to set aside judgment herein is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

94 Cal. App. 774

LONDON v. ROBINSON et al. (Civ. 6306.) ★

District Court of Appeal, First District, Division 2, California. Nov. 15, 1928.

Rehearing Denied Dec. 14, 1928. Hearing Denied by Supreme Court Jan. 14, 1929.

1. Municipal corporations 🔑601—Ordinance amending previous zoning ordinance providing that provisions were not retroactive as to existing permits did not preclude erection of building under permit theretofore issued.

Where original zoning ordinance provided that its provisions were not to be retroactive so far as existing permits were concerned, and provided for application of provisions to any area thereafter transferred to another district, restrictive provisions of amending ordinance, containing no provision making the change retroactive, did not operate to forbid erection of building for which a permit had been issued prior to passage of ordinance.

2. Municipal corporations 🔑601—Zoning ordinance applied only from effective date.

A zoning ordinance enacted by municipality applied only from date on which it took effect.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by L. London against L. B. Robinson and another. Judgment for plaintiff, and defendants appeal. Reversed.

Tum Suden & Tum Suden, of San Francisco, for appellants.

C. F. Nichols and Carl E. Day, both of San Francisco, for respondent.

STURTEVANT, J. In this action the plaintiff sought a decree restraining the owner, Robinson, and the contractor, Moren, from erecting a building on Hillpoint avenue near Parnassus avenue in San Francisco. In his complaint the plaintiff alleges that such erec-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

tion would be in violation of certain zoning ordinances.

Heretofore Ordinance 5464 (N. S.) was enacted. Thereafter the defendant Robinson purchased a lot on Hillpoint avenue, adopted plans and specifications for the erection of a building, entered into a contract therefor, and a building permit was issued to him. All fees were paid, and thereafter the building contract, together with plans and specifications, was filed for record in the recorder's office at 11:15 a. m. on July 27, 1925. In the meantime such proceedings were had that Ordinance 6708 (N. S.) was framed and was passed by the board of supervisors during the afternoon of July 27, 1925. By the terms of the charter of the city of San Francisco the last-named ordinance took effect August 7, 1925. On August 13, 1925, this suit was commenced. It is based on the theory that, after the enactment of Ordinance 6708 (N. S.), the right of the defendants to proceed with the erection of the building ceased. The trial court made findings in favor of the plaintiff, and the defendants have appealed.

[1] Among other contentions, the defendants assert that they have not violated any ordinance. We think the assertion is well founded. Turning first to the provisions of the ordinance first enacted, it will be found that section 9 was not intended to make unlawful buildings and uses then in existence or use. Turning next to the provisions of section 17, it is clear that the entire section is addressed to buildings not constructed, but for which permits had theretofore been duly issued. The language used in that section shows clearly that it was addressed to situations as they existed on the date that Ordinance 5464 took effect, and not otherwise. Furthermore, that section clearly indicates that said ordinance was not to be retroactive so far as said permits were concerned. That same ordinance provided that alterations or changes in districts might be made. Then in the second paragraph of section 11 we find the following:

> "If any area is hereafter transferred to another district * * * the provisions of this ordinance in regard to the premises or building existing at the time of the passage of *this* ordinance shall apply * * * in such transferred area."

If it be said that the passage just quoted refers to "premises and buildings," but does not mention uncompleted buildings, still the plaintiff is not helped, because there is then no provision making the change retroactive, as that passage does not contain retroactive language.

[2] Turning to the amending Ordinance No. 6708 (N. S.), it will be found that it is wholly silent regarding its provisions having any retroactive effect. The amendment is confined to a direct reference to Ordinance No. 5464 (N. S.), and then adds that it is amended as follows:

> "Section 6 of the use of property zone maps, constituting a part of said ordinance, is hereby ordered changed so as to place both sides of Hillpoint avenue from Parnassus avenue to its northerly termination and extending to the depth of the rear lot lines, in the first residential district instead of the second residential district."

As stated above, it took effect August 7, 1925. Under well-established rules, it spoke only from that date. In 43 C. J. 574, the general rule is stated as follows:

> "As is the case with statutes, ordinances or by-laws operate in the future only, and are never to be given a retroactive effect if susceptible of any other construction. An intention that a statute or an ordinance shall have a retroactive operation is not to be presumed, but must be manifested by clear and unequivocal language, and in case of doubt the statute or ordinance must be construed to have a prospective effect only."

In the same text at page 344 we find the following:

> "Zoning regulations ordinarily have no retroactive effect unless the authorizing legislation specifically so states. By force of statute or ordinance zoning regulations may not have the effect of revoking permits for buildings granted prior to their adoption."

The rule last stated is the rule of construction concerning the effect of ordinances in general prescribing building regulations. 43 C. J. 330.

It follows that the defendants were within their rights in proceeding to erect the building in controversy; that their rights have not been lost; and that the judgment should be reversed. It is so ordered.

We concur: BUCK, Presiding Justice pro tem.; NOURSE, J.

94 Cal. App. 782

In re NOVOTNY'S ESTATE. (Civ. 6236.)★

District Court of Appeal, Second District, Division 2, California. Nov. 15, 1928.

Rehearing Denied Dec. 10, 1928. Hearing Denied by Supreme Court Jan. 14, 1928.

1. Wills 🔑310, 400—Probate judge weighs testimony and circumstances attending execution of will, and his determination on sufficient testimony that witness was not present is final.

It is the function of the probate judge to weigh testimony and circumstances attending the execution of the will, and probate court's determination on sufficient testimony that attesting witness was not present at execution of will cannot be reversed on appeal.

2. Wills 🔑302(1)—Determination of probate court denying probate, under conflicting testimony as to presence of witnesses when will was executed, held justified.

Probate court's decision denying probate to will under conflicting testimony as to whether attesting witnesses were present at time will was executed *held* warranted under evidence, where attorney, who testified in behalf of will, was instrumental in procuring appointment of his son-in-law as guardian under the will.

3. Attorney and client 🔑20—Court, in will contest, could permit counsel, representing surviving husband, as contestant, to represent husband as guardian ad litem for minor daughter.

In proceedings for contest of will, court did not err in permitting counsel for surviving husband of deceased, as contestant, to also represent surviving husband in his capacity as guardian ad litem for minor daughter, since court, in exercise of his discretion, may permit counsel for contestants to cross-examine witnesses.

4. Wills 🔑400—Refusal to admit testimony in will contest held not ground for reversal, where court permitted stipulation that witness would testify as claimed.

In will contest, court's refusal to admit testimony impeaching one of attesting witnesses *held* not ground for reversal, where court permitted stipulation that witness, if present, would testify according to counsel's statement in offer of proof.

5. Wills 🔑305—Statement of testatrix of purpose to make will protecting mother held immaterial in will contest based upon noncompliance with requirements concerning execution.

In proceeding for contest of will on ground that formal requirements of execution were not complied with, testimony that testatrix had expressed purpose of making will to protect her mother *held* immaterial.

6. Wills 🔑292—In will contest, exclusion of evidence that no unreasonable compensation could be paid attorney's son-in-law for services as trustee held not error.

In will contest, in which it was claimed that will was executed, in the absence of one of the attesting witnesses, court did not err in refusing to hear proof that there could be no unreasonable compensation paid attorney's son-in-law for services as trustee, since amount of compensation would be determined by order of court.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Proceedings by Charles Lantz for the probate of the will of Grace L. Novotny, deceased. Before probate, contest was filed by Gustave Novotny on his own behalf and as guardian ad litem for Jean Ann Novotny. From judgment denying probate, proponent appeals. Affirmed.

Winslow P. Hyatt, of Los Angeles, for appellant.

Hibbard & Kleindienst, of Los Angeles, for respondents.

THOMPSON, J. This is an appeal by proponent from a judgment denying probate to the instrument offered as the last will and testament of Grace L. Novotny, deceased. Before probate, a contest was filed by the surviving husband on his own behalf and as guardian ad litem of his minor daughter, Jean Ann Novotny. The contest was tried before a jury, and resulted in a disagreement. The court then set the hearing of the formal proof of the will before himself, and as a matter of grace permitted counsel for the contestants to cross-examine the witnesses. Frances Avery, one of the subscribing witnesses, called by the court, testified, in substance, that she had known Mrs. Novotny for about three and one-half years before her death, and in the capacity of a practical nurse had helped to take care of the deceased as well as her infant child, Jean; that about three days before the execution of the will Mrs. Novotny's mother had visited her daughter, and raised "Ned in general" because her daughter was married to Mr. Novotny, and "wanted her to leave him," because "all he married her for was what she had," and "told her daughter that she had no business to get married until she was dead"; that on the following day, at the request of Mrs. Novotny, she called Mr. Lantz, an attorney, and the proponent of the will, who came and talked with the deceased alone for about an hour. Two days later, and on August 2d, Mr. Lantz returned, and asked Mrs. Avery to leave the room, and during her absence therefrom, and while caring for the child, Mr. Lantz called her back; that, when she returned to the room, proponent was holding a white paper in his hand, which he asked her if she would sign. When she answered in the affirmative, he asked Mrs. Novotny if she wanted the witness to sign, and Mrs. Novotny said, "Why, will you?" to which she also replied in the affirmative. The witness further testified that proponent then inquired who would be the other witness, and answered his own

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★For opinion on rehearing, see 273 P. 58. Hearing denied by Supreme Court.

question by suggesting his son, who was waiting in an automobile outside. While Mrs. Avery was getting pen and ink, Mr. Lantz called his son. A soon as the son came in, Mrs. Avery signed the paper, and immediately left the room. She further testified that she did not see the other witness, Mr. Lantz's son, sign, nor did she see Mrs. Novotny sign, nor did Mrs. Novotny say she had signed, or that the instrument was her will; that all she saw at the time was one sheet of paper without a cover, whereas it appears that the instrument proposed consisted of three pages and cover. She also says that, when Mr. Lantz placed the sheet of paper before her for her signature, he folded it, and that she did not even read the attestation clause. In this connection the stenographer of proponent testified that she typewrote the will for her employer, and handed the pieces of paper to him without fastening them together. There was also testimony substantiating what appears from the face of the signature itself, to wit, that a line drawn under the signature of Grace L. Novotny was drawn after the signature was appended. On cross-examination by counsel for proponent Mrs. Avery was questioned as follows:

> "Q. Now, do you remember Mr. Lantz asking the question of Mrs. Novotny what that was when he handed her that paper?
>
> "A. Yes, sir.
>
> "Q. And what did she say?
>
> "A. He says, 'Do you remember what you got in your hands or what you are signing?' And then she asked him, and he says, 'Why, it is your will.'
>
> "Q. Let me get that wording, just that answer again, please. (The reporter read the answer.)
>
> "Q. Isn't it a fact that Mr. Lantz asked Mrs. Novotny at that time the question 'What is this?' and is it not a fact that Mrs. Novotny said 'That is my will?'" (No response.)
>
> "Q. Did you understand the question? A. Read the question over again, please. (The reporter read the question.)
>
> "A. He asked her if she knew what she was signing or what this paper was, and she hesitated, she didn't know, and he says, 'Isn't it a fact you are signing your will?'
>
> "Q. And what did she say to that?
>
> "A. 'Oh.'
>
> "Q. What is that?
>
> "A. 'Oh.'
>
> "Q. She just said 'Oh,' and then after that she asked you to write—to sign your name to it?
>
> "A. No, not after that. She asked me before that."

The other subscribing witness, C. Chapman Lantz, testified that the will was signed by Mrs. Novotny and declared to be her last will in the presence of himself and Mrs. Avery, and that they signed in the presence of each other.

In general, the will devised all of the property to Charles Lantz, but, nevertheless, in trust for the purpose of paying the income to Mrs. Novotny's mother during her lifetime, or in the event that her husband died before she did without adequate provision for their daughter, for the purpose of distributing the income to the daughter and mother in a proportion to be determined by the trustee. The will also provided for the termination of the trust and the distribution of the funds to the daughter Jean Ann Novotny, after the death of her grandmother, and upon attaining her majority. The husband was left nothing. Charles Lantz was also nominated guardian of the estate of the daughter, in the event one became necessary, and, in the event of the resignation, death, or disability of Charles Lantz, T. A. Box, Jr., shown by the testimony to be proponent's son-in-law, was to act as trustee, and also as executor in the place of Mr. Lantz, under the same circumstances. Mr. Lantz's testimony shows that he recommended his son-in-law to Mrs. Novotny for the appointment, and wrote his name into the will with pen and ink in blank spaces provided therefor.

[1, 2] In this situation appellant urges three reasons as grounds for reversal: First, that the formal proof of the will was complete and all statutory requirements complied with; second, that the court erred in permitting the guardian ad litem of the minor daughter to participate in opposing the probate of the will; and, third, that the court erred in refusing to permit proponent to introduce certain additional testimony.

In support of his first contention, the appellant asserts that, even though Mrs. Avery had stepped into the kitchen, i. e., into another room of the apartment at the time Mrs. Novotny signed the will, she was nevertheless in the presence of the testatrix and "of the other witness to the will." He also argues that, when from some cause or another a subscribing witness to a will testifies contrary to the solemn act of attestation, the testimony should be weighed with grave suspicion. While it is true that there was no door between the bedroom, in which it is said Mrs. Novotny signed the instrument, and the kitchen, yet the wall between the two, according to the plat which was introduced, practically covered the head of the bed. Mrs. Avery was positive in her assertion that she was not present when Mrs. Novotny signed the instrument, and also that she did not acknowledge it to be her signature. It is undoubtedly the function of the probate judge to weigh the testimony and all of the circumstances attending the execution of the purported will for the purpose of deciding whether Mrs. Avery was present when the instrument was signed by the deceased, or whether the deceased acknowledged it to be her signature. That court having determined, upon sufficient testimony, that she was not present, it certainly cannot be said that as a matter of law we can declare the contrary. It may well be true that under some circumstances the probate judge should view with suspicion the testimony of a subscribing witness who denies the solemn act of attestation, yet it must not only be borne in mind that the witness here says she had no opportunity to read the attestation clause or see the instrument which she was witnessing, but also that the attorney who was in charge of the formalities of execution, and into whose keeping the will was intrusted, and whose son was called by his own suggestion, was to profit by the terms of the will. While he was not a beneficiary or legatee for his own use, nevertheless the fees to be paid him for acting as executor, also as trustee and perhaps as guardian of an estate shown by the testimony to approximate $20,000, may have been properly considered by the court in relation to other circumstances as tending to throw doubt upon the testimony of proponent and his son, C. Chapman Lantz. Courts go so far as to say, that, where there is the confidential relationship of attorney and client between the testatrix and a beneficiary, coupled with activity of the latter in the preparation of a will, a presumption of undue influence arises. Estate of Witt, 198 Cal. 407, 420, 245 P. 197. With this rule in mind it is obvious that the probate judge was fully justified in viewing with caution testimony of the attorney and his son. We find nothing inconsistent with this view in either the Estate of Tyler, 121 Cal. 405, 53 P. 928, or Estate of Dow, 181 Cal. 106, 183 P. 794, relied upon by appellant. In both of the authorities cited, the trial court held the will to have been executed with proper formalities. In the Tyler Case the only subscribing witness alive had forgotten the details attending the execution, and it was held that a presumption of due execution arose upon proof of the signatures of the testator and witnesses. In the Dow Case the court, after pointing out that the will was actually signed in the bodily presence of the testatrix, says:

> "The most that can be said in favor of the appellant on the question as to whether or not the subscribing witness, Kinsman, signed the will when the testatrix was asleep is that the evidence upon this point is so conflicting that the finding of the trial court upon the question is conclusive on this court."

So here, the finding of the court cannot be disturbed.

[3] The next attack of appellant upon the judgment is conclusively repulsed by the authority of the Estate of Relph, 192 Cal. 451, 221 P. 361. To use the language of the appellant, the point made is:

> "The court erred in permitting the guardian of the infant Jean Ann Novotny to participate in opposing the probate of the will of her mother, the guardian having a personal interest, adverse to his ward."

In the case mentioned the Supreme Court says:

> "When a will is contested before probate there are two separate and distinct proceedings pending before the court. One is the petition for the probate of the will; the other is the contest of the probate of the will. (Estate of Latour, 140 Cal. 414, 73 P. 1070, 74 P. 441; Estate of McDermott, 148 Cal. 43, 49, 82 P. 842; Estate of Cullberg, 169 Cal. 365, 146 P. 888.) The petition for the probate of a will is distinctly a proceeding in rem. (Estate of Baker, 170 Cal. 578, 585, 150 P. 989; Estate of Allen, 176 Cal. 632, 169 P. 364.) The petitioner or proponent appears therein as plaintiff and tenders to all of the world all of the issues of fact relevant to the ultimate question of the validity of the will. While all persons interested in the estate are in a sense parties defendant thereto, there are no defendants in the sense of active parties litigant in this proceeding. It is in a sense an ex parte proceeding, in which the burden rests upon the petitioner to prove all the material allegations of his petition, whether denied or not, and the responsibility is upon the court to guard and protect the interests of all persons interested therein. * * * In the proceeding for the probate of the will, as distinguished from the proceedings upon the contest, the evidence and the issues of fact are solely for the consideration and determination of the court, even though a jury may have been demanded and impaneled for the trial of the issues upon the contest. (Estate of Latour, supra; Estate of McDermott, supra.) The contestants are not parties to this proceeding and have no right to appear therein (Estate of Latour, supra), but the trial court, having itself the right to cross-examine the witnesses produced therein, may, in the exercise of its discretion, permit counsel for contestants so to do. (Estate of Cullberg, supra.) But when such permission is granted it is as a matter of grace and not in recognition of a right possessed by contestants."

It could not possibly have affected the rights of appellant whether the counsel to whom the grace was extended represented the surviving husband alone or the husband in his individual capacity and as guardian ad litem of his minor daughter.

[4] Appellant also assigns the refusal of the court to admit certain testimony as reason for a reversal. The first instance complained of consists of an offer upon the part of the appellant to produce a witness who would testify that Mrs. Avery had "told her that Mr. Lantz had been there and that Grace had made her will," to which the court replied:

> "It may be stipulated that Mrs. Peterson would so testify if she were here, because I heard what she said in the other case," [the contest] "and it would not affect my decision in the matter in the slightest."

A recital of the circumstances is sufficient to demonstrate that appellant has nothing of which to complain.

[5, 6] Counsel next offered testimony to show that Mrs. Novotny, in conversation with friends, had expressed the purpose of making a will to protect her mother during the latter's lifetime. Counsel has not pointed out to us in what manner the proffered testimony would have borne upon the question of the due execution of the will, and we can perceive no way in which it could have been enlightening to the court below. Nor are we able to find any merit in the complaint of appellant that the court refused to hear proof that there could be no unreasonable compensation paid to Mr. Lantz for his services as trustee, for the reason that the amount of compensation would be determined by order of court.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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94 Cal. App. 791

Ex parte BRYANT.

District Court of Appeal, First District, Division 2, California. Nov. 16, 1928.

1. **Criminal law 🔑238—Proof of defendant's abandonment of children warranted justice in holding defendant to answer to superior court, notwithstanding absence of direct testimony that nonsupport was willful (Pen. Code, § 270).**

Proof of defendant's abandonment and nonsupport of children, without direct testimony that nonsupport was willful or without lawful excuse, warranted justice in holding defendant to answer to superior court, under Pen. Code, § 270, where defendant did not establish that nonsupport was excusable.

2. **Witnesses 🔑293—Statute making proof of father's abandonment of children prima facie evidence abandonment was willful held not to require self-incrimination (Pen. Code, § 270; Const. art. I, § 13).**

Pen. Code, § 270, making proof of father's abandonment and desertion of children prima facie proof that abandonment was willful and without excuse merely fixes quantum of evidence necessary to establish guilt, and does not violate Const. art. 1, § 13, providing that no person in criminal case shall be compelled to be a witness against himself.

3. **Criminal law 🔑108(1)—Venue of prosecution of father for abandonment of children was properly laid in county of residence of mother who had custody of children and supported them (Pen. Code, § 270).**

In prosecution of father for abandonment of children under Pen. Code, § 270, venue was properly laid in county where mother resided, where children were in her custody and maintained by her.

4. **Criminal law 🔑108(1)—Venue of prosecution for child desertion is properly laid in county where children are supported (Pen. Code, § 270).**

Venue of offense of child desertion, denounced by Pen. Code, § 270, is properly laid and proved in county where defendant's children were supported and maintained.

Application by Albert Bryant for habeas corpus, to be directed to the Sheriff of San Benito County. Writ discharged, and petitioner remanded.

James Snell, of Hollister, for petitioner.

A. M. Runnells, Dist. Atty., of Hollister, for respondent.

PRESTON, Justice pro tem. Albert Bryant, the petitioner, is now in the custody of the sheriff of San Benito county, and seeks his release on habeas corpus.

The facts revealed by the record are briefly these: Petitioner is the father of two minor children. He abandoned his wife and these two children in San Benito county in 1922. His wife obtained a divorce in San Benito county in 1924, and the custody of the children was awarded to her, and she and the children since 1924 have continuously resided, and now reside, in Hollister, San Benito county, Cal. Petitioner has been absent from San Benito county since 1922 and his whereabouts unknown to his wife and children, and he has not since 1922 contributed anything whatever towards the support of said children, nor has he visited or attempted to visit or communicate with them since 1924. In July, 1928, petitioner was located, arrested, brought back to San Benito county, and charged with a violation of section 270 of the Penal Code. The charging part of the complaint which was filed in Hollister township, San Benito county, is as follows:

> "That said Albert Bryant on or about the 19th day of July, 1928, at and in said County of San Benito, State of California, who was then and there the father of two minor children, to wit, Alberta Bryant and Edna Bryant, did willfully, unlawfully and without lawful excuse, omit to furnish said minor children with necessary food, clothing, shelter, medical attendance and other remedial care."

A preliminary examination was had before the justice of the peace of said township, and the petitioner was held to answer to the superior court for failing to support his minor children, and, in default of bail, was committed to the custody of the sheriff. Thereafter, and on the 30th day of July, 1928, the district attorney of San Benito county filed an information against him, charging him with the same offense. The case has not been tried in the superior court. On August 8, 1928, the petition for a writ of habeas corpus was filed in this court.

[1] The first contention made on behalf of petitioner is that the evidence produced at the preliminary examination fails to show that any public offense has been committed. This contention is grounded entirely upon the fact that there was no direct testimony introduced at the preliminary examination that petitioner's failure to support his children was "willful and without lawful excuse." The statute itself, however (section 270, Pen. Code), makes this proof unnecessary. Mrs. Bryant testified that petitioner abandoned her and the children in 1922, and since that time has contributed nothing to the support of the children. This proof meets all the requirements of the statute.

The statute itself (section 270) makes proof of abandonment or desertion of a child by the father, or proof of the father's omission to furnish his child with necessary food, clothing, shelter, or medical attendance, or other remedial care, prima facie evidence that such abandonment, desertion, or omission was "willful and without lawful excuse." The petitioner offered no evidence to overcome the prima facie showing made by the prosecution; therefore the justice of the peace was warranted in holding petitioner to answer to the superior court.

[2] Petitioner contends that section 270, in so far as it attempts to make proof of abandonment, desertion, or omission, etc., prima facie proof that such omission or abandonment was willful and without lawful excuse, is in violation of that part of section 13, art. 1, of the Constitution, which states that "no person shall * * * be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property without due process of law." We cannot agree with this contention. Section 270 merely fixes the quantum of evidence which, until overcome, establishes beyond a reasonable doubt the guilt of a defendant charged with a violation of that section; it does not compel a defendant to be a witness against himself.

The same principle is involved in section 1105 of the Penal Code. Under that section, when the people have proved the killing, and no evidence has been given tending to prove justification, they have performed the task imposed upon them, and have proved prima facie the guilt of the defendant beyond a reasonable doubt.

By reason of the statutory rule of evidence laid down in section 1105 the prima facie case of the prosecution can be overcome only by proof of justification, excuse, or circumstances of mitigation. People v. Rodrigo, 69 Cal. 601, 11 P. 481; People v. Mize, 80 Cal. 41, 22 P. 80. Likewise, by reason of the statutory rule of evidence laid down in section 270, the prima facie case of the prosecution can be overcome only by proof that the omission on the part of petitioner to furnish his children necessary food, clothing, etc., *was not willful and was excusable.*

[3, 4] It is also contended that the evidence fails to show that any offense was committed in the county of San Benito. There is no merit in this contention. The venue of the offense denounced by section 270 of the Penal Code is properly laid and proved in the county where the children were supported or maintained. Here the children were in the custody of their mother and maintained by her in San Benito county. The mother's place of residence determines the question as to jurisdiction. 20 Cal. Jur. 425, and cases there cited.

Other contentions made on behalf of petitioner are without merit and require no discussion.

The writ is discharged, and the petitioner remanded to the custody of the sheriff of San Benito county.

We concur: KOFORD, P. J.; NOURSE, J.

205 Cal. 594

PEOPLE v. THOMAS. (Cr. 3158.)

Supreme Court of California. Nov. 26, 1928.

Homicide ⚷145—Law presumes guilty intent, where uncontradicted evidence in murder case showed defendant was actuated by deliberate and premeditated malice (Code Civ. Proc. § 1962, subd. 1).

Where uncontradicted evidence in murder case showed that defendant was actuated by deliberate and premeditated malice and was bent on killing, and defendant did not testify or offer any evidence in his own behalf, nor give any explanation or excuse for committing the offense, law presumes guilty intent, under Code Civ. Proc. § 1962, subd. 1.

In Bank.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Samuel Thomas was convicted of murder in the first degree, and he appeals. Affirmed.

Jay Maurice, of Oakland, Henry Meadows, Frank Larche, and Larche & Mannin, all of Oakland, for appellant.

U. S. Webb, of San Francisco, and Earl Warren, of Oakland, for the People.

SHENK, J. The defendant was charged with the murder of Rose Lewis on April 29, 1928, in the county of Alameda. The jury found him guilty as charged and fixed the extreme penalty. He appeals from the judgment and from an order denying his motion for a new trial. The case is submitted for decision on the transcript alone.

On and prior to the day of the homicide the deceased was residing at the home of a Mrs. Quintero on Fifth street, between Center and Chester streets, in the city of Oakland. Two doors removed from the Quintero home Hazel Taylor and Ruby Kelly resided. The defendant entertained some animosity toward Ruby Kelly, the cause for which is not disclosed by the evidence. He also knew Hazel Taylor. About 8 o'clock on the evening of April 29, 1928, the deceased and Ruby Kelly were standing on the front porch of the house occupied by Mrs. Kelly. The defendant approached them and inquired concerning the whereabouts of Hazel Taylor. Mrs. Kelly replied that Hazel Taylor had gone out with a young man living next door. The defendant then walked to the corner of Fifth and Center streets, and the deceased started to her home. Mrs Kelly warned the deceased not to go home at that time, because she believed that the defendant by his actions meant trouble, and invited the deceased into her house. The deceased said, "No, I am going home," and she proceeded to do so. Ruby Kelly then went into her own home, locked the door, and peered out of her front window, which was only a few feet from the front sidewalk. She saw the deceased walking on the sidewalk toward her own home. She then saw the defendant walking at a fast pace, approach the deceased from behind, and heard him address the latter with a vile epithet, saying, "I am going to kill you." He then violently assaulted the deceased, striking her to the ground three times, and kicking her body. She also heard the deceased say, "Oh, I am not the girl." Another eyewitness heard the defendant say to the deceased, "——— don't look back and don't say a word," and heard the deceased reply, "I am not the woman you want: the woman is in the house, downstairs." Death ensued a short time after the assault. A post mortem examination disclosed that the deceased had been stabbed with a sharp instrument which penetrated the heart.

The record shows without contradiction that the defendant was actuated by deliberate and premeditated malice, and was bent upon killing. He did not testify or offer any evidence in his own behalf, and has advanced no explanation or excuse for his heinous offense. Under these circumstances the law presumes a guilty intent. Code Civ. Proc., § 1962, subd. 1. The defendant was fairly tried and convicted under full and appropriate instructions of the court. No error appears in the record.

The judgment and order are affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

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205 Cal. 554

George W. HICKS and Gertrude R. Hicks (His Wife), Plaintiffs and Respondents, v. George Osborne WILSON, Defendant and Appellant. (S. F. 12443.) ★

Supreme Court of California. Nov. 21, 1928.

Hearing Denied in Bank Dec. 20, 1928.

Department 2.

Appeal from Superior Court, City and County of San Francisco, James M. Troutt, Judge.

Knight, Boland & Christin, Knight, Boland, Hutchinson & Christin, and J. W. Radil, all of San Francisco, for appellant.

Grove J. Fink, of San Francisco, and Albert L. Johnson, of Modesto, for respondents.

LANGDON, J. This is an appeal by the defendant Wilson from a judgment against him in an action brought to recover $3,000 alleged to be due for money paid to defendant Cokely, a realtor, as agent for defendant Wilson, on account of the purchase of real property. Defendant Wilson, the owner of the real property, refused to execute a deed conveying the same to plaintiffs. Wilson offered the sum of $600 to plaintiffs, and upon their refusal to accept

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied in bank.

the tender he placed the money in the bank and gave notice of the deposit.

The trial court found: That on November 2, 1920, Cokely was duly empowered and authorized, in writing, to sell the real property in question. That thereafter, and during the month of November, 1920, the plaintiffs entered into a binding contract of purchase of said property. That the authorization of the agent included the following: "I authorize said W. H. Cokely to accept a deposit on account of the purchase price of said property and give receipt therefor in my name." That plaintiffs, during the month of November, 1920, deposited with and in the hands of the defendant Cokely, as the agent of defendant Wilson, and for and on account of said defendant Wilson, the sum of $3,000 as a part of the purchase price of the property, for which payment a receipt was duly issued by the agent. That on December 1, 1920, defendant Wilson was apprised of the fact that plaintiffs were making payments, on account of the purchase price, to Cokely, and on December 2, 1920, after receiving information from the plaintiffs as to the payments by them to Cokely, defendant Wilson received the sum of $500 from his agent Cokely on account of said purchase price. That thereafter, by letter of December 27, 1920, to plaintiffs, defendant Wilson attempted, for the first time, to repudiate the actions of his agent, Cokely.

It was also found that the delivery of the $3,000 by the plaintiffs to defendant Cokely, as agent for defendant Wilson, was made prior to the delivery of the premises involved by defendant Wilson to plaintiffs and prior to defendant Wilson's notice to plaintiffs not to pay any more money to said Cokely; that, at all times between November 2, 1920, and December 27, 1920, the defendant Wilson held out Cokely as his agent for the consummation of the sale herein and in the beginning expressly told plaintiffs to do business with him. It is also found that defendant Wilson refused and still refuses to deliver a deed to the property and also refuses to return to plaintiffs their partial payment of $3,000 made upon the purchase of the premises.

On substantially the same facts this case has been before this court on a prior appeal (Hicks v. Wilson, 197 Cal. 269, 240 P. 289), where this court adopted the opinion of the District Court of Appeal, in which that court answered and met every argument made by appellants upon the present appeal. We decline to discuss these same arguments again. This is the third occasion upon which the overcrowded calendars of the appellate courts of this state have been further burdened with this case. The record discloses that the merits of the case are entirely with the plaintiffs, as is also the law. The case presented upon the second trial, as the findings herein set forth will indicate, differs in no substantial particular from the case set forth in the opinion of the District Court of Appeal upon the former appeal, which opinion and decision was considered and approved by this court in the decision we have cited. There is no possible justification for a second appeal, after the first decision stating the law of the case, and clearly and emphatically discussing the arguments made by appellant, and differentiating from the instant case the authorities upon which he relies. The plaintiffs in this case have been deprived of their money now for about eight years, due to this protracted litigation.

The judgment is affirmed, with the addition of a fine of $250, to be paid by appellant for a frivolous appeal.

We concur: RICHARDS, J.; SHENK, J.

205 Cal. 634

RANKIN v. DE BARE. (S. F. 12003.) ★

Supreme Court of California. Nov. 26, 1928.

Hearing Denied in Bank Dec. 24, 1928.

1. Limitation of actions 🔑55(6)—Where trespass is of permanent nature, entire cause of action accrues when trespass is committed, as regards limitations.

Where injury or trespass is of a permanent nature, all damages, past and prospective, are recoverable in one action, and entire cause of action accrues when injury is suffered or trespass committed, as regards limitations.

2. Limitation of actions 🔑32—Where defendant constructed building resting partly on plaintiff's lot, May 1, 1917, action for damages commenced January 5, 1923, held barred (Code Civ. Proc. § 338, subd. 2).

Where defendant constructed building on his lot, which rested partly on plaintiff's adjoining lot, on or about May 1, 1917, action for damages and for restitution of premises, commenced January 5, 1923, *held* barred under Code Civ. Proc. § 338, subd. 2.

3. Injunction 🔑113—Where building resting partly on plaintiff's lot was built in 1917, plaintiff commencing action in 1923, could not have mandatory injunction because of delay.

Where defendant's building, resting partly on plaintiff's lot, was constructed about May 1, 1917, and plaintiff commenced action for damages and for restitution of premises January 5, 1923, case was not one for mandatory injunction to compel defendant to remove his building from portion of plaintiff's land, in view of plaintiff's long delay in asserting his rights.

Department 2.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action for damages and for restitution of premises by Augustus H. Rankin against Joseph De Bare, in which defendant filed a cross-complaint. From the judgment, both parties appeal. Reversed.

James T. O'Keefe, of Redwood City, J. E. McCurdy, of San Mateo, and John Ralph Wilson, of San Francisco, for appellant.

Joseph F. O'Malley and Albert Picard, both of San Francisco, for respondent.

SHENK, J. On January 5, 1923, when this action was commenced, the plaintiff was the owner of lot 15, block 1, Hillcrest, in Daly City, San Mateo county. At the same time

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★Hearing denied in bank.

the defendant was the owner of the adjoining lot 16. In 1914 a two-story building was constructed on the defendant's lot. Subsequently and prior to May 1, 1917, this building was reconstructed and added to on the side of and adjoining the plaintiff's property. In 1918 the plaintiff purchased lot 15, which was improved with a one-story building. On November 27, 1922, the plaintiff served upon the defendant a notice that the latter's building was encroaching upon the plaintiff's property to the extent of an inch and one-half, or thereabouts, to the damage of the plaintiff, and demanded a removal of defendant's building to the extent of such encroachment within 10 days. Upon a refusal of the defendant to comply with the notice and demand, this action was brought for damages and for restitution. The defendant answered, denying the encroachment, and by cross-complaint sought to quiet his title to the northeasterly three inches of lot 15. The court found against the defendant on his cross-complaint and entered judgment in favor of the plaintiff for the sum of $350 as damages. From this judgment cross-appeals have been taken. The court further found that "the defendant constructed a large building on lot 16, and a portion of said building is and ever since May 1, 1917, has been on said plaintiff's lot 15."

The principal contention made by the plaintiff on his appeal is that the judgment is inconsistent with and in conflict with the findings, in that no provision is made in the judgment for restitution to the plaintiff of that part of his lot which is occupied by the defendant's building and does not compensate the plaintiff for future damages. The defendant, in support of his appeal, contends that the judgment is excessive, and that the plaintiff's cause of action is barred by subdivision 2 of section 338 of the Code of Civil Procedure, which prescribes a period of three years for the commencement of an action for trespass upon or injury to real property.

[1-3] Considering the defendant's appeal first, it is beyond dispute that the defendant's building rested on plaintiff's lot to the extent of an inch or two along the boundary line between the two lots. There is no merit in the contention that the defendant's occupancy has been of such character as to vest in him title by adverse possession, but the contention that the plaintiff's cause of action is barred must be sustained. The record shows that the injury or trespass is permanent in character. Where the injury or trespass is of a permanent nature, all damages, past and prospective, are recoverable in one action, and the entire cause of action accrues when the injury is suffered or the trespass committed. Williams v. Southern Pacific R. R. Co., 150 Cal. 624, 89 P. 599; Kafka v. Bozio, 191 Cal. 746, 218 P. 753, 29 A. L. R. 833. The trespass was committed, according to the evidence and findings, on or about May 1, 1917. Three years expired on May 1, 1920, and as this action was not commenced until January 5, 1923, the cause of action was barred. Further, in view of the plaintiff's long delay in asserting his rights, the case is not one for a mandatory injunction to compel the defendant to remove his building from the said portion of plaintiff's land (see Rothaermel v. Amerige, 55 Cal. App. 273, 275, 203 P. 833).

The judgment is reversed.

We concur: RICHARDS, J.; LANGDON, J.

205 Cal. 625

HEITER v. HIRSCHFELD. (S. F. 12212.)★

Supreme Court of California. Nov. 26, 1928.

Hearing Denied in Bank Dec. 24, 1928.

Automobiles 🔑244(50)—Evidence as to contributory negligence of pedestrian, struck by automobile while crossing street to safety zone, sustained judgment of nonsuit.

In action for damages for personal injuries to pedestrian, struck by automobile while crossing from sidewalk to safety zone, evidence relative to contributory negligence was such as to sustain judgment of nonsuit.

Department 1.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by Margaret E. Heiter against Mervin H. Hirschfield. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Leon Samuels and Daniel A. Ryan, both of San Francisco, for appellant.

J. E. Reardon, Wm. M. Abbott, and K. W. Cannon, all of San Francisco, for respondent.

SEAWELL, J. The appeal was taken from a judgment of nonsuit, entered at the close of plaintiff's testimony upon motion of defendant. Plaintiff sued to recover damages for personal injuries received when she was struck by defendant's automobile while she was crossing from the sidewalk on the northerly side of Hermann street, a few feet west of the point where the lines of Market and Hermann streets meet, to a "safety zone" located in said Market street, just north of the car tracks of the street railways laid thereon. From said safety zone plaintiff planned to board an approaching car going west on Market street. Defendant's automobile was also proceeding in a westerly direction.

Defendant moved for a nonsuit, on the grounds that the evidence showed conclusively that defendant was free from negligence and that plaintiff was guilty of contributory negligence. Although the order granting the nonsuit is general in terms, the judge, in dismissing the jury, made the statement

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied in bank.

that he had determined as a matter of law that plaintiff was guilty of contributory negligence, and we are of the view that the judgment of nonsuit must be sustained on said ground.

The only testimony as to the facts of the accident was given by plaintiff and by defendant, who was called by plaintiff as a witness under the provisions of section 2055, Code of Civil Procedure. The accident occurred at approximately five minutes after midnight on May 18, 1923. Plaintiff had been walking westerly on the northerly side of Market street, waiting for the approach of a J car, which she wished to board. Upon reaching a place a few feet beyond the point where the northwesterly line of Market street and the north line of Hermann street join at an obtuse angle, plaintiff looked back in an easterly direction on Market street and observed a J car and defendant's automobile approaching on Market street, both being approximately 200 feet east of the point from which she observed them. She started into the street, walking obliquely in a southwesterly direction towards the safety zone, which was elevated a few inches above the level of the street, to board the approaching car. The shortest distance between the point where plaintiff left the sidewalk and the eastern end of the safety zone was 45 feet. Plaintiff, however, did not adopt such a course, but instead proceeded obliquely in a southwesterly course, which would require her to cover a distance of over 60 feet before reaching the safety zone. She testified that she kept her eyes on the automobile and street car continuously from the time she stepped from the curb until she reached a point near the safety zone, where she was struck; that when she took her eyes off the automobile it was about 6 feet from her, and she believed it was far enough away to give her time to get onto the safety zone; that she "stepped lively," but the left bumper or wheel of the automobile struck her, just as she was about to place her right foot on the elevated safety zone, causing her to suffer a comminuted fracture of the left leg.

Defendant, who is a physician, when examined as plaintiff's witness under the provisions of section 2055, Code of Civil Procedure, testified that he was driving his automobile, which was a Cleveland touring car model, in a westerly direction on Market street at a moderate rate of speed, estimated by him as 15 miles an hour. He was traveling about 2½ feet from the north line of the safety zone, which, by reason of the intersectional conditions, was the usual and proper place to drive. He did not observe plaintiff until he was 20 feet west of the east end of the safety zone. She was then 15 feet ahead of him and about 3 feet north of the right-hand side of his automobile, and, according to defendant, plaintiff was running in the direction of the safety zone. Plaintiff denied that she ran at any time, but admitted that she "stepped lively." Defendant turned the car to the right and immediately applied his brakes upon seeing plaintiff step in front of his car, and brought the automobile to a stop in approximately 17 feet, 2 feet beyond the point where the left front wheel or bumper struck plaintiff.

Defendant further testified that the intersection was "very poorly lighted," and that plaintiff wore dark-colored clothes; that his lights were standard equipment with which the machine was delivered to him, throwing out light 75 to 100 feet, and the brakes were in perfect condition. Both plaintiff and defendant united in testifying that there was no traffic at the intersection at the time of the accident, except defendant's automobile and the approaching J car which plaintiff wished to board. Plaintiff declared herself unable to estimate the speed of defendant's car. The only testimony given on this subject was the testimony of defendant, which was that he was not exceeding 15 miles an hour when defendant came within the compass of the rays of his headlights, and that he immediately applied his brakes upon discerning the presence of plaintiff.

Plaintiff repeatedly testified that, as she measured the situation, she thought she had time to reach the safety zone ahead of the approaching automobile, which she was watching as she hurried across the street. No evidence is offered and no claim is made that she was misled in any way by defendant increasing the speed of his car. The unfortunate injury inflicted upon her, which was a serious one, was occasioned by an error of judgment on her part. It would appear from the record before us that the only reasonable thing for defendant to do was to attempt to stop, as he was unable to tell what course plaintiff would take upon finding herself in a situation of imminent peril. He did, however, in the moment that was left him to act before the plaintiff was struck, attempt to avoid the accident by turning his car to the right.

We have examined the evidence in this case in the light of the well-established rules that should govern trial courts in passing upon motions for nonsuits, and we are of the opinion that we cannot say that the trial court committed error in granting the motion in the instant case.

The cases relied on by appellant, especially Collom v. Bloch, 70 Cal. App. 33, 232 P. 486, are not controlling here, because in those cases a different state of facts existed requiring the entry of a different judgment. In Collom v. Bloch, supra, the decedent attempted to cross in front of an automobile 45 or 50 feet distant from him, but in that case the distance to be traversed by decedent before he reached a position of safety was shorter than in the instant case. In the case herein, the distance between the curb and the point where appellant planned to step onto the safety zone was over 60 feet. The defendant's automobile was 6 feet from her when she reached the path of the automobile, not nearly 45 or 50 feet, as in Collom v. Bloch, supra.

Judgment affirmed.

We concur: CURTIS, J.; PRESTON, J.

205 Cal. 556

DE HAVEN v. KUHN. (Sac. 4112.) *

Supreme Court of California. Nov. 21, 1928.

Hearing Denied in Bank Dec. 20, 1928.

1. Evidence 🔑441(9)—Written contract for sale of sheep covered all sheep sold, and seller could not introduce oral evidence regarding price of dry ewes.

Contract whereby seller agreed to sell buyer about 2,200 ewes and their lambs for $6.37½ per head, after shearing, *held* to cover 1,769 ewes with lambs and 363 dry ewes delivered at time of seller's performance, so that seller, suing for amount due, could not introduce evidence that buyer orally agreed to pay seller for dry ewes at rate of $9 per head.

2. Sales 🔑363—In action for price of sheep, court properly directed verdict for defendant paying into court amount satisfying terms of written contract.

In action for price of sheep in which written contract introduced covered all ewes and lambs sold, court properly directed verdict for defendant, where defendant paid into court an amount sufficient to fully satisfy terms of written contract.

Department 2.

Appeal from Superior Court, Tehama County; H. S. Gans, Judge.

Action for money due upon sale and delivery of sheep by D. O. De Haven against Alfred Kuhn. From a judgment for defendant, plaintiff appeals. Affirmed.

James T. Matlock, of Red Bluff, for appellant.

McCoy & Wetter, of Red Bluff, for respondent.

RICHARDS, J. [1, 2] In this action judgment was rendered and entered upon a directed verdict by a jury in defendant's favor. The action was one commenced by the plaintiff for the recovery of a sum of money alleged to be due from the defendant to the plaintiff as the result of a transaction for the sale and delivery by plaintiff to defendant of 3,903 sheep, for which it was alleged the defendant agreed to pay the sum of $25,821.75, of which sum, according to the averments of the complaint, no part had been paid except the sum of $2,000. Defendant's answer to the complaint denied that he owed the plaintiff any greater sum than $22,837.82 as a result of said transaction, which latter sum the defendant paid into court, and by agreement of the parties the same was delivered to the plaintiff, leaving the question of whether any further balance remained due to be determined upon the trial of the case. During the trial the plaintiff introduced in evidence the following written agreement:

> "Corning, Cal., March 26, '27.
>
> "I hereby agree to sell to Alfred Kuhn about 2200 ewes and their lambs at $6.37½ per head after shearing.
>
> "$100.00 is hereby received on deposit.
>
> "D. O. De Haven."

The plaintiff further offered to prove that, at the time of the delivery of the sheep referred to in said writing, there were delivered 363 dry ewes, for which the defendant orally agreed to pay plaintiff at the rate of $9 per head. It is apparently conceded that the 363 dry ewes formed a portion of the band of sheep which were delivered by the plaintiff to the defendant at the time of the plaintiff's performance of his aforesaid written agreement. It is the plaintiff's contention that, because the written agreement for the sale of this band of sheep refers only to "2200 ewes and their lambs at $6.37½ per head," the said agreement does not include the dry ewes, which were delivered at the same time, and which he insists should have been paid for at the higher rate. The plaintiff's complaint as originally drawn appears to have reference to a single transaction between the parties for the purchase and sale of a band of 3,903 sheep, composed of 1,769 ewes with lambs, at the purchase price of $6.37½ per head, and 363 dry ewes, at $9 per head. Upon the trial plaintiff asked leave to amend the verbiage of his complaint on the face thereof so as to render the transaction one for the purchase and sale of 3,901 sheep, consisting of 1,769 ewes with lambs, at the price of $12.75 a pair, and 363 dry ewes, at $9 a head. The amendment being allowed, the plaintiff's counsel undertook to have the plaintiff testify to the details of an oral transaction, whereupon the defendant's counsel objected upon the ground the transaction was evidenced by a writing, which he produced, and which the plaintiff proceeded to offer in evidence. The writing having been thus offered and admitted, counsel for plaintiff undertook to show a contemporaneous oral understanding with relation to the 363 dry ewes, which he claimed were to be purchased at a different price per head than that stated in the written agreement, to which effort on his part objection was made that, having counted upon a single transaction for the purchase and sale of said band of sheep, and such transaction having been shown to have been put in writing, and the

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied in bank.

plaintiff having introduced in evidence such writing, he was not to be permitted to vary its terms by oral evidence. After an extended colloquy between counsel and the court, from which the latter became satisfied that there was but one transaction between the parties, and that the written agreement between them covered and related to the precise number of sheep which the plaintiff was to sell and deliver, and which he actually did deliver to the defendant, the trial court refused to permit the plaintiff to show orally that the 363 dry ewes were not enumerated in, and covered by, the written agreement between the parties to the transaction. It therefore directed the jury to return a verdict in the defendant's favor. We are unable to say in this state of the record that the trial court was in error in the interpretation which it thus gave to the agreement in writing between these parties for the sale and delivery of this band of sheep. If this view be correct, the trial court was not in error in directing a verdict in the defendant's favor, the evidence otherwise showing that the payment into court by the defendant was of an amount sufficient to fully satisfy the terms of the written agreement.

The judgment is affirmed.

We concur: LANGDON, J.; SHENK, J.

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205 Cal. 559

LATRONICA v. GENNONI. (Sac. 4139.)

Supreme Court of California. Nov. 21, 1928.

Partnership ⟹218(3)—Evidence as to partnership relation between parties living together illicitly as husband and wife held insufficient for submission to jury.

Evidence, in action for purpose of establishing existence of partnership, relative to partnership relation existing between parties living together illicitly as husband and wife, *held* insufficient for submission to jury.

Department 2.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Giovanni Latronica, as special administrator of the estate of Marianna B. Latronica, against Antone Gennoni, also known as Antonio Giannoni. Judgment for defendant, and plaintiff appeals. Affirmed.

Anthony Devoto and Devoto & Richardson, all of San Francisco, for appellant.

G. P. Ross, of Los Banos, for respondent.

RICHARDS, J. The plaintiff, as special administrator of the estate of Marianna B. Latronica, deceased, commenced this action against the defendant for the purpose of having it established that a partnership existed between the deceased and the defendant, commencing in January, 1911, and continuing to the time of the death of said deceased, on or about February 19, 1925, and for an accounting between the defendant and the estate of said deceased with relation to the properties of said partnership, and for a division thereof between the parties to this action. The defendant by his answer denied the existence of such partnership. The trial court granted a nonsuit at the close of the plaintiff's testimony, which, in so far as it bore upon the question of the existence of any such partnership, consisted solely of the evidence of the defendant himself when called as a witness for the plaintiff, under the provisions of the Code permitting his examination as such. From the judgment in the defendant's favor which followed the order of the court granting such nonsuit plaintiff prosecutes this appeal.

The facts of the case briefly stated are these: At some time during the year 1911 or 1912 the defendant and Marianna B. Latronica began living together illicitly as husband and wife; the defendant having then a wife living, which fact was known to the deceased when she entered into, and continued to live in, such illicit relation. The defendant was conducting a farm and dairy business in the vicinity of Los Banos, and the deceased lived with him on the farm, doing the cooking and helping with the work for about ten years, and up to the time when a divorce was obtained by the defendant's wife, and some time thereafter the deceased and the defendant entered into a legal marriage, which continued until the death of the former, in February, 1925. We have examined the record herein with a view to determining whether any substantial evidence was presented on behalf of the plaintiff showing the existence of any partnership agreement or relation between the defendant and the deceased during the period of their illicit relationship and prior to their aforesaid marriage, and we have failed to find any tangible evidence thereof which would have justified the trial court in refusing to grant the motion for a nonsuit. The defendant, as we have seen, was practically the only witness in support of the plaintiff's case. He had denied in his sworn answer the existence of the alleged partnership. He was not asked when a witness as to whether or not such partnership existed, and his entire testimony goes no further than to the extent of showing that the deceased and he lived and worked together upon his ranch as though they were husband and wife, each being aware of their illicit relationship. Whatever property was accumulated during the period of such relationship stood at all times in the name of the defendant, and was wholly dealt with by him as his individual property. From the time when the parties were married, and thereafter up to the time of her death, whatever interest the deceased had in such property after said marriage was a community interest therein, to which the husband succeeded upon her death.

In the absence of any sufficient or substantial evidence tending to show either an agreement to form a partnership, or a course of conduct from which the existence of a partnership between the parties prior to their marriage could be implied, we are of the opinion that the trial court properly granted the defendant's motion for nonsuit, and that the judgment based thereon must be, and the same is hereby, affirmed.

We concur: SHENK, J.; LANGDON, J.

205 Cal. 519

SELLERS v. WOOD HYDRAULIC HOIST & BODY CO. et al. (S. F. 12418.) *

Supreme Court of California. Nov. 19, 1928.
Hearing Denied in Bank Dec. 17, 1928.

1. **Automobiles 🔑245(88)—Contributory negligence of motorist whose driver did not, before entering intersection, see defendant's automobile, striking plaintiffs, approaching from right, held for jury.**

In action for injuries suffered by plaintiff when her automobile was struck by defendant's automobile approaching from right after plaintiff's automobile had entered street intersection, contributory negligence of plaintiff, in that her driver, when stopping before entering intersection, did not see defendant's automobile, where plaintiff's car was closed car and street was obstructed by large truck, *held* for jury.

2. **Witnesses 🔑267—Trial court has large discretion in allowing cross-examination.**

Trial court has large discretion in matter of allowing cross-examination.

3. **Witnesses 🔑269(6)—Restricting cross-examination, which extended entirely beyond subject of direct examination, as to automobile collision, held not abuse of discretion.**

In action for injuries suffered in automobile collision, in which defendant testified that truck forced him into wrong side of street, court's restriction of cross-examination of plaintiff's witnesses, who had come out of doorway into which truck was backed, immediately upon hearing crash of collision, which cross-examination extended entirely beyond subject of direct examination and was an attempt to go into what witness had seen when he left doorway and went to scene of collision, *held* not abuse of discretion.

4. **Witnesses 🔑372(1)—Where defendant's witness was openly hostile to plaintiff, proper exercise of discretion of judge was to allow considerable freedom in cross-examination.**

In action for injuries suffered in automobile collision, where defendant's eyewitness to accident was openly hostile to plaintiff and there was an attempt made by plaintiff to impeach his testimony, proper exercise of discretion of trial judge under such circumstances was to allow considerable freedom in cross-examination.

5. **Appeal and error 🔑882(8)—Where testimony objected to by defendants was permitted to remain in record upon defendant's insistence, they cannot claim on appeal they were prejudiced by original ruling admitting evidence.**

Where testimony objected to by defendants was permitted to remain in record upon insistence of defendants when plaintiff moved to strike out questions and answers to which objections had been made, defendants cannot claim on appeal that they were prejudiced by original ruling admitting evidence.

6. **Trial 🔑132—Failure to direct jury to disregard plaintiff's counsel's remark, to effect he thought defense would be put in, held not error, where counsel withdrew remark and amended statement.**

In action for injuries sustained in automobile collision, court's failure to immediately direct jury to disregard remark of plaintiff's counsel, made when explaining to court that it was impossible for him to secure attendance of certain witness as follows, "I had no idea that the case would be concluded so soon. I thought that there would be a defense put in," *held* not error, where counsel immediately withdrew remark and amended his statement when objection was made thereto, and court in final instructions told jury to disregard all statements of counsel to court or to each other.

7. **Damages 🔑132(2)—$20,000 to woman 50 years old sustaining severe injuries, probably permanent in character, loss of earning capacity, and incurring over $2,500 medical expenses, held not excessive.**

Verdict for $20,000 to woman 50 years of age, who had been conducting profitable business before accident, *held* not excessive, where she expended over $2,500 for medical attention, sustained fractured skull rendering her unconscious for days and irrational for weeks, and where she required guardian and constant attendant at time of trial, seven months after accident, and would probably never be able to resume employment requiring concentration, and where she suffered broken bones in her right hand, and teeth in her lower jaw were so loose as to require extraction.

Department 2.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action for damages for personal injuries by Mary S. Sellers, by Edith Schee, her guardian ad litem, against the Wood Hydraulic Hoist & Body Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Bronson, Bronson & Slaven, Roy A. Bronson, and E. D. Bronson, Jr., all of San Francisco, and Myron Harris, of Oakland, for appellants.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied in bank.

Jesse Nichols, of Oakland, and Ford, Johnson & Bourquin, of San Francisco, for respondent.

LANGDON, J. This is an appeal by defendants from a judgment against them for $20,000 in an action for personal injuries suffered by the plaintiff as the result of an automobile collision at the intersection of Third avenue and East Eleventh street, in the city of Oakland, Cal.

The plaintiff was riding in a Ford coupé driven by her chauffeur. This automobile was proceeding south on the west side of Third avenue. The testimony shows that as it approached the north curb of Eleventh street it slowed down and stopped momentarily and then proceeded to cross the street slowly. The defendant corporation's Hudson automobile, driven by its employé, defendant Lynn, approached the crossing along the center of Eleventh street at a rapid rate of speed, according to the testimony, traveling east and was some 60 or 80 feet west of the intersection at the time the Ford coupé entered it. The testimony shows clearly that the Ford coupé had the right of way over the Hudson automobile approaching from the right. Indeed, no argument is made by appellants that the record does not establish the negligence of defendants, but the position is taken that contributory negligence was shown. The day was clear and the street was dry. The coupé had passed the center of the intersection when the Hudson car crashed into it, striking it in the side toward the rear. The Ford coupé was overturned and the plaintiff was seriously injured. In the brief filed by the appellant Lynn but one point is argued: That the plaintiff was guilty of contributory negligence by imputation to her of the alleged contributory negligence on the part of her driver. Appellant Lynn also adopts the points urged by the appellant corporation in its opening brief. The corporation appellant adopts the argument of Lynn on contributory negligence and urges other points of alleged error which we shall consider hereinafter.

[1] There is no merit in the argument that plaintiff was guilty of contributory negligence. It is based entirely upon the proposition that at the time the driver of the Ford coupé stopped before entering the intersection, he did not see the Hudson automobile. It is urged that if he had looked, he must have seen. This conclusion does not necessarily follow from the record. The evidence shows that he was driving a closed car, which must have obstructed the view to some extent (Marini v. Southern Pacific, 201 Cal. 392, 257 P. 74), and it also appears that the street was obstructed by a large truck. Furthermore, as urged by respondent, it clearly appears from the testimony of disinterested witnesses that even if the driver of the Ford automobile had seen the approaching Hudson car at that time, there would have been no occasion for him to hesitate in crossing for he had the right of way and the Hudson was between 60 and 80 feet away and he could not judge of its speed. The jury has found upon the issue of contributory negligence in favor of the plaintiff, and appellants' contention that a verdict should have been directed for the defendants on the ground of contributory negligence is entirely without merit.

[2, 3] It is urged upon the appeal that the trial court committed prejudicial error in restricting the cross-examination of the witness Harley. The witness Harley was called by plaintiff for but one purpose, to contradict defendant Lynn as to the presence of a truck which Lynn claimed had backed into the doorway out of which Harley came immediately upon hearing the crash of the collision, and the presence of which truck Lynn claimed had forced him on to the north side of Eleventh street just prior to the collision. The cross-examination, which was restricted by the trial court, extended entirely beyond the subject of this direct examination and was an attempt to go into what the witness had seen when he left the doorway and went to the scene of the collision. The trial court had a large discretion in the matter of allowing cross-examination, and there is no showing made of an abuse of such discretion.

[4, 5] It is urged also that the trial court erred in allowing too extensive cross-examination by the plaintiff of the defendants' witness Ginsberg. It is urged that the cross-examination of this witness by the plaintiff extended beyond the scope of the direct examination. Ginsberg was an eyewitness to the accident; he was openly hostile to the plaintiff, and there was an attempt made by the plaintiff to impeach his testimony. Under such circumstances, a proper exercise of the discretion of the trial judge would be to allow considerable freedom in cross-examination. However, conceding that the cross-examination permitted in this instance was too broad, the appellants may not avail themselves of the error because of the facts which we shall state. Objection was made by the defendants to some of the cross-examination of this witness, but the objections were overruled. Later in the trial, when counsel for plaintiff stated that it was impossible for him to secure the immediate attendance of a witness upon whom he relied to impeach the testimony of Ginsberg, he also stated that under the circumstances he would not delay the submission of the case, but would dispense with the testimony of this impeaching witness and to avoid all question about the matter he would move to strike out the questions and answers of the witness Ginsberg to which objection had been made. Counsel for defendants opposed the granting of this motion and insisted that the testimony objected to should remain in the record. They were

told by the court that their action in resisting the motion to strike would preclude them from taking advantage in the future of any alleged error in the admission of the testimony to which objection had been made, but they persisted in their objection to the motion, which was then denied by the court. The position taken by appellants now is that the motion to strike did not particularize as to the portions of the testimony referred to. While, technically, the motion was not made in proper form, it is clear from a reading of the record that the defendants were opposing the motion on its merits and the failure to particularize as to the portions of the testimony referred to cannot be considered as prejudicial to defendants and appellants nor as destructive of the force and effect of their insistence that the testimony remain in the record. The testimony objected to by defendants was permitted to remain in the record upon the insistence of defendants, and they should not now be heard to claim that they were prejudiced by the original ruling.

[6] It is urged that the trial court erred in failing to immediately direct the jury to disregard a remark of counsel claimed to have been prejudicial to the defendants. Counsel was explaining to the court that it was impossible for him to secure the attendance of a witness upon whose testimony he relied to impeach the witness Ginsberg, and in explaining why this occurred, he said:

> "I had no idea that the case would be concluded so soon. I thought there would be a defense put in."

There is no merit in the contention of appellants with reference to this matter, as counsel for plaintiff immediately withdrew the remark and amended his statement when objection was made thereto, thus confessing his error before the jury, and the jury in the final instructions were told to disregard all statements of counsel to the court or to each other.

Extended argument is made that error occurred in the giving of certain instructions. The instructions as a whole correctly and fairly stated the law to the jury, and the merits of this action are so apparent that technical error in instructions would not warrant a reversal of the judgment.

[7] The claim that the judgment is excessive is clearly without merit. The plaintiff has been put to an expense of over $2,500 for medical attention. She sustained a fractured skull which rendered her unconscious for days and irrational for weeks, and at the time of the trial, seven months after the accident, she required a guardian and a constant attendant. The medical testimony was to the effect that she probably never would be able to resume employment requiring concentration. She was a woman about 50 years of age and prior to the accident had been conducting a profitable business. The testimony showed that not only were her mental faculties impaired by the accident, but she had suffered broken bones in her right hand, as a result of which the hand was crippled and the fingers stiff, and that the teeth in her lower jaw were so loosened and injured as to require extraction. The record shows severe injuries, probably permanent in character, loss of earning capacity, probably for all time, and large expenses incurred by plaintiff as the result of her injury.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.

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205 Cal. 577

NICHOLAS v. JACOBSON. (S. F. 11753.)

Supreme Court of California. Nov. 22, 1928.

Physicians and surgeons 🔑18(8)—Evidence held not to support jury's finding that surgeon removing varicose veins was responsible for deterioration of patient's testicle.

In action for damages by unskillful surgical operation for removal of varicose veins from plaintiff's scrotum, evidence *held* insufficient to justify jury's finding that defendant was responsible for deterioration of plaintiff's testicle.

Department 2.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by M. J. Nicholas against P. N. Jacobson. Judgment for plaintiff, and defendant appeals. Reversed.

Dutton & Gilkey, of Oakland (David C. Dutton, of Oakland, and Hartley F. Peart and Charles V. Barfield, both of San Francisco, of counsel), for appellant.

Philip M. Carey, of Oakland (Marvin B. Sherwin, of Oakland, of counsel), for respondent.

RICHARDS, J. This appeal is from a judgment in favor of the plaintiff and against the defendant, a physician and surgeon, in an action wherein the plaintiff sought to recover damages from the defendant for an alleged unskillful surgical operation; said judgment having been rendered and entered after a trial before a jury, which returned a verdict in favor of the plaintiff for the sum of $10,000, and upon which judgment was rendered and entered for said sum. The operation in question was one having for its purpose the removal of a long-standing affliction, known as varicocele or varicose veins, from the scrotum of the plaintiff. In his original complaint the plaintiff alleged that said operation was unskillfully performed, and that in the course thereof the defendant had unnecessarily removed the plaintiff's left testicle. After the trial had proceeded for several days upon the specific issue thus tendered, the plaintiff was permitted, over the defendant's objection, to amend his complaint so as to eliminate the averment as to the removal of said testicle, and to substitute therefor an averment to the effect that the same had been injured and destroyed as a result of said operation.

The main contention of the appellant upon this appeal is that the evidence educed at the trial was insufficient to justify the verdict of the jury and the judgment of the trial court. This contention has rendered necessary upon our part a careful and, in fact, a critical examination of the entire record, with a view to determining the merit of this contention. We have made such examination and have reached certain conclusions thereon. We do not, however, deem it either necessary or desirable to set forth with much of detail the evidence in this case, for reasons which should be obvious, and will content ourselves, therefore, with a brief statement of the conclusions drawn from such evidence or from the lack of it which, in our opinion, would compel a reversal of this cause upon appeal.

The action is one brought against a physician and surgeon for alleged unskillfulness in the performance of a surgical operation. There is no evidence whatever in this record tending to show that the defendant, as a physician and surgeon, was not fully possessed of that degree of care, skill, and learning ordinarily possessed and exercised by physicians and surgeons practicing their profession in the same or similar locality. The uncontradicted evidence in the case is to the contrary. There is no sufficient evidence in this record tending to show that the defendant, in the part which he took or supervised in the operation in question, failed in any degree to exercise that measure of care and skill which is ordinarily possessed and exercised by physicians practicing the profession of medicine and surgery in the same or similar locality, unless it is to be found in a reasonable inference to be drawn from the alleged result of the operation in question that it was unskillfully performed. There is no sufficient evidence in this record tending to show that in the performance of said operation the left testicle of the plaintiff was removed. The evidence of medical experts called by the plaintiff is, with one exception, to the contrary; and said exception relates to the testimony of a physician called by plaintiff which shows upon its face that his opinion that the plaintiff's left testicle had been removed was based upon an insufficient examination, and was formed under circumstances which rendered it valueless.

Finally, there is no sufficient evidence in the record before us that the deterioration of the plaintiff's left testicle, which forms the gravamen of his action as set forth in his amended complaint, was either due to said operation or to any unskillfulness on the part of the defendant or his associates in the course of its performance. The uncontradicted evidence discloses that the plaintiff had been suffering from the affliction known as varicocele for several years prior to the performance of the operation in question; that he had subjected himself to a previous operation by another physician and surgeon for the removal of varicose veins several months prior to the operation in question in this case, and which prior operation had been unsuccessful in so far as it accomplished the removal of such varicose veins. The uncontradicted medical testimony offered on behalf of both parties in the case showed that a frequent, if not usual, effect of the longstanding affliction of varicose veins upon the scrotum is to cause a degeneration and eventually atrophy of the testicle, the healthy condition of which must depend upon a normal state of the blood circulation which ministers to that organ; and the practically uncontradicted evidence in this case serves to show that such deterioration existed and was in the course of progress at the time of the operation which was performed by the defendant and his associates, and which in so far as it effected the removal of the varicose veins upon the plaintiff's scrotum was entirely successful. The practically undisputed evidence herein further discloses that the extent of deterioration which had reduced the plaintiff's left testicle to the size af approximately a raisin would not, in the natural course of things, have resulted from the operation which the defendant and his associates performed, but would rather appear to have been the result either of the pre-existing state of degeneration due to the presence of varicose veins, or to some unskillfulness in the performance of the previous operation. In short, there is no sufficient showing in this record upon which the plaintiff would be entitled to base a reasonable inference that the deterioration of his testicle was due in any degree to the surgical operation which the defendant and his associates performed.

It follows from the foregoing that there was no sufficient evidence offered at said trial in support of the plaintiff's case to justify the inference drawn by the jury that the defendant was in any degree responsible for the affliction or condition of which the plaintiff complains. In view of the foregoing conclusion, we deem it unnecessary to further review the alleged errors urged by the appellant as occurring in the course of the trial and upon which he relies for a reversal of the judgment herein.

The judgment is reversed.

We concur: SHENK, J.; LANGDON, J.

205 Cal. 491

BECKER et ux. v. BELDT et al. (L. A. 9557.)

Supreme Court of California. Nov. 16, 1928.

1. Fraudulent conveyances 🔑299(11, 13)—Evidence held to show that conveyances of property by defendant to his sister and mother were fraudulent (Civ. Code, § 3442).

In action on promissory note, wherein attachment was levied on certain property, evidence *held* to show that conveyances by defendant of property to his sister and mother were, as against claim of plaintiffs, null and void, under Civ. Code, § 3442, as being in fraud of creditors, justifying finding that defendant was owner of such properties.

2. Fraudulent conveyances 🔑241(2)—In suit by creditor upon note wherein attachment was issued, court had jurisdiction to determine question of fraudulent conveyance, where issue of ownership was tendered and met (Code Civ. Proc. § 542, subd. 2; Civ. Code, § 3441).

The general rule under Civ. Code, § 3441, that creditor must first reduce his claim to judgment before he can resort to equitable action to reach property fraudulently transferred by his debtor has no application to suit by creditor upon promissory note wherein he properly obtained specific lien by attachment against property, in view of Code Civ. Proc. § 542, subd. 2, and hence in such a suit, where issue of ownership was tendered and squarely met, court had jurisdiction to determine whether or not conveyances in question were fraudulent.

3. Appeal and error 🔑1010(1)—Trial court's findings and judgment, amply supported by evidence, will not be disturbed on appeal.

Trial court's findings and judgment, having ample support in the evidence, will not be disturbed upon appeal.

Department 1.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by William Becker and wife against L. B. Beldt and others, wherein Carrie Truitt and another intervene. From judgment for plaintiffs, interveners appeal. Affirmed.

Ray Meacham, of Long Beach, for appellants.

Le Roy N. French and Keeler, Fickert & French, all of Los Angeles, and Clock, McWhinney & Clock, of Long Beach, for respondents.

PRESTON, J. The question of the sufficiency of the evidence to support the findings and judgment presents the sole issue for our determination. The appeal is by the interveners from judgment for plaintiffs in an action to recover upon a promissory note secured by a second chattel mortgage on furniture in a court dwelling house. Both note and mortgage were executed by defendants L. B. Beldt and Rena B. Beldt, and were assigned to plaintiffs by the original mortgagee. Subsequently said defendants sold their lease and said furniture to defendant E. H. Truitt, subject to existing incumbrances, and he assumed payment of said note and second mortgage. Thereafter the first mortgage was foreclosed and the property sold. The amount secured, however, was not sufficient to pay the indebtedness, and said second mortgage was thereby terminated and rendered valueless. For that reason plaintiffs sued to recover upon the note alone, and caused an attachment to be levied upon the interest of said E. H. Truitt in said two parcels of real estate standing in the name of others and hereinafter designated parcel A and parcel B, respectively. Appellant Carrie Truitt, the mother of said defendant E. H. Truitt, thereupon filed herein a complaint in intervention, asserting her ownership of said parcel A, and appellant Irene Truitt, the sister of E. H. Truitt, filed her complaint in intervention asserting her ownership of said parcel B. The trial court found for plaintiffs, awarding them the sum of $2,400, with interest. The judgment further decreed that defendant E. H. Truitt was the owner of an undivided eight-thirteenths interest and appellant Carrie Truitt was the owner of an undivided five-thirteenths interest in said parcel A, and that said E. H. Truitt was the owner of said parcel B, in which appellant Irene Truitt had no right, title, or interest. As above stated, this appeal is prosecuted by said interveners, who question the propriety of said attachment and claim that the evidence is insufficient to sustain the findings respecting the ownership of said real property.

[1] We find no basis for the claim of insufficiency of the evidence. It appears that said E. H. Truitt was unable to pay his debts and was without funds or assets aside from his interest in said parcels of real estate. Some months prior to commencement of this action he transferred his equity in said lease and furniture, the value of which was fixed at the sum of $1,600, to Tracy R. and Hazel Z. Ottinger, husband and wife, in exchange for which they conveyed to intervener Carrie Truitt the property designated parcel A, the exchange value of which was stated to be $6,000, subject to incumbrances totaling $3,400. The other $1,000 due on the purchase price was paid by said intervener. Thus it appears that said E. H. Truitt furnished eight-thirteenths of said purchase price and said intervener furnished five-thirteenths thereof, and the court found their respective undivided interests to be in that proportion. The Ottingers failed to comply with the terms of the lease or to make any payments on the note, and as a result the whole amount was declared due and payable, and this suit was instituted. To permit the above property transfer to defeat the just claim of plaintiffs

would be to work an obvious injustice upon them.

It further appears that said defendant E. H. Truitt had been purchasing the property designated parcel B under an installment contract. Intervener Irene Truitt testified that her said brother was indebted to her in the sum of $200; that, in consideration of an additional payment to him of $200 (that is, for a total of $400) he assigned and delivered to her said property upon which it was found he had paid the sum of $790, said conveyance being made during the period when plaintiffs were two of his creditors and he was unable to meet his obligations. She stated that she did not know the original price of the lot, or how much was owing or had been paid on the contract of purchase; that she supposed she took the property as security for the money he owed her. As a whole her testimony was evasive and from it the court was justified in concluding in effect that not only did she have knowledge of the fraudulent intent of her brother in making the conveyance to her but that she participated in the carrying out of that fraud by arranging to take the title out of the reach of plaintiffs and give back to her brother a sum of money greater than the amount of the indebtedness found to be owing by him to her. As said in the case of Wolbrecht v. French, 24 Cal. App. 505, 508, 141 P. 942, 943:

> "Conveyances have sometimes been upheld which have the effect of giving preference to one creditor over another. It is established as a rule, however, that such creditor receiving preference must take only enough property to satisfy his debt, and that where he bargains to pay an added cash difference which is desired to be used by the debtor for his own purposes, such fact invalidates the entire transaction and renders the conveyance null and void as against the protesting creditor."

Said conveyance was, as against the claim of plaintiffs, null and void, as was likewise the attempted transfer of defendant's equity in said parcel A to his mother. Section 3442, Civil Code; Hemenway v. Thaxter, 150 Cal. 737, 90 P. 116; Gray v. Brunold, 140 Cal. 615, 74 P. 303.

[2, 3] The general rule, and cases supporting it, relied upon by appellants, that a creditor must first reduce his claim to judgment before he is entitled to resort to an equitable action to reach property fraudulently transferred by his debtor (Roberts v. Buckingham, 172 Cal. 458, 156 P. 1018; section 3441, Civil Code), has no application to the instant case, which is a suit by the creditor upon a promissory note wherein he properly obtained a specific lien by attachment against the property. "Property standing in the name of one person, but owned by the debtor, may be attached at the suit of the creditor. Section 542, subd. 2, Code Civ. Proc.; Brown v. Campbell, 100 Cal. 635, 35 P. 433, 38 Am. St. Rep. 314; Bank of San Francisco v. Pike, 53 Cal. App. 524, 200 P. 752; 23 C. J. p. 344." Horan v. Varian (Cal. Sup.) 268 P. 637.

Thereafter appellants by their complaints in intervention tendered the issue of ownership of said property, which issue was squarely met by respondents and was fairly tried and determined. Under the theory upon which the case was tried, and in view of the attachment lien, and the tender of the issue by appellants themselves, the court had jurisdiction to determine the question of whether or not said conveyances were fraudulent, and its findings and the judgment, having ample support in the evidence, will not be disturbed upon appeal.

Judgment affirmed.

We concur: SEAWELL, J.; CURTIS, J.

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205 Cal. 515

SANCHEZ v. EAST CONTRA COSTA IRRIGATION CO. (S. F. 12387.)

Supreme Court of California. Nov. 19, 1928.

1. Waters and water courses 🔑260—Children playing in canal held not to assume risk of unknown and unguarded danger incident to syphon built at bottom of canal, though assuming risk of dangers incident to canal.

Where owner of irrigation canals constructed large syphon in canal from one side of creek to other, and opening of syphon could not be seen in canal, and was unguarded, concealed danger was created without warning to persons invited by owner to live close by canal, and children tempted to play in canal assumed risk of open and obvious danger incident to canal, but did not assume risk of unknown, concealed, and unguarded danger incident to syphon.

2. Corporations 🔑488—That two stockholders of private irrigation company were public corporations did not make company governmental agency, relieving it from liability for its torts.

Where large part of stock of private irrigation company was privately owned, mere fact that two of its stockholders were public corporations did not make it such governmental agency as to relieve it from liability for its torts.

3. Corporations 🔑182—Stockholders have no estate in property of corporation.

Stockholders of a corporation have no estate in property of corporation.

Department 2.

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Action by Arturo Sanchez against the East Contra Costa Irrigation Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. E. Rodgers and A. F. Bray, both of Martinez, for appellant.

A. P. Black and Arthur Brand, both of San Francisco, for respondent.

LANGDON, J. This is an appeal by the defendant from a judgment in favor of the plaintiff in the sum of $6,000 for the death of the infant son of plaintiff, who was drowned in a syphon at the bottom of an irrigation ditch belonging to the defendant. The defendant owned certain irrigation canals and ditches in Contra Costa county. One of its canals was approximately 10 miles long, and crossed under various roads. In one place it was necessary for this canal to cross a wide arroyo or stream known as Marsh creek. To cross this creek it was necessary to construct a syphon from the canal on the one side of the creek to the canal on the other side. This syphon ran from the bottom of the irrigation main canal downward under Marsh creek and came up into the irrigation main canal upon the other side of Marsh creek. The opening of this syphon in the end of the canal was four feet in diameter, and was unguarded. The defendant company had constructed, within a short distance of the place of the accident, several small houses in which employees of the company, with their families, resided. The roadway leading to these houses ran alongside the side of the canal and along the edge of Marsh creek; there being nothing but the thickness of a low concrete bulkhead between the canal and the road. The plaintiff was an employee of the company, and lived in one of the said houses with his wife and children. His five year old son, who was drowned, had been playing with other children at the edge of the canal, and attempted to wet his handkerchief in its waters to wipe some blood from an injury he had sustained. He fell into the main canal, which, at the time of the accident, was filled with about 3 feet of water, and then, evidently, slipped into the syphon at the bottom of this 3 feet of water. The water in the canal was muddy, and the opening of the syphon could not be seen. The body of the child was recovered from a place some 15 feet down in the syphon. There was no sign of warning to notify passersby of the presence of this large syphon.

Appellant contends that it was not required to guard its canal against the danger of children falling into it, and this is conceded by the plaintiff and respondent. However, this case involves a situation where the defendant has placed upon its property an artificial peril, a concealed danger, without warning to those who were invited by defendant to live close by. The case of Faylor v. Great Eastern Quicksilver Mining Co., 45 Cal. App. 194, 187 P. 101, while presenting a different situation, announces a rule, the reasons for which make it applicable here. In that case, it was reiterated that the rule of nonliability was not to be applied in "instances where the owner maintains on his land something in the nature of a trap, or other concealed danger, known to him, and as to which he gave no warning to others." It was also said in the case last cited:

> "But the case at bar is distinguished from all the cases in our own, and so far as our attention has been called to them, in other jurisdictions recognizing the rule where relief has been denied trespassing children injured by the condition of machinery or premises, for in the case at bar the danger was distinctly a concealed danger. The bait of the trap may be said to have been the push-car, in itself an attractive lure to boys of the age of John Faylor. The tunnel, which, like any cave, natural or artificial, has been both in fiction and in fact, * * * irresistibly attractive to boys, and the concealed stope in the dark tunnel five hundred feet deep and filled with water, was the trap into whch the tunnel and cars led the boy's unwary feet. From the evidence in this case, the company knew that the children played about this mine."

[1] In the instant case, the canal with its shallow water was the bait of the trap. The defendant knew that children lived close by, and the opening to the syphon might have been easily guarded. It is a matter of common knowledge that children playing on the edge of a shallow body of water will be tempted to play in the water and to reach into it, and, while defendant need not have guarded against this open and obvious stream of water, under numerous California decisions, we think a different rule applies where an apparently harmless, shallow stream of water contains a large opening into which any one might slip, which opening is wholly unguarded and completely concealed from view. If the children had gone swimming in this canal and had slipped into the syphon, a similar legal situation would have been presented. The children assumed the risk of the open, obvious, notorious danger incident to the canal, containing about 3 feet of water; but they did not assume the risk of an unknown, concealed, and unguarded danger. The exception to the general rule, under which exception the present case falls, is discussed in the following cases: Bjork v. City of Tacoma, 76 Wash. 225, 135 P. 1005, 48 L. R. A. (N. S.) 331; Cœur d'Alene Lumber Co. v. Thompson (C. C. A.) 215 F. 8, L. R. A. 1915A, 731; City of Indianapolis v. Emmelman, 108 Ind. 530, 9 N. E. 155, 58 Am. Rep. 65; Indianapolis v. Williams, 58 Ind. App. 447, 108 N. E. 387; Loftus v. Dehail, 133 Cal. 214, 65 P. 379; Peters v. Bowman, 115 Cal. 345, 47 P. 113, 598, 56 Am. St. Rep. 106; Loveland v. Gardner, 79 Cal. 317, 21 P. 766, 4 L. R. A. 395; Malloy v. Hibernia Sav. & L. Soc., 3 Cal. Unrep. 76, 21 P. 525.

[2, 3] It is also contended by defendant and appellant that it is not liable for its torts because it is a governmental agency. This contention is without merit. The defendant

is a private corporation and, at the time of the accident, nearly 8,000 shares of its stock were held in private ownership. The mere fact that two of its stockholders happened to be public corporations would not alter the rule of liability. The stockholders of a corporation have no estate in the property of the corporation. Bank of Visalia v. Smith, 146 Cal. 403, 81 P. 542.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.

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205 Cal. 629

KATZ v. HELBING et al. (S. F. 12445.)*

Supreme Court of California. Nov. 26, 1928.

Hearing Denied in Bank Dec. 24, 1928.

1. Negligence 🔑108(1)—Allegation that injuries were proximate result of negligence will not render complaint sufficient, if other allegations show that negligence did not proximately cause injury.

In complaint for personal injuries, allegation that plaintiff suffered injuries as direct and proximate result of defendants' negligent conduct will not render complaint sufficient, if it affirmatively appears from other allegations that act made basis of liability is as matter of law not proximate cause of injury.

2. Municipal corporations 🔑809(2)—Placing of building materials on public streets likely to cause accidents is wrongful, if reasonably prudent man would have foreseen resulting injury.

In absence of statutory prohibition against placing of building materials in public streets likely to be attended by accidents to persons lawfully using streets, whether by wrongful act of interference of young children or otherwise, it is duty of court to declare such conduct wrongful if reasonably prudent man would have foreseen that injury would probably result, for acts of defendant are deemed proximate cause of such consequences as reasonably prudent man would anticipate as likely to result therefrom.

3. Evidence 🔑7—Court will take judicial notice of deleterious effect of quicklime causing injury.

In action for injuries sustained by passenger in street car when struck by lime left on sidewalk by defendants and thrown by small boy, court will take judicial notice of deleterious effect of quickline to tissues and flesh of human body and eyes.

4. Evidence 🔑25(2)—Court, in action for injuries from lime thrown by boy, may take judicial notice of fact that lime box was located on busy street.

In action for injuries sustained by passenger in street car when struck by lime left on sidewalk by defendant and thrown by small boy, trial court may take judicial notice of fact that place occupied by lime box was portion of very busy business area in city, and that many persons of all ages passed place daily.

5. Negligence 🔑126(2)—Proof of conduct of small boys, in throwing lime left by defendants on sidewalk, to create liability for injuries, held admissible under complaint alleging knowledge of conduct and access to lime.

Under complaint for injuries to passenger in street car struck by lime left on sidewalk by defendants and thrown at street car by small boy, alleging that defendants knew small boys were taking lime and throwing it at passing street cars, and that boys had free access to lime, proof could be offered showing that frequency, extent, and character of acts of small boys were such as to create liability on part of defendants for injury.

6. Evidence 🔑129(1)—Occurrence of act in past under similar circumstances is relevant in determining probability of future occurrence.

In determining probability of event happening in future, its occurrence in past under similar circumstances is relevant.

7. Negligence 🔑128—Under complaint for injuries from lime left on sidewalk and thrown at street car by small boy, proof of precautionary measures taken by defendants would be admissible.

Under complaint for injuries to passenger in street car struck by lime left on sidewalk by defendants and thrown at street car by small boy, alleging that defendants knew small boys were taking lime and throwing it at passing street cars, and that boys had free access to lime, evidence was admissible to show whether defendants had warned children of dangerous character of their acts and commanded them to desist, or had called on officers to assist them, or whether any precautionary or preventive measures whatsoever had been taken.

8. Negligence 🔑124(1)—Under complaint for injuries from lime left on sidewalk and thrown by small boy, evidence of defendants' ability to move materials to less accessible place held relevant.

Under complaint for injuries to passenger in street car struck by lime left on sidewalk by defendants and thrown at street car by small boy, alleging that defendants knew small boys were taking lime and throwing it at passing street cars, and that boys had free access to lime, evidence as to ability of defendants to have moved materials to some less accessible place would be relevant as circumstance bearing on liability.

9. Negligence 🔑111(1)—Failure to more definitely allege conduct of small boys in throwing lime left on sidewalk did not render complaint for injuries insufficient.

Under complaint for injuries to passenger in street car struck by lime left on sidewalk by defendants and thrown at street car by small boy, alleging that defendants knew small boys were taking lime and throwing it at passing street cars, and that boys had free access to lime, absence of more definite allegations as to frequency and character of acts of boys did not render complaint insufficient to state cause of action.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied in bank.

10. Negligence 🔑62(3)—Eleven year old boy, throwing lime left on sidewalk by defendants, held not such responsible agent as to make act proximate cause of injury.

Under complaint for injuries to street car passenger struck by lime left on sidewalk by defendants and thrown at street car by eleven year old boy, it could not be said as matter of law that boy, presumed to possess average intelligence for one of his age, was such a responsible agent as would make his act proximate cause of damage.

11. Negligence 🔑1—Negligence is relative to time, place, and circumstances.

Negligence is relative to time, place, and circumstances.

12. Negligence 🔑50—Defendants leaving on sidewalk lime, causing injury when thrown by small boy, held required to take precautionary measures, if reasonably prudent persons would have taken such measures.

In action for injuries to street car passenger by lime left on sidewalk by defendants and thrown at street car by small boy, defendants would be under duty to take precautionary measures, if reasonably prudent persons would have adopted measures to protect public against repetition of acts of boys during five days during which lime was left on sidewalk.

13. Negligence 🔑110—Complaint for injury from lime left on sidewalk by defendants and thrown by small boy showed duty on defendants to protect general public and stated case.

Under complaint for injuries to passenger in street car struck by lime left on sidewalk by defendants and thrown at street car by small boy, alleging defendants knew small boys were throwing lime and had free access to lime, allegations, if true, required defendants to protect general public from injury arising from condition that they caused to exist and which they knew was tempting youthful minds to deeds likely to cause injury to persons lawfully using streets and sidewalks, and hence complaint stated cause of action.

Department 1.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Fred Katz against William Helbing, Sr., and others, doing business under the firm name and style of Helbing Company, a copartnership, and others. Judgment for defendants, and plaintiff appeals. Reversed.

Hubbard & Hubbard and Grove J. Fink, all of San Francisco, for appellant.

Redman & Alexander and Walter H. Linforth, all of San Francisco, for respondents.

SEAWELL, J. Plaintiff appeals from a judgment for defendants entered after defendants' demurrer to plaintiff's amended complaint had been sustained without leave to amend.

The complaint, which the court below held did not state a cause of action, sets forth the following facts: All defendants except defendant A. G. Isaacs were members of a copartnership engaged in the building contracting business in the city and county of San Francisco, and were the owners of certain real property in said city and county. Said defendants and defendant A. G. Isaacs, on August 25, 1925, were, and for several weeks prior thereto had been, engaged in the construction of a building upon said real property, and on said date and for many days prior thereto "negligently and carelessly kept and maintained upon the public sidewalk and in the public street directly in front of said lot of land and said building certain building materials consisting, in part, of wet lime and/or mortar." On said August 25, 1925, while plaintiff was a passenger on a street car passing said lot, "a small, immature and irresponsible boy of tender years, to-wit, of the age of eleven years," picked up a quantity of wet lime and/or mortar so negligently and carelessly maintained by defendants and threw it at said street car on which plaintiff was a passenger, and portions of said wet lime struck plaintiff in the face and entered the socket of his right eye, thereby injuring and burning the eyeball to the extent that it became necessary to remove said eyeball. His left eye was also injured to the extent that the sight thereof has been permanently impaired. It is further alleged in paragraph VII of the complaint that—

> "At all times from the 20th day of August, 1925, to and including the time plaintiff was injured, defendants well knew that small boys were taking wet lime and/or mortar from said building materials so negligently and carelessly kept and maintained by defendants upon said sidewalk and in said street, as aforesaid, that said boys had free and open access to said lime and/or mortar, that said boys were throwing such wet lime and/or mortar at street cars which passed along said street in front of said building, and that passengers, including plaintiff, upon said street cars would probably be injured by such lime and/or mortar so thrown by said boys as plaintiff was injured, as aforesaid. Yet defendants, continuously from said 20th day of August, 1925, to and including the time plaintiff was injured, and for many days after defendants had knowledge of said acts of said boys, continued negligently and carelessly to keep and maintain said building materials, including such wet lime and/or mortar, upon said public sidewalk and in said public street."

On account of said injuries and damages, alleged to be "the direct and proximate results of the negligent and careless maintenance by defendants, and by each of them, of said building materials upon said public sidewalk and public street," plaintiff demanded damages in the sum of $50,000.

[1] Respondents argue that it affirmatively appears from the allegations of the complaint that the act of respondents in maintaining the

building materials in the street was not the proximate cause of plaintiff's injuries, but that said injuries were proximately caused by the intervening wrongful act of the eleven year old boy who threw the lime and mortar, striking plaintiff. The allegation in paragraph VIII of the complaint that plaintiff suffered injuries "as direct and proximate results" of the negligent and careless conduct of the defendants, will not, of course, render the complaint sufficient if it affirmatively appears from other allegations that the act made the basis of liability is, as a matter of law, not the proximate cause of the injury complained of.

[2] It must be conceded that building materials are commonly left standing on the sidewalk and border of the street fronting on buildings in the course of construction, and that wet lime and mortar are frequently mixed in boxes placed upon the sidewalk or street area, to be from there carried into the building for use. This practice, under ordinary circumstances, is recognized as lawful by custom and judicial decision. But, if experience had demonstrated that the placing of building materials in public streets and sidewalks was likely to be attended by accidents to persons lawfully using said streets and sidewalks, whether by virtue of wrongful acts of interference of young children or otherwise, we might expect to find the matter regulated by statute, and in the absence of statutory prohibitions it would be the duty of courts and juries to declare such conduct wrongful if a reasonably prudent man would have foreseen that injury would probably result, for the acts of a defendant are deemed the proximate cause of such consequences as a reasonably prudent man would anticipate as likely to result therefrom. Royal Indemnity Co. v. Public Service Corporation, 42 Cal. App. 628, 183 P. 960; Polloni v. Ryland, 28 Cal. App. 51, 151 P. 296; Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134. Intervening wrongful acts of third persons, but for which injuries complained of would not have been received, ordinarily break the chain of causation, because they are not to be anticipated as probable consequences, but are occasional and exceptional results. But this is not always the case, especially where the acts of children of a non-responsible age are involved. See Parkin v. Grayson Owen, 25 Cal. App. 269, 143 P. 257; Cahill v. E. B. & A. L. Stone Co., 153 Cal. 571, 96 P. 84, 19 L. R. A. (N. S.) 1094; Id., 167 Cal. 126, 138 P. 712; Faylor v. Great Eastern Q. Min. Co., 45 Cal. App. 194, 187 P. 101.

Hale v. Pacific Telephone & Telegraph Co., 42 Cal. App. 55, 183 P. 280, and the cases from other jurisdictions cited by respondents, in which intervening acts of children have been held to break the chain of causation, were all decided on the ground that the intervening acts there involved were not to be anticipated. Horan v. Town of Watertown, 217 Mass. 185, 104 N. E. 464; Perry v. Rochester Lime Co., 219 N. Y. 60, 113 N. E. 529, L. R. A. 1917B, 1058; Hall v. New York Telephone Co., 214 N. Y. 49, 108 N. E. 182, L. R. A. 1915E, 191; Hartnett v. Boston Store, 265 Ill. 331, 106 N. E. 837, L. R. A. 1915C, 460; Beetz v. City of Brooklyn, 10 App. Div. 382, 41 N. Y. S. 1009. The same principle may, perhaps, be applied to Loftus v. Dehail, 133 Cal. 214, 65 P. 379.

It may be conceded that the probability of young boys injuring pedestrians or passengers upon passing street cars by throwing wet lime mischievously or in prankish or frolicsome mood, even where the box of lime is situated upon a public sidewalk and in convenient reach of passersby, is so slight in a majority of cases that ordinarily no duty is imposed upon the person who places materials or substances upon the sidewalk for a lawful purpose to take unusual precautions to guard against the possibility of injury by the misuse of said materials by strangers. Considering the question with respect to the general social welfare, the law has determined that it is better that the damages incurred by the acts of third parties go uncompensated, rather than that liability should be imposed upon the person who placed or caused said materials to be placed upon a public street without guard, accessible to all who may choose to use them in any way their malevolent disposition or thoughtless fancy may direct.

[3-6] The court will take judicial notice of the deleterious effect of quicklime to the tissues and flesh of the human body and such a delicate organ as the eye. If necessary, the court is permitted to consult standard authorities or treatises in the investigation of questions of science and in doing this we are informed that "lime" is a "caustic highly infusible substance," and that quicklime develops great heat when treated with water. The trial court is also permitted to take judicial notice of the fact that the place occupied by the lime box, 940 Sutter street, San Francisco, was a portion of a very busy business area of said city and great numbers of persons of all ages passed and repassed said place daily. The allegations of the complaint, in testing its sufficiency, must be considered in the light of the situation thus presented. The complaint proceeds to allege that from August 20, 1925, to the time plaintiff was injured, five days later, defendants well knew that small boys were taking said wet lime and mortar and throwing it at passing street cars, that said boys had free and open access to the lime and mortar, and that passengers upon the street cars were the targets of their markmanship. We are of the opinion that it must be held that under these allegations proof might be offered showing that the frequency, extent and character of the acts of the small boys were such as to create li-

ability on the part of defendants to plaintiff. In determining the probability of an event happening in the future, its occurrence in the past under similar circumstances is relevant. In cases of this class the courts have stated that the fact that an occurrence has happened in the past is a circumstance to be considered in determining whether it was reasonably to be expected to happen in the future. Cole v. German Sav. & Loan Society (C. C. A.) 124 F. 113, 63 L. R. A. 416.

[7-9] Evidence would also be admissible under the foregoing allegations to show whether defendants had warned said children of the dangerous character of their acts and commanded them to desist, or, failing to secure obedience, had called upon officers of the law to assist them, or whether any precautionary or preventive measures whatsoever had been taken. Further, evidence as to the ability of defendants to have moved the materials to some less accessible place would be relevant as a circumstance bearing upon liability. The allegation that the boys had "free and open access" to the lime and mortar suggests that their acts were of a permissive character which would tend to create liability. While plaintiff might well have included in his complaint more definite allegations as to the frequency and character of the acts of the boys, we are of the view that their absence does not render the complaint insufficient to state a cause of action.

[10] Although, if the injury herein had resulted from the intervening agency of a person of an age and discretion to realize the inherently dangerous properties of wet lime and mortar and its capacity for inflicting injury, and who possessed adult judgment and experience and a proper sense of duty which one member of society owes to another, the act of such a person would be held to be the proximate cause of the damage done, it cannot be said as a matter of law that an eleven year old boy, presumed to possess average intelligence for one of his years, since the contrary is not alleged, is such a responsible agent. As was said by this court in Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 P. 712, in discussing the allied question as to contributory negligence in children:

> " 'There is no precise age at which, as a matter of law, a child is to be held accountable for all his actions to the same extent as one of full age. * * * The question as to the capacity of a particular child at a particular time to exercise care in avoiding a particular danger, is one of fact, falling within the province of a jury to determine.' "

See, also, Mayne v. San Diego Elec. Ry., 179 Cal. 173, 175 P. 690, and Greeneich v. Knoll, 73 Cal. App. 1, 238 P. 163.

In Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 P. 712, the plaintiff, a boy twelve years of age, was injured, while endeavoring to stop a push car which had been left standing unguarded and unlocked on the rails on a public street and had been wrongfully set in motion by other children with whom plaintiff was playing. The court said, at page 136 (138 P. 716):

> "The theory of the defendant is that the act of the other children in setting it [the push car] in motion destroyed the causal connection between the negligence of the defendant in leaving the car unguarded and the injury to plaintiff. But if the defendant was negligent in not safeguarding the car, the mere fact that it was put in motion in play by children before plaintiff joined them will not excuse it, *as such a thing ought to have been anticipated by it.* The original neglect of the defendant in failing to guard the car continued as the direct and culpable cause of the injury and its responsibility is to be determined by the *probable injurious consequences to children which were to be anticipated therefrom* and not by subsequent and independent events or agencies that may have arisen. In such a case children are not considered such responsible agents as break the chain of causation." (Italics supplied.)

Certain cases involving the liability of owners of automobiles parked in the public streets for injuries to pedestrians resulting from the acts of children in releasing the brakes and causing the automobile to "run away," while denying liability under the facts proved, contain language which indicates that each case must be determined by its particular facts, and that although under ordinary circumstances a rule of nonliability prevails in the automobile cases—which we believe must also prevail in the larger proportion of building material cases—there may be factual circumstances rendering the intervening acts of children a probable consequence and hence requiring a different ruling. Thus, in Jackson v. Mills Baking Co., 221 Mich. 64, 190 N. W. 740, 26 A. L. R. 906, the court said:

> "The car was in the street where it had a right to be. Brewin had no reason to anticipate that the children would board the car and start it. Children had frequently come out to the car on his previous trips, but had never climbed onto the car and had not been in the habit of playing in or meddling with it. * * * *If Brewin had left his wagon standing in the street and gone out of sight of it and remained away for a considerable period while children were in the habit of playing in and around it, a different question would be presented.*" (Italics supplied.)

See, also, Maloney v. Kaplan, 233 N. Y. 426, 135 N. E. 838, 26 A. L. R. 909; Kaplan v. Shults Bread Co., 212 App. Div. 110, 208 N. Y. S. 118; Touris v. Brewster, 235 N. Y. 226, 139 N. E. 249. See, also, note, 26 A. L. R. 912.

In Jackson v. London County Council, 28 Times L. R. 66 and 359, recovery was allowed in a case similar in important particulars to the case at bar.

[11, 12] Negligence is relative to time, place, and circumstances. There is no fixed rule which may be universally applied. The question here is: What was the duty of the respondents, knowing what they are charged with knowing and seeing what the complaint alleges they saw? If reasonably prudent persons would, under the allegations of the complaint, have adopted or taken steps to adopt some measure to protect the public against the repetition of the acts which recurred during five successive days, and we are of the view that they would have taken such steps, then it became the duty of defendants to act in a similar manner. It would then become a demonstrable proposition that the lime in its semisolid state was attracting the immature and thoughtless as a substance for childlike amusement. That it was a dangerous substance to scatter about in thickly populated districts must be known to adult persons.

[13] Call the lime in its mixed form an attractive nuisance, or what you may, the basic fact remains that if the allegations of the complaint be taken as true, the defendants owed to the general public protection from annoyance and injury arising from a condition which they had caused to exist and which they knew was tempting and impelling youthful minds to deeds that were likely to bring damage to innocent persons lawfully using the public sidewalks and streets. Every person in his intercourse with his fellows owes to them certain natural inherent duties, of which all normal persons are conscious, among which is the duty of protecting life and limb against peril when it is in his power to reasonably do so.

From what we have said in passing upon the sufficiency of the complaint we do not intend to be understood as forecasting the facts which may be developed in the trial of the case. The facts may reveal a case of nonliability. All that we hold is that it appears to us, upon a consideration of the law question thus far developed, that the complaint states a cause of action.

The judgment is reversed.

We concur: CURTIS, J.; PRESTON, J.

205 Cal. 512

GORDON v. DUFRESNE. (L. A. 9568.)

Supreme Court of California. Nov. 19, 1928.

Landlord and tenant ⟹92(1)—Lease and option to purchase form one document, and covenant to pay rent supports option as well as right to occupy premises.

Option to purchase contained in lease and lease itself are not severable, but form one document, the provisions of which are interdependent, and covenant to pay rent or do other acts supports option as well as the right to occupy premises.

Department 1.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by George P. Gordon against Annie Boyle Dufresne. Judgment for defendant, and plaintiff appeals. Reversed.

Neil S. McCarthy, George J. Stoneman, and Earl L. Banta, all of Los Angeles, for appellant.

William L. Kuehn and Arthur S. Loveland, both of Los Angeles, for respondent.

PRESTON, J. This is an action to enforce specific performance of the option clause contained in a written agreement of lease and option entered into by defendant as lessor with plaintiff as lessee, which provided, in part, as follows:

> "That the said Lessor has letten * * * and the said Lessee has hired and taken * * * Lots (describing lots 11-18, inc., Los Angeles county) * * * for a period of two years * * * at the total rent of * * * $600, payable * * * in equal monthly payments of $25.00, in gold coin of the United States of America, it is also expressly agreed by the Lessor that Lessee may at any time within the time this lease is in force & effect, purchase the within named lots for the sum of $6000, payable $1500 at time of exercising this option to purchase, $1500 one year thereafter, $1500 two years thereafter and $1500 three years thereafter, with interest on the deferred payments at the rate of 8% per annum payable annually. * * *"

Within said two-year period, plaintiff, desiring to exercise said option to purchase, tendered to defendant the sum of $1,500 as first installment of said purchase price of $6,000 and as a part of his pleading offered to pay into court all further sums due under the contract and to perform any other convenant required of him thereunder. Defendant refused to accept the tender, to make, execute, and deliver to plaintiff a good and sufficient deed to said property, or to otherwise fulfill the terms of her covenant. This action to compel specific performance resulted.

Upon the pleadings and the evidence the court found that no consideration was paid to defendant by plaintiff for said option to purchase; that said property had a substantial rental value; that the rent money was not, and was not intended to be, a part of any consideration for said option, and that defendant recalled and withdrew said option, and it was canceled and annulled prior to any offer, acceptance, or compliance therewith by plaintiff. No findings were made upon any of the other issues tendered by the pleadings, to prove which evidence was adduced. The court concluded as a matter of law that the part of said lease granting the option was wholly without consideration and a mere nudum pactum, from which defendant had the legal right to and did withdraw prior to offer or compliance therewith by plaintiff, and her action in so doing operated to cancel the option and relieve her from liability thereon. Judgment accordingly was entered for defendant, and plaintiff now appeals.

The question of the divisibility of lease and option agreements of the type here presented has been before this court many times, and it has been many times decided that such agreements are not severable, but that, on the contrary, the lease and option form one document, the provisions of which are interdependent, and the covenant to pay rent or do other acts supports the option as well as the right to occupy the premises. Prichard v. Kimball, 190 Cal. 757, 214 P. 863; Cates v. McNeil, 169 Cal. 697, 147 P. 944; Hall v. Center, 40 Cal. 63; De Rutte v. Muldrow, 16 Cal. 505; 35 Corpus Juris, pp. 1038, 1039. There is no material variance between the wording of the agreements under consideration in the above cases and the wording of the provisions before us which would serve to distinguish said cases and make inapplicable here the rule therein announced.

The judgment of the trial court, which is based solely upon said incorrect conclusion of law, is therefore reversed.

We concur: CURTIS, J.; SEAWELL, J.

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205 Cal. 506

In re MERCER'S ESTATE.★

EMERY v. NIXON.

(S. F. 12820.)

Supreme Court of California. Nov. 16, 1928.

Rehearing Denied Dec. 13, 1928.

1. Adoption 🔑18—Neither death of adopter nor of adopted child terminates status of such child (Civ. Code, § 228).

Neither death of the adopter nor of the adopted child has effect of terminating status of such child, when once it is lawfully fixed, under Civ. Code, § 228.

2. Adoption 🔑21—Adopted child of husband predeceasing wife has right under statute to inherit community property left by wife at death; "children" (Civ. Code, §§ 227, 228, 1386, subd. 8).

Adopted daughter of husband predeceasing wife has right to inherit common property of husband and wife remaining on wife's death, under Civ. Code, § 1386, subd. 8, since word "children" in statute includes adopted children, in view of sections 227, 228, relating to adoption.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second, and Third Series, Child; Children (in Statutes).]

3. Executors and administrators 🔑17(7)—Nominee of adopted daughter of predeceased husband held eligible for letters of administration of deceased wife's estate, consisting partly of community property (Civ. Code, § 1386, subd. 8).

Adopted daughter of husband predeceasing wife *held* to be person entitled to benefit of Civ. Code, § 1386, subd. 8, relating to inheritance of community property, and as such entitled to succeed to proportion of deceased wife's estate, consisting largely of what was formerly community property, and a proper person to nominate petitioner as an eligible person for letters of administration of wife's estate.

In Bank.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

In the matter of the estate of Anna B. Mercer, deceased, and in the matter of the estate of Anna B. Mercer, also known as Anna Bell Mercer, deceased. Murray B. Emery and H. D. Nixon each petitioned for letters of administration, and from an order appointing Nixon as administrator, Emery appeals. Affirmed.

Puter & Quinn and Marc F. Morrison, all of Eureka, and Charles Mannon, of Ukiah, for appellant.

Delos A. Mace, of Eureka, for respondent.

PRESTON, J. This appeal involves the right to letters of administration upon the estate of Anna B. Mercer, deceased, and, as a necessary consequence, the right of succession to that portion of her estate which was formerly the community property of herself and her predeceased husband, William L. Mercer. The facts are not in dispute.

On and prior to June 9, 1873, and for 35 years thereafter, the above-named parties were wife and husband. On said date the husband, with the express written consent in open court of the wife, regularly adopted as his child one Hermina Augusta Tappendorf, then aged two years, the decree reciting:

> "* * * And she is hereby declared henceforth and forever to be the lawfully adopted child of the said W. L. Mercer, and that henceforth and forever she shall be regarded and treated in all respects as the child of the said W. L. Mercer."

The child was reared in said family, and is now known in the record as Hermina A. Hansbrough. After accumulating considerable community property, the said William L. Mercer died testate on November 16, 1908, bequeathing the bulk of his estate to his widow, decedent herein. Later, and on October 5, 1927, Anna B. Mercer died intestate, leaving an estate, a large portion of which was formerly the community property of herself and her said predeceased spouse. Said decedent left no issue, and neither spouse left parents surviving. The nearest blood kin to the dece-

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★Rehearing denied.

dent is Maria Benson Emery, a sister. The said adopted daughter nominated respondent H. D. Nixon as administrator of said decedent's estate, and said sister nominated Murray B. Emery to the same office. The nominees have each petitioned for letters of administration, both claiming to be qualified for same under section 1365 of the Code of Civil Procedure, and thus has arisen the issue for our determination.

The court below gave and made its order appointing as administrator of said estate respondent Nixon, the nominee of said adopted daughter, and the nominee of said sister has appealed therefrom. The appeal turns upon the question as to whether said adopted daughter will succeed under subdivision 8 of section 1386 of the Civil Code to that portion of the estate of said decedent which was the community property of herself and her husband. This question in turn is resolved by the scope we declare the word "children" to have in that portion of said subdivision reading as follows:

> "If the deceased is a widow, * * * and leaves no issue, and the estate, or any portion thereof, was common property of such decedent and * * * her deceased spouse, while such spouse was living, such property goes in equal shares to the children of such deceased spouse. * * *"

This provision, of course, is to be read in connection with section 228 of the Civil Code, as follows:

> "A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain toward each other the legal relation of parent and child, and have all the rights and be subject to the duties of that relation."

This appeal has been ably presented by both sides. Appellant relies upon the principle set forth in the case of In re Darling, 173 Cal. 221, 226, 159 P. 606. In that case John Darling, deceased, died intestate. Arnold Darling Bennison, the issue of the marriage of a predeceased son of decedent, was regularly adopted, prior to the death of decedent, by H. G. and Eda Bennison, both of which foster parents survived said decedent. The court held that, under subdivision 1 of section 1386 of the Civil Code, an adopted child is entitled to succeed to the share in the estate of the father of his father by blood, that such father by blood would have succeeded to had he survived his own father. In discussing the question, the court said:

> "The adoption statutes of this state do not purport to affect the relationship of any person other than that of the parents by blood, the adopting parents, and the child. It is the person adopting and the child who by the express terms of the section, after adoption 'shall sustain towards each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation,' and it is the parents by blood who, from the time of the adoption, are 'relieved of all parental duties towards, and all responsibilities for the child so adopted, and have no right over it,' and are, in the eyes of the law, no longer its parents. The adoption simply fixes the status of the child as to its former and adopted parents. To its grandparents by blood it continues to be a grandchild, and the child of its parents by blood. It does not acquire new grandparents in the persons of the father and mother of an adopting parent.
>
> "It is only in so far as it is necessary to protect the full rights of the child as a child of the adopting parents and the corresponding rights of the adopting parents as father and mother of the adopted child that the statutes relative to adoption can play any part in the construction of section 1386 of the Civil Code, the inheritance statute here involved. As was said in Hockaday v. Lynn, 200 Mo. 456, 98 S. W. 585, 8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775: 'In fact, it may be laid down as a general conclusion that while the statute of adoption must be read into the statute of dower and that of descents and distribution, it is with this singularity always to be observed, viz., that the adopted child is so let in only for the purpose of preserving in full its right of inheritance from its adoptive parent.' This was followed by the statement, 'and the door to inheritance is shut and its bolt shot at that precise point,' a statement which appears to be sustained by the authorities generally in the absence of plain statutory provision to the contrary. The result would appear to be that within the meaning of subdivision 1 of section 1386 of the Civil Code, Arnold Darling Bennison was, at the date of the death of deceased, so far as deceased himself was concerned, 'issue' or a 'child' of his deceased child, John Darling, Jr., and entitled to succeed as such to the share his father would have taken if alive, by right of representation."

The further contention of appellant is that, inasmuch as an adopted child cannot inherit from the parents, nor from the brothers or sisters of the adopting parent, nor from its own foster brothers or sisters, but does inherit from its blood relatives of these classes, it must follow that the adopted daughter in the case before us may not inherit from the widow of the adopting father to whom she bears no blood relation. In other words, an adopter may not, it is said, corrupt the blood stream by foisting heirs upon his family. Stating the proposition another way, an adopted child is allowed to inherit from, but not through, its adopting parent.

Respondent, on the other hand, contends that the question is one of statutory construction, and when construed it gives ex proprio vigore the right of inheritance to the adopted daughter; that the child once adopted remains the child of the adopting parents forever; that this relation is curtailed and restricted if such child may not at all times enjoy as to the adopting parent the privileges of a natural child; in other words, that the relation of the child to its adopting parent brings it into the class of persons designated by law to take in the contingency we have before us. This contention is again stated by respondent in the following manner:

> "She is not seeking to inherit through her father by substitution or right of representation. She inherits from the decedent because of her status as 'child' of her father, W. L. Mercer. As pointed out in the Estate of Marshall, 42 Cal. App. 683, 184 P. 43, 'The respondent's relationship to her deceased mother would be the determining factor in establishing her status as an heir of Thomas E. Marshall.'"

Appellant raises, it is true, an intricate question of law, and he argues it ingeniously and persuasively; but it fails to satisfy the mind. The family blood stream of neither W. L. Mercer nor Anna B. Mercer is in any way contaminated by the infusion of foreign blood into it. This is at once made clear by merely supposing that, when these spouses intermarried, the husband possessed a natural daughter by a previous marriage. No one would contend for a moment that such a daughter would not have unquestionably the right under this statute to the community property in question. But we would have in such case an heir who bore no blood relationship whatever to the decedent, and, to our mind, a person in no different class than the adopted daughter in the case before us. The statute directing succession need not follow the ties of blood.

The weakness of appellant's position is simply that the adopted daughter cannot have the full benefit of her right as a daughter of the deceased husband in her relation to said husband unless the word "children" in this statute of succession is held to include her. The predeceased spouse had an interest in, if not full ownership of, the property in question. Natural justice suggests that his daughter have an interest therein. In making his will he may have had the very contingency in mind that has arisen, and decedent, too, may, with knowledge of this statute, have declined to make a will.

[1] The legislative intent is that such common property go to the child or children of the predeceased spouse, and, in the absence of such children, to divide same equally between the families of the respective spouses. Estate of Brady, 171 Cal. 1, 4, 151 P. 275. There is nothing in section 228 that in any way contemplates termination of the status of an adopted child when once it is lawfully fixed. Estate of Jobson, 164 Cal. 312, 128 P. 938, 43 L. R. A. (N. S.) 1062; Estate of Hunsicker, 65 Cal. App. 114, 118, 223 P. 411. Neither the death of the adopter nor of the adopted child would have any such effect.

[2] As another illustration, suppose decedent had willed the property to "my heirs," or to the "children of my deceased husband"; would there be any question but that such a testament would include the said adopted daughter? Admittedly, in subdivision 1 of section 1386, the word "issue" included an adopted child. In re Newman, 75 Cal. 213, 16 P. 887, 7 Am. St. Rep. 146; Estate of Winchester, 140 Cal. 468, 74 P. 10; In re Darling, supra. Appellant admits that the word "issue" in several places in said section does include an adopted child. Again, an adopted child has been held to be a lineal descendant of the adopting parent. Estate of Winchester, supra; Warren v. Prescott, 84 Me. 483, 24 A. 948, 17 L. R. A. 435, 30 Am. St. Rep. 370. If this be conceded, it argues strongly for the rule that an adopted child is entitled to any legacy the law gives to the children of an adopting parent.

The whole matter is concluded by the observation that the cases cited and the principles urged by appellant furnish no sufficient reason for restricting the scope of the word "children" in the provision under review. To exclude adopted children from its scope would be to say that they are not entitled, as to the adopting parent, to the full rights of natural children, which is contrary to the express provision of the statute (sections 227 and 228, Civ. Code), and the terms of the decree of adoption. Even the case of Hockaday v. Lynn, 200 Mo. 456, 98 S. W. 585, 8 L. R. A. (N. S.) 117, 118 Am. St. Rep. 672, 9 Ann. Cas. 775, above referred to, concedes that:

> "The adopted child is so let in only for the purpose of preserving in full its right of inheritance from its adoptive parent."

In the case of Patterson v. Browning, 146 Ind. 160, 44 N. E. 993, a widower with children by his first marriage remarried, and afterwards adopted a child. He died without issue by his second wife, leaving his wife, his natural children, and adopted child all surviving him. Under a statute which gave to an adopted child all the rights in the estate of its adopting father or mother, by descent or otherwise, that it would take if a natural heir, coupled with a statute vesting the fee simple of a decedent's lands in his widow, "provided, that if a man marry a second or subsequent wife, and has by her no children, but has children alive by a previous wife, the land which, at his death, descends to such wife, shall at her death descend to his children," it was held that the adopted child was a child of decedent, and, with the natural children, an heir to the estate.

Warren v. Prescott, supra, holds that a legally adopted child is a lineal descendant of its adopting parents, within the meaning of the statutes of Maine, and, as such, may take a legacy given by will to one of its adopting parents, who predeceased the adopted child.

Lastly, we indorse the sentiment expressed in Markover v. Krauss, 132 Ind. 294, 302, 31 N. E. 1047, 1050 (17 L. R. A. 806), as follows:

> "As before suggested, we do not mean by this that the Legislature has attempted to perform the impossible feat of doing the work of nature, and of creating a child of one's blood out of a

stranger. We simply recognize and acknowledge the untrammeled power of the Legislature to fix the legal status of the respective parties, and to control absolutely the manner in which property shall descend and be distributed."

See, to the same effect, Estate of Hill, 179 Cal. 683, 688, 178 P. 710.

[3] We, therefore, hold the nominator of respondent to be a person entitled to the benefit of said portion of subdivision 8 of section 1386 of the Civil Code, and, as such, entitled to succeed to a portion of the estate of said decedent, and a proper person to nominate the respondent as an eligible person for letters of administration.

The order of the court below is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

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205 Cal. 590

WILLIAMS et al. v. GORDON et al.
(L. A. 9499.)

Supreme Court of California. Nov. 23, 1928.

1. Mortgages ⟹401(4)—Failure of bank to send notice that interest installment on note secured by mortgage was due held no defense, in action to foreclose mortgage.

That bank in which note and mortgage securing it were deposited failed to send any notice that installment of interest on note was about to fall due *held* no defense in action to foreclose mortgage on failure to pay interest installments when due; there being nothing in either note or mortgage requiring giving of such notice.

2. Mortgages ⟹401(4)—Commencement of action to foreclose mortgage on failure to pay interest installment held election to declare principal due.

In action to foreclose mortgage on failure to pay interest installments on note, portion of answer denying that plaintiffs elected to declare principal due constitutes no defense, since commencement of action is sufficient in itself to show such election.

3. Mortgages ⟹454(1)—Allegation that plaintiffs in foreclosure action were indebted to defendants on unliquidated demand, held no defense, in view of judgment in suit on such demand only for costs.

In action to foreclose mortgage for failure to pay interest installments due, allegation in answer that plaintiffs were indebted to defendants on an unliquidated demand exceeding amount of delinquent interest installments, and that demand was subject of another suit, *held* not to constitute defense to action, especially where it is further shown that such other suit resulted finally in judgment in defendants' favor only for costs.

4. Mortgages ⟹401(5)—Tender of unpaid interest installments after commencement of foreclosure action was of no avail.

Tender by defendants, after commencement of action to foreclose mortgage for failure to pay interest installments, of full amount of such installments, together with interest thereon, was of no avail.

5. Costs ⟹260(4)—Defendants in foreclosure action would not be penalized for apparently frivolous appeal, in view of lack of notice of delinquency in payment of interest installments.

Defendants, appealing from judgment foreclosing mortgage on failure to pay interest installments, would not be penalized, though appeal might well be held to be frivolous, where no notice of delinquency of interest was given defendants within reasonable time before suit was brought, but only notice was that sent to defendants' attorneys one day before filing of complaint.

Department 1.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action to foreclose mortgage by Wirt Clay Williams and another against John A. Gordon, Clara H. Gordon, and others. From the judgment, named defendants appeal. Affirmed.

Ray Howard, of Los Angeles, for appellants.

L. G. Shelton, of Glendora, for respondents.

CURTIS, J. Action to foreclose mortgage. Judgment in favor of plaintiffs, from which two of the defendants, John A. and Clara H. Gordon, appeal. Said defendants, the appellants herein, appeared in said action, and filed an answer to the complaint. The plaintiffs thereupon moved to strike out portions of said answer on the ground that the same were sham, irrelevant, and immaterial, and also filed a demurrer to said answer on the ground that it failed to set forth facts sufficient to constitute any defense to plaintiffs' cause of action. The court granted said motion, and sustained said demurrer. Upon said defendants' failure to file any further or amended answer, their default was entered, and later judgment was given against them by default. They now claim on this appeal that the trial court erred in granting plaintiffs' motion to strike out portions of said answer and in sustaining the demurrer to their answer, for the reason that said answer stated facts which, if true, were sufficient to constitute a valid defense to plaintiffs' cause of action.

[1,2] The note secured by said mortgage was dated September 20, 1924, and was payable on or before three years after date. It provided that the interest should be paid quarterly, "and if not so paid, it shall become part of the principal, and bear the same rate of interest as the principal; and should the

interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note." The quarterly installments of interest falling due on December 20, 1925, and March 20, 1926, were not paid, and the action was begun April 28, 1926. The first defense set up in the answer is that defendants' failure to pay said installments of interest was due to the fault of the bank, with which said note and mortgage had been deposited, in neglecting to send the usual notice that an installment of interest was about to fall due; that all parties to said mortgage intended that the interest should be paid in the usual course of business and according to the custom prevailing in that locality, which is alleged to be that the note should be deposited in the bank where it was made payable, and that the bank should send such notice a reasonable time before each installment became due; and that plaintiffs so deposited said note and mortgage, and the bank failed to send any notice regarding either of said installments of interest. These facts constituted no defense to said action. There was nothing in either the note or mortgage which gave defendants any right to notice of the time when the installment of interest would fall due, and the terms of the note and mortgage must govern and determine the rights of the parties thereto. Neither is there any merit in that part of the answer in which the defendants deny that plaintiffs elected to declare the principal due. The commencement of the action is sufficient in itself to show such election. Bank of Commerce v. Scofield, 126 Cal. 156, 58 P. 451; Trinity County Bank v. Haas, 151 Cal. 553, 91 P. 385.

[3] It was next alleged in the answer that the plaintiffs were indebted to said defendants on an unliquidated demand amounting to $299, which amount was more than the amount of said two delinquent installments of interest, and that said demand was the subject of another suit in a justices' court between said parties at the time said two installments of interest became due. These facts were not sufficient to constitute a defense to said action. Especially is that true when the allegations of the answer further show that the suit in the justices' court resulted finally in a judgment of $26 only in favor of said defendants, and that said judgment was a judgment for costs rendered in said action, it being alleged that the defendants herein were defendants in said action, and that said defendants, who had filed a cross-complaint upon their said claim for $299, failed to recover anything whatever on said claim.

[4, 5] It is finally alleged by defendants in their said answer that they tendered to plaintiffs the full amount of said two installments of interest, together with compound interest thereon, but that the same was refused. It appears, however, from said answer that this tender was made after this action had been commenced. It needs no citation of authority to show that such a tender could be of no avail to defendants. Defendants bitterly complain that the institution of this action is the result of ill feeling on the part of plaintiffs toward defendants arising from the controversy between said parties in said justices' court action. With this complaint this court cannot concern itself. It would appear, however, that a complete answer to such charge appears in the record, which shows that no steps were taken by plaintiffs to foreclose their mortgage until more than a month after the second quarterly installment of interest had become delinquent, and that more than four months intervened between the time the first delinquent installment of interest fell due, after which plaintiffs might have exercised their option to declare the whole note due, and have brought this action, and the date when this action was in fact commenced. A forbearance of over four months by plaintiffs may well be considered sufficient to absolve them from the charge that they were actuated by ill will or malice in the institution of this action. However, we are not disposed to penalize the appellants, as suggested by respondents, by reason of an appeal which, without any strained construction of the law or the facts, might well be held to be frivolous. Had notice been given appellants of the delinquency of said interest within a reasonable time before suit was brought, they might, and probably would, have paid the same, as they had paid all previous installments of interest. The only notice appearing in the record to have been given appellants was one sent them by the attorneys for respondents, which was sent one day previous to the filing of the complaint herein. The next morning the appellants sought out the respondent Wirt Clay Williams, and actually delivered to him the full amount of interest due, but said respondent refused to accept the same as payment of said interest, and thereafter the money so delivered to said respondent was by his attorney thereafter returned to appellants, as this action had been commenced prior to the delivery of said money to said respondent. This somewhat hasty procedure on the part of respondents, while it does not offer any defense to their maintenance of this action, should not be encouraged by the courts, and we refuse to do so.

Judgment affirmed.

We concur: PRESTON, J.; SEAWELL, J.

205 Cal. 563

THOMPSON v. FITZGERALD. (S. F. 12429.)

Supreme Court of California. Nov. 22, 1928.

1. Appeal and error 🔑1002—Jury's verdict for plaintiff on conflicting evidence as to negligence and contributory negligence is binding on Supreme Court.

Jury's verdict for plaintiff on conflicting evidence as to defendant's negligence and plaintiff's contributory negligence is binding on Supreme Court on appeal.

2. Appeal and error 🔑1067—Failure to instruct as to duty to stop motorcycle before entering arterial street held not reversible error, where failure to stop was not proximate cause of collision with automobile.

Failure to stop motorcycle before entering arterial street not being proximate cause of injury to one riding on rear seat, in collision with automobile, under version of accident accepted by jury, court's failure to instruct jury as to duty to stop did not prejudice defendant's rights, and is not reversible error.

3. Negligence 🔑93(1)—Motorcycle driver's negligence in not stopping at arterial street held not imputable to one riding on rear seat.

Negligence of motorcycle driver in not bringing it to complete stop before entering arterial street could not be imputed to fellow employee riding on rear seat on way to latter's home during lunch hour, so as to bar recovery by him for injuries in collision with automobile, in absence of evidence that failure to stop was chargeable to any independent act of negligence on his part.

4. Automobiles 🔑168(6)—Automobilist had no right to travel on arterial street at excessive speed and without regard to rights of motorcyclist first reaching intersection.

Right of one driving automobile on arterial street to assume that motorcycle would be brought to stop before entering it did not give him right to travel in excess of established speed limits and without regard to rights of persons first reaching intersection to enter or cross such street.

Department 1.

Appeal from Superior Court, City and County of San Francisco; T. A. Norton, Judge.

Action by Alfred G. Thompson against Phillip Fitzgerald. Judgment for plaintiff, and defendant appeals. Affirmed.

Francis N. Foley and Ford, Johnson & Bourquin, all of San Francisco, for appellant.

Harry I. Stafford and Dean Cunha, both of San Francisco, for respondent.

SEAWELL, J. Plaintiff sued to recover damages for personal injuries sustained by him on July 3, 1925, when a motorcycle upon which he was riding as the guest of one Raymond Flores, who was driving said motorcycle, collided with an automobile driven by defendant at the intersection of Fulton and Buchanan streets in the city of San Francisco. The jury returned a verdict for plaintiff for $1,500, upon which was entered the judgment from which defendant appeals.

[1] A judgment for Raymond Flores, the driver of the said motorcycle, against defendant and appellant herein, was recently affirmed by this court. Flores v. Fitzgerald (Cal. Sup.) 268 P. 369. The defenses in the case now before us, as in Flores v. Fitzgerald, supra, were that defendant was free from negligence, and that plaintiff was guilty of contributory negligence. The evidence in the case herein was sharply conflicting. The facts testified to by appellant and his witnesses, if believed by the jury, would have required a judgment in appellant's favor under the instructions given by the court. The jury, having returned a verdict for plaintiff, has impliedly accepted the version of the accident related by plaintiff and his witnesses to be true. This determination of the jury is binding upon this court on appeal. Since the account of the accident given by plaintiff and his witnesses, and accepted by the jury as true, is similar in all material particulars to that testified to by Flores and his witnesses in the case in which Flores was plaintiff, and is stated in detail in that case (Flores v. Fitzgerald, supra), we will not repeat it here.

[2] The motorcycle upon which plaintiff was riding as the guest of Flores was traveling south on Buchanan street, while appellant was going east on Fulton street. The motorcycle and automobile collided in the southwest corner of the intersection of the two streets. Appellant complains of the action of the trial court in refusing to instruct the jury that it was unlawful for the motorcycle to cross Fulton street from an intersecting street unless the motorcycle should have been brought to a full stop before entering the intersection, and in instructing them instead that it was unlawful for the motorcycle to cross Fulton street from an intersecting street unless the motorcycle should have been brought to a full stop before entering the intersection *provided such street was clearly marked or signposted to give notice of such fact.* The driver of the motorcycle did not bring it to a full stop before entering the intersection from Buchanan street, but there were no marks or signposts upon the street directing the drivers of vehicles to stop before entering the intersection. The board of supervisors of the city and county of San Francisco had passed an ordinance declaring Fulton street between Van Ness avenue and Stanyan street an arterial street, and providing that it should be unlawful for any driver or operator of any vehicle to cross an arterial street from an intersecting street unless such vehicle should have been brought to a full stop before entering the intersection of such arterial street. Ordinance 6672, N. S. Said ordinance did not make the duty to stop

before entering the arterial street conditional upon the street having been signposted or marked to give notice of the fact that it had been designated an arterial street. Said ordinance, if a valid exercise of the legislative power of the board of supervisors, became effective on the day before the accident.

Respondent contends on the authority of Ex parte Daniels, 183 Cal. 636, 192 P. 442, that the enactment of said ordinance was in excess of the powers of the board of supervisors, because it conflicted with the provisions of the state Motor Vehicle Act as then in force, and hence the trial court did not err in refusing to give appellant's requested instructions embodying the provisions thereof.

In Flores v. Fitzgerald, supra, we held that it was unnecessary to pass upon the validity of the ordinance, for the reason that the failure of the driver of the motorcycle to bring it to a complete stop was not the proximate cause of the accident. In that case the trial court, in its instructions to the jury, recognized the ordinance as valid, and instructed the jury that by its terms the driver of the motorcycle was required to stop before entering Fulton street. In the instant case the jury were told that there was a duty to stop only if the street were signposted or marked, and, since it was not signposted or marked, the jury must have concluded that there was no duty to stop. In Flores v. Fitzgerald, supra, the appellant moved for a nonsuit and directed verdict, claiming that said ordinance, recognized by the court as valid, and Flores' failure to obey it, required as a matter of law, a determination that Flores was guilty of contributory negligence barring his recovery. To uphold the action of the trial court in denying the motions for a directed verdict and nonsuit, it was only necessary for this court to decide that the question of proximate cause was one of fact and that the jury might have legally concluded that the failure of the driver to stop was not the proximate cause of the accident. However, we regard the statements in said case as holding that the evidence recited showed conclusively, as a matter of law, that the failure to stop was not the proximate cause of the accident. The evidence determining the question in that case and the account of the accident accepted by the jury in the instant case being similar in all important particulars, the reasoning therein set forth is equally applicable to the case at bar. We quote from Flores v. Fitzgerald:

> "It is not necessary to pass upon the validity of said ordinance, for the reason that we are of the opinion, that, conceding said ordinance was valid and in full force and effect at the date of the collision, and that the respondent violated it by failing to stop before entering upon the intersection of said streets, we are not satisfied that such failure on his part in any way contributed to his injury. * * * It does not appear that his failure to stop his machine momentarily before entering the intersection had any direct connection with, or was in any manner responsible for, the collision with appellant's automobile. Although the violation of the ordinance may have been negligence per se, yet, as it was not shown that such negligence was the direct or proximate cause of his injury, it will not defeat his right of recovery for damages sustained by reason of said injury. * * * Had respondent stopped before entering the intersection, and then proceeded to cross the street at from ten to fifteen miles per hour, which was within the legal limit, the collision would, no doubt, have happened in much the same manner as described above. If such is the case, then we think the conclusion is irresistible that the proximate cause of respondent's injury was not his failure to come to a full stop before attempting to cross the street intersection. * * *"

Since it can be said as a matter of law that the failure of the motorcycle to be brought to a stop was not the proximate cause of the injury under the version of the accident accepted by the jury, the failure of the court to instruct the jury that there was a duty to stop, if such a duty existed, did not prejudice appellant's rights and does not constitute reversible error.

[3] It is not, however, essential to the affirmance of the decision herein to hold that the failure of the driver of the motorcycle to stop it before entering the intersection was not proximate cause of the accident. There is the factor in this case, not present in Flores v. Fitzgerald, supra, that the plaintiff was not the driver of the motorcycle, but was riding on the rear seat as a guest of the driver. Plaintiff and the driver, Flores, were both employees of the Pacific Telephone & Telegraph Company, assigned to its Pine and Steiner street office. Flores and plaintiff were on the way to plaintiff's home during the lunch hour at the time of the collision. Plaintiff was not in the control or management of the vehicle, nor was the relationship between the two such that Flores was the agent of plaintiff in the management of the vehicle. Any negligence of Flores in failing to bring the motorcycle to a complete stop could not be imputed to plaintiff to bar plaintiff's recovery. Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76; Pope v. Halpern, 193 Cal. 168, 223 P. 470; Meyers v. Southern Pacific Co., 63 Cal. App. 164, 218 P. 284; Bryant v. Pacific Electric Railway, 174 Cal. 737, 164 P. 385. Nor under any possible construction of the evidence can it be held that the failure of the motorcyclist to stop was chargeable to any independent act of negligence on the part of plaintiff.

[4] Nor would said ordinance of the city and county of San Francisco, if valid, render defendant's conduct free from negligence. In operating his automobile, defendant had the right to anticipate that other drivers would operate their vehicles in the manner required by law and would stop before entering arterial streets if the law so required. However,

the jury having impliedly found plaintiff's account of the accident to be true, it must be held that, even though defendant had the right to assume that the motorcycle would be brought to a stop before entering the intersection, he was negligent as a matter of law. The right to assume that operators of other vehicles would bring them to a stop before entering the arterial street did not give defendant a right to travel upon the arterial street at a high rate of speed, in excess of established speed limits, and in disregard of the rights of those wishing to enter or cross the arterial street, who reached the intersection when the vehicle upon the arterial street was at a considerable distance therefrom.

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.

205 Cal. 596

PEOPLE v. COEN. (Cr. 3139.)★

Supreme Court of California. Nov. 26, 1928.

Rehearing Denied Dec. 11, 1928.

1. Indictment and Information ⊂=>37—Information charging defendant, on certain date and in named county, murdered particular decedent held sufficient (Pen. Code, §§ 950, 951, 952).

Information charging the offense of murder, alleging that defendant did, on a certain date in named county, murder particular decedent, *held* sufficient, under Pen. Code, §§ 950, 951, 952, as following substantially the language of section 951, as amended by St. 1927, p. 1043, prescribing the form of information for various felonies.

2. Criminal law ⊂=>126(1)—Denial of application for change of place of trial for murder held not erroneous under circumstances.

Refusal of application for change of place of trial for murder, on ground defendant could not have a fair and impartial trial in county wherein alleged crimes were committed, *held* not erroneous, in view of fact that trial court was able, without unusual exertion or delay, to procure a fair and impartial jury to try the cause.

3. Jury ⊂=>131(10)—Action of trial court in conducting main examination of jurors, and limiting right of defendant to conduct further examination, held not erroneous under circumstances (Pen. Code, § 1078, as amended by St. 1927, p. 1039).

Action of trial court, assuming to act in conformity with Pen. Code, § 1078, as amended by St. 1927, p. 1039, in conducting main examination of jurors on their voir dire, and limiting right of defendant through his counsel to conduct further examination, *held* not prejudicial error, in view of fact that a fair and impartial jury was nevertheless selected, and defendant, after securing extension of right to exercise peremptory challenges, made no effort to secure further extension, so as to include and excuse juror whose examination was unduly restricted.

4. Homicide ⊂=>223—Evidence given by defendant at coroner's inquest, amounting to confession, held properly admitted, despite duress in obtaining confession in jail.

Where evidence given by defendant in murder prosecution at previous coroner's inquest, amounting to a confession of homicide charge, was practically free from whatever duress attended him while in jail, in inducing confession to officers, the trial court did not abuse its discretion in allowing prosecution to introduce such evidence at the trial.

5. Witnesses ⊂=>40(1)—Nine year old child held properly permitted to testify in murder trial, after careful inquiry regarding mental capabilities.

Permitting nine year old child to testify in murder prosecution was not error, in view of careful inquiry made regarding mental capabilities of child, and her knowledge of nature of proceeding and of her oath, particularly since testimony was in entire harmony with evidence of her elders given in regard to same matters.

6. Criminal law ⊂=>1172(2)—Instruction in murder prosecution, wherein defendant tendered dual plea, that defendant was conclusively presumed sane on issue of not guilty, held harmless error (Pen. Code, §§ 1016, 1017, as amended, and § 1026 as added, by St. 1927, pp. 1148, 1149).

Where defendant, in prosecution for murder, offered no objection to proceeding under provisions of Pen. Code, §§ 1016, 1017, as amended, and section 1026 as added, by St. 1927, pp. 1148, 1149, and tendered dual plea of not guilty, and not guilty by reason of insanity, as provided for therein, and proceeded without objection to trial of the cause on issue of not guilty, instruction to effect that, in determining the issue under such plea, the defendant was conclusively presumed to be sane, was at the most only harmless error, there being no evidence in record, at time of submission of such issue, which in any degree tended to show that defendant was insane.

7. Criminal law ⊂=>163—Plea of jeopardy by reason of conviction on plea of not guilty was without merit as to subsequent trial on issue of not guilty by reason of insanity (Pen. Code, §§ 1016, 1017, as amended, and § 1026 as added, by St. 1927, pp. 1148, 1149).

Where defendant, entering dual plea in prosecution for murder, in accordance with Pen. Code, §§ 1016, 1017 as amended, and section 1026 as added, by St. 1927, pp. 1148, 1149, was convicted on plea of not guilty, plea of once in jeopardy as to subsequent trial of issue of not guilty by reason of insanity was without merit, in that sole purpose of such hearing was that of permitting defendant to relieve himself of the state of jeopardy in which he had been thus placed through showing that, at time of commission of crimes of which he had been found guilty, he was in fact insane, and therefore innocent.

★Rehearing denied.

8. Criminal law 🔑1166½(6)—Refusal to permit further examination of jury on issue of not guilty by reason of insanity held harmless error, in view of evidence (Pen. Code, §§ 1016, 1017, 1078, as amended by St. 1927, pp. 1039, 1148, 1149, and § 1026 as added, by St. 1927, p. 1149).

In prosecution for murder, wherein defendant entered dual plea of not guilty and not guilty by reason of insanity, as authorized by Pen. Code, §§ 1016, 1017, as amended, and section 1026 as added, by St. 1927, pp. 1148, 1149, refusal of trial court, after conviction on plea of not guilty, to permit a further examination of jury to determine existence of a state of bias or prejudice with regard to issue of insanity, even though constituting an abuse of discretion under section 1078, as amended by St. 1927, p. 1039, *held* at the most harmless error, in view of fact that there was no substantial evidence sufficient to justify a finding that defendant was insane.

9. Criminal law 🔑493—Opinion evidence of lay witnesses as to sanity is of no greater evidentiary value than facts and circumstances, forming basis of opinion.

Opinion evidence of lay witnesses as to sanity is of no greater evidentiary value than that which could be given to facts and circumstances to which they each testified, and which formed the sole basis of their opinion.

In Bank.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Perry Coen, alias James A. Allendale, was convicted of murder in the first degree, and he appeals. Affirmed.

J. C. C. Russell and William R. McKay, both of Hanford, for appellant.

U. S. Webb, of San Francisco, J. W. Ferguson, of Hanford, Clarence H. Wilson, of Los Angeles, and J. F. Pryor, of Hanford, for the People.

RICHARDS, J. The defendant and appellant herein was charged by information with the crime of murder, alleged to have been committed on the 4th day of December, 1927. The information was in two counts, in the first of which the defendant was charged with the murder of one Edna Artist, and in the second count of which he was charged with the murder of George Mace Artist, the two decedents being husband and wife. In each of said counts the defendant was accused of "a felony, to wit, murder, in that on the 4th day of December, 1927, in the county of Kings, state of California, he murdered" the particular decedent. Upon his arrest and arraignment he appeared in court by counsel and filed a demurrer to each of said counts, based upon the contention that the information does not state facts sufficient to constitute a public offense, and that it does not substantially conform to the requirements of sections 950, 951, and 952, of the Penal Code of this state. The trial court overruled said demurrer, whereupon the defendant, without offering any objection or suggestion as to the form or effect of his respective pleas as these are provided for in the recent amendments to the Penal Code, entered a plea of "not guilty" and also entered a plea of "not guilty by reason of insanity" to each count in said information.

Prior to the commencement of the trial the defendant applied for a change of place of trial to another county, basing his motion therefor upon the contention, supported by his own affidavit and also that of his counsel, that a fair and impartial trial could not be had in the county of Kings, wherein his two alleged crimes had been committed, by reason of the existence of a widespread feeling of bias and prejudice among the people of said county against him. Upon the hearing of said application counter affidavits in opposition thereto were presented on behalf of the people, with the result that upon such hearing the defendant's application for a change of place of trial was denied. When the cause was thereafter called for trial, and a jury was sought to be impaneled for the purposes of such trial, and when a jury panel of 12 persons had been drawn and sworn to answer questions relative to their qualifications to act as such jurors, the trial judge, acting in accordance with section 1078 of the Penal Code as the same was amended in 1927 (St. 1927, p. 1039), undertook to examine said prospective jurors as to their qualifications to serve and act as a fair and impartial jury in said cause; and having so examined certain of said jurors the trial judge undertook, in the exercise of the discretion with which he is invested by the terms of said amended section of the Penal Code, to limit and define the extent of the examination of said prospective jurors on the part of counsel for the defendant. The detail and effect of such limitation will be set forth and considered at a later point in this opinion. When, as the result of the voir dire examination, a jury was finally selected and sworn to try the cause, the trial thereof was proceeded with upon the issue raised by the defendant's plea of "not guilty," and during the course of which no evidence was offered upon the direct issue as to the sanity or insanity of the defendant, although the defendant and several other witnesses on his behalf took the stand and testified quite fully and without objection with relation to the facts and circumstances preceding, attending, and succeeding the commission of the alleged dual crime.

Upon the conclusion of such evidence and the argument of respective counsel the court instructed the jury with relation to the questions of law presented upon the trial of the defendant upon his plea of "not guilty," and in the course of such instructions directed the attention of the jury to the fact that the defendant had entered the plea of "not guilty," and also the plea of "not guilty by reason of insanity," and that under the law existing by virtue of the then recent amendments of the Penal Code, where a defendant entered these two pleas he must first be tried on the plea of "not guilty," and later, if the jury find him guilty, the question of his sanity at the time of the commission of the offense is to be tried before a jury, and in giving these instructions the trial court further instructed the jury that under said recent amendments of the Penal Code the defendant, upon his plea of "not guilty" and upon the trial thereof, was conclusively presumed to be sane at the time of the commission of his alleged offenses, and that the question of his sanity or insanity at the time of the commission of his alleged crimes would be determined thereafter upon the hearing upon his plea of "not guilty by reason of insanity." The jury, having been thus instructed, retired to deliberate upon their verdict, but after a time returned to ask in substance for a re-reading of the instructions. The court thereupon re-read the entire body of its instructions and the jury again retired, and after a time again returned to request a re-reading of the court's instructions upon the subject of murder and upon the powers and duties of the jury with respect to punishment. The court re-read that portion of its instructions which covered the matters upon which the jury sought further light, and it again retired, and presently returned a verdict upon each of the counts in the information, finding the defendant guilty of murder in the first degree and expressly fixing the penalty at death.

Upon the polling of the jury and the recordation of the verdict, the court proceeded to state to the jury that it had a further duty to perform, in view of the fact that the defendant had pleaded "not guilty by reason of insanity"; whereupon counsel for the defendant inquired of the court whether it intended to proceed at once to try that issue. The court replied that it was about to examine the jury for that purpose; whereupon counsel for the defendant interposed a challenge to the entire panel, upon the ground that they were biased and prejudiced to an extent which rendered them not capable jurymen to try that issue, and counsel objected to the further progress of the trial upon that ground. The court overruled the challenge and objection, and proceeded to examine the jury by asking each of them whether they had any prejudice against the plea of insanity as a defense to crime, and whether they would have any hesitancy in agreeing upon a verdict finding the defendant insane at the time he committed the act in question, if the defendant should establish by a preponderance of evidence that he was insane at that time. Each of the jurors in turn answered the foregoing questions asked by the trial judge in the negative. Counsel for the defendant propounded no questions, but stood upon their objection that the jury, having brought in a verdict against the defendant finding him guilty of murder, was disqualified to pass upon the question of his sanity or insanity at the time of the commission of his alleged crimes. Counsel for the defendant also interposed the plea of once in jeopardy, basing said plea upon the record showing the foregoing trial and conviction. The court overruled said plea, and, having done so, continued the further trial of the cause until a later date, and again continued the hearing several times on account of the illness of the defendant.

The cause was resumed on March 21, 1928; whereupon, the jurors being present, the court directed the clerk to swear the jury, and thereupon counsel for the defendant objected to the jury being sworn until they should have an opportunity to examine them as to their qualifications to proceed to the trial of the issue presented by the defendant's plea of "not guilty by reason of insanity." Counsel for the defendant also insisted upon their alleged right to exercise anew their peremptory challenges, basing this claim upon the assertion that this was another trial upon another issue, as to which they were entitled to re-examine the jury and to exercise peremptory challenges. The trial court overruled the various objections of defendant's counsel, and declined to permit them to re-examine the jury or exercise further challenges. Thereupon the clerk read to the jury the information and the defendant's plea thereto as to each of the counts thereof, "not guilty by reason of insanity." Thereupon counsel for the defendant renewed their objection to a further trial of the cause, upon the ground that the defendant had been once in jeopardy, which objection the court overruled. It was then stipulated that the evidence which had theretofore been taken upon the defendant's plea of "not guilty" might be considered as introduced in evidence and as read to the jury upon the present hearing upon the defendant's plea of "not guilty by reason of insanity." The hearing then proceeded upon the latter issue, the defendant assuming the burden and producing certain evidence, expert and other, touching the question of his sanity or insanity, and presenting chiefly in the form of hypothetical questions, a series of facts and circumstances which had reference to the relations existing between the defendant, the two decedents and the daughter of the latter, over a considerable portion of time prior to the commission of the dual homicide. The defendant also introduced the testimony of certain lay witnesses who had known and worked with him for some years prior to the date of said crime, and of an additional lay witness who had occupied the prison with him after his arrest, and which witnesses related peculiarities in the conduct and demeanor of the defendant during the period of their acquaintance with him.

The defendant having rested upon said issue, the prosecution introduced considerable evidence of the same general character as that presented by the defendant, at the conclusion of which the cause upon this issue was argued by respective counsel. The court gave to the jury a body of instructions having particular reference to the defendant's plea of "not guilty by reason of insanity"; whereupon the jury retired to deliberate upon their verdict, and presently returned a unanimous verdict finding the defendant sane at the time he committed the offenses set forth in the two counts of the information. Counsel for the defendant thereupon moved the court in arrest of judgment and for a new trial, basing the former motion upon the grounds previously urged, and the latter motion generally upon all the grounds set forth in section 1181 of the Penal Code, and particularly upon the various grounds which had been urged during the proceedings upon the trial and upon certain alleged newly discovered evidence with relation to the issue of the defendant's insanity. The court denied the motions in arrest of judgment and for a new trial. Thereupon the court proceeded to pronounce judgment, declaring the defendant guilty of the crime of murder in the first degree upon each count in the information, and that he was sane at the time he committed the offenses set forth therein, and sentencing him to suffer the death penalty. From such judgment, and the order denying his motion for a new trial, the defendant has taken and prosecutes this appeal.

[1] The first contention which the appellant makes upon this appeal is that presented by his demurrer to the information. An examination of the record discloses that the information, as to the charging part thereof, follows substantially, and in fact almost exactly, the language of section 951 of the Penal Code as amended in 1927 (St. 1927, p. 1043), prescribing the form of informations for various felonies, including that of murder, and specifically providing that in cases of murder it should be sufficient in the information to charge the defendant with having "murdered" the deceased person. In view of this express provision embraced in the recent amendment to the Penal Code, we are constrained to hold that the objection, made by the defendant to the information upon the ground that it was not in sufficient compliance with certain sections of the Penal Code as they existed prior to the making of the aforesaid amendment, is without substantial merit.

[2] The next contention urged by appellant is that the trial court erred in denying his application for a change of place of trial from the county of Kings, wherein his two alleged crimes were committed and wherein he asserted he could not have a fair and impartial trial, to another county wherein the state of bias and prejudice alleged to exist in the county of Kings did not prevail. The record discloses that upon the hearing of said application a large amount of evidence, both in support of and in opposition thereto, was presented to the court and was fully and carefully considered by it, and that in denying the defendant's application it did so with the added statement in its order to the effect that, "if it developed at a later date that it is impossible to get an unprejudiced jury, the motion may be renewed." The record further discloses that thereupon the impanelment of a jury was proceeded with, with the result that, without any unreasonable or undue extension of such proceeding, or any unusual difficulty or delay, a fair and impartial jury was selected from the citizenship of Kings county to try the said cause.

It further appears that upon the selection of such jury, and prior to the further proceeding with such trial, the defendant renewed his motion for a change of place of trial, but without making or attempting to make any further showing in the way of reasons why his application therefore should be granted than those already presented upon his previous motion, and that the court thereupon finally denied his application for a change of place of trial. We are satisfied, from a careful examination of the record, that the trial court, in the presence of the conflicting evidence presented before it, and particularly in the presence of the fact that it was able without unusual exertion or delay to procure a fair and impartial jury to try the cause, committed no breach of the discretion with which it was invested in the making of its order denying defendant's application for a change of place of trial.

[3] The next contention, which the appellant quite strenuously urges, is that the trial court committed prejudicial error, both in assuming to itself conduct the main examination of the jurors upon their voir dire, and in limiting unduly the right of appellant through his counsel to conduct such further examination of the members of the prospective jury as would suffice to sufficiently disclose the existence of any fact which might furnish the basis of challenges for cause, or which might otherwise show a lack of qualification on the part of the individual jurors to serve as such upon the jury. The briefs of counsel for the appellant would seem to present a very plausible basis for the foregoing contention, for it is admittedly true that the trial court, in assuming to act in conformity with the provisions of section 1078 of the Penal Code as amended in 1927, did undertake at the outset of the examination of the prospective jurors in this cause to unduly limit the right of counsel for the defendant to conduct such reason-

able examination of certain of the prospective jurors as is still permitted under the provisions of said amended section of the Penal Code, which reads as follows:

> "It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury. He shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant." Pen. Code, § 1078, as amended by St. 1927, p. 1039.

Impressed by the earnest contention of counsel for the appellant in the foregoing regard, we have made a most careful examination of the record for the purpose of determining whether there exists therein sufficient showing of prejudicial error which would compel or justify a reversal of this cause. As a result of such examination we find the following to be the facts: At the outset of the trial 12 prospective jurors were called into the jury box and duly sworn for the purposes of their voir dire examination. The examination of the first of these disclosed a sufficient basis for a challenge for cause, and said juryman was excused upon such challenge. The next juror examined was one J. J. Smith, who was examined quite at length by the trial judge touching his qualifications to serve as such juror. At the conclusion of such examination by the judge, the defendant, through his counsel, undertook to further examine said juror by asking him more particular questions touching his qualifications than those which had been embraced in his previous more general examination. The particular questions thus sought to be asked by defendant's counsel related chiefly to the inquiry as to whether he had read various newspaper articles published prior to the trial regarding the case. We feel satisfied that the trial court unduly restricted the examination of the juror Smith in the foregoing regard, and that it also unduly restricted the right of counsel for the defendant to make similar inquiries of certain other of the prospective jurors who were among the 12 first called for examination. The record, however, further discloses that the defendant did not present either a challenge for cause or a peremptory challenge as to juror Smith, and that the latter actually served upon the jury which was finally selected to try the cause. As to the remaining 10 jurors in this first drawn panel, they were all dismissed, either upon challenges for cause or peremptory challenges preferred by the defendant. Upon the repletion of the jury box with another quota of prospective jurors, the trial judge apparently reconsidered and withdrew from his previous attitude of strictness with relation to the examination of such jurors on the part of defendant's counsel, and not only permitted counsel for the defendant to conduct reasonably an examination of such further prospective jurors as were thereafter called to the jury box, but in every case wherein the further examination of such jurors was attempted by counsel for the defendant with the purpose in view of revealing possible grounds for challenges for cause, the trial court permitted a practically unrestricted examination. It thus appears that, as to every juror who was finally retained to try the cause, with the exception of juror Smith, there was no prejudicial limitation of the rights of the defendant upon the voir dire examination. The defendant claimed and was permitted to exercise 20 peremptory challenges upon the trial of the dual charge in the information. With respect to the juror Smith it nowhere appears that, after the trial judge had relaxed his earlier strictitude, any effort was made on the part of the defendant to further examine said juror prior to his being sworn to try the cause, and it further affirmatively appears that as to said juror Smith no peremptory challenge was presented. The defendant, however, having exhausted his 20 peremptory challenges without having challenged juror Smith, was permitted by the trial court to exercise an additional peremptory challenge with respect to another juror, who had been called to the box after the defendant's exhaustion of his quota of peremptory challenges. Having thus procured the aforesaid extension of his right to exercise peremptory challenges, the defendant, as the record discloses, made no effort to procure a further extension thereof so as to include and excuse juror Smith, and that without further objection on the part of the defendant the latter juror was, with the other 11, properly selected as jurors sworn to try the cause. Under the foregoing circumstances, as disclosed by our very careful examination of the record, we have no hesitation in concluding that no prejudicial error was committed by the trial court in the course of the selection of a fair and impartial jury to try the cause.

[4] The next contention urged by the appellant is that the trial court erred in allowing the prosecution to introduce the evidence given by the defendant at the coroner's inquest, which amounted to a confession of the commission of the dual homicide. The basis of this contention on the part of the defendant consists in his claim that the testimony which he gave at the coroner's inquest, while apparently given freely and voluntarily, was in fact a reproduction there of a confession which had been extorted from him by a course of threats, abuse, and intimidations to which he had been subjected at the hands of the officers of the law while in jail shortly after his arrest, upon the suspicion that he had committed the aforesaid crime. Upon the defendant's objection to the admission in evidence of his testimony given at the coroner's inquest, the defendant testified at length and with much of detail with regard to his aforesaid treatment while in jail, and to its effect in inducing the confes-

sion made to the officers there. On the other hand, all of the officers whom he thus charged with abuse and intimidation took the stand and denied much of the matter to which the defendant testified. It must be conceded, however, that a considerable amount of harsh treatment and of vile language addressed to the defendant by these officers prior to his confession there remained undisputed, and, had the confession which the defendant there gave been offered in evidence at the trial, it would be, to say the least of it, a matter of grave doubt as to whether that confession of the defendant, given under such circumstances, should have been received in evidence.

But that confession was not offered in evidence, and the fact is, as shown by the record, that some considerable time elapsed between the date of said jail confession and the time when the defendant was called as a witness and testified at the coroner's inquest. The practically undisputed evidence shows that, when called as a witness at the inquest, the defendant was fully informed of his rights in the premises, and was practically free from whatever duress had attended him while in the jail. The affirmative evidence of those who were present at the inquest would seem to show that whatever testimony the defendant gave there was freely and voluntarily given. Upon such showing, made preliminarily to the offer in evidence of the defendant's testimony so given, we are of the opinion that the trial court did not abuse its discretion in allowing the introduction in evidence of the defendant's said testimony. Having done so, and said evidence having been read to the jury, the trial court proceeded to instruct the jury that it was the ultimate judge of the propriety of considering such evidence. In so doing the trial court gave to the jury both the instruction offered by the prosecution and the instruction upon the same subject offered on behalf of the defendant, both of which instructions correctly stating the law and being in entire harmony with each other. Under the foregoing circumstances, we are of the opinion that the trial court did not abuse its discretion in permitting the introduction in evidence in the first instance of the defendant's said testimony, and that the defendant was not prejudicially affected thereby, nor by the instructions which the trial court subsequently gave to the jury upon the subject.

[5] The next contention of the appellant requiring comment is that wherein it is urged that the trial court was in error in permitting Ione Artist, a child of the age of nine years, a daughter of the decedents, who was present in the home of her parents and was a witness to certain facts which form a part of the res gestæ attending the commission of the dual crime, to testify as a witness in the case. Before permitting said child to be sworn and to give her evidence, the trial court conducted a quite careful inquiry regarding the mental capabilities of the child and her knowledge of the nature of the proceeding and of her oath and duty to be truthful in relation to the matters with respect to which she was to give her testimony, and we are unable to say that as the result of such careful and searching inquiry on the part of the trial judge he abused his discretion in permitting the evidence of this nine year old child to be given in the case. In support of this conclusion it may be added that the testimony of this child, when given and considered as a whole, is in entire harmony with the evidence of her elders, given in regard to the same matters with relation to which she was called and gave her testimony.

We come next to consider the contention of the defendant to the effect that sections 1016, 1017, and 1026 of the Penal Code, as amended in 1927 (St. 1927, pp. 1148, 1149), are unconstitutional in so far as these sections provide for a dual hearing before the same or another jury upon the defendant's plea of "not guilty" and "not guilty by reason of insanity," made and required to be made by the provisions of the amended sections of the Penal Code above referred to. The record discloses that the defendant upon his arrest and arraignment, and after he had been provided by the court with able counsel, and after both he and they had been informed by the court as to the recent amendments in the Penal Code permitting the presentation by the defendant of the dual plea of "not guilty" and "not guilty by reason of insanity," and after sufficient time had been given to defendant and his counsel to determine what pleas he should present or refuse to present to the charges embraced in the information, tendered without any objections or qualification both of said pleas, and that thereupon the trial of the cause upon the defendant's plea of "not guilty" proceeded before the jury selected as above set forth; that during the course of the trial, and up to the time of the submission thereof to the jury, the defendant was permitted to testify fully and without objection to his version of the facts and circumstances preceding, attending, and succeeding the killings with which he was charged; that during his testimony, and also during the testimony of whatever witnesses he offered during that portion of the trial upon his own behalf, there was neither evidence nor suggestion that the defendant was insane.

Neither was there any contention presented by the defendant or his counsel touching the subject of his right to show, or to have the jury consider, any fact or proof with relation to the defendant's sanity or insanity, either at the time or prior to the commission of these homicides. In the foregoing state of the record this cause was submitted to the jury upon the defendant's plea of "not guilty," and upon a trial thereon, and upon the instructions as to the law of the case which the trial court then proceeded to give. In the course of giving such instructions as were offered by respective counsel and were either given as offered or as modified by the trial judge, there was an instruction to the effect that:

> "To each count in this information the defendant has entered the plea of 'not guilty,' and also the plea of 'not guilty by reason of insanity.' Under the law, where a defendant enters these two pleas, he must first be tried on the plea of 'not guilty,' and later, if the jury find him guilty, the question of his sanity at the time of the commission of the offense is tried before a jury. You are instructed that this trial is on the plea of the defendant 'not guilty,' entered to each count of the information; that is to say, you are to determine whether or not the defendant committed the crimes charged against him in the information. In this trial the defendant is conclusively presumed to have been sane on December 4, 1927, at the time the offenses are alleged to have been committed."

Upon the other phases of this cause the instructions of the trial court were very full and very fair, and the defendant upon this appeal, other than by his attack upon the constitutionality of the foregoing amendments to the Penal Code, has made no objection or claim of error on the part of the trial court in its instructions to the jury. When the jury had been thus instructed and had retired, and had later been returned to the trial court twice for the reading, once of the court's entire instructions, and again of those portions thereof relating to the crime of murder of the first degree and to the powers and duties of juries in relation thereto, and had finally, and after such repeated instructions, returned to the court with a unanimous verdict finding the defendant guilty of murder of the first degree upon both counts in said information, and expressly fixing his punishment at death, the court announced its intention to proceed before the same jury with the hearing upon the defendant's plea of "not guilty by reason of insanity." The court thereupon proceeded to further examine each of the jurors, touching their qualifications to hear and determine the issue raised by the defendant's said plea, asking of each juror the following questions:

> (1) "Have you any prejudice against the plea of insanity as a defense to crime?" to which each juror responded in the negative.
>
> (2) "If the defendant should establish by a preponderance of evidence that he was insane at the time he committed the act, would you have any hesitancy in agreeing on a verdict finding him insane at said time?" to which question each juror in turn responded in the negative.

Thereupon defendant's counsel insisted upon the right of the defendant to further conduct an examination of said jurors as to their qualifications in the way of existing bias or prejudice to further sit and act as trial jurors in the cause, and also insisted upon the right of the defendant to further exercise peremptory challenges, and counsel for the defendant objected to further proceeding with the cause until they had been accorded the rights thus asserted and insisted upon. The trial court denied each of the foregoing requests, and its denial thereof is now asserted to have been prejudicial error. The defendant thereupon made the further objection to the further hearing of the cause before this or any other jury upon the ground that the defendant, by virtue of the proceedings thus far taken in the cause, had been once in jeopardy, and that to further proceed with the hearing upon the present issue would be to place the defendant for a second time in jeopardy, and in furtherance of said objection counsel for the defendant formally proffered the plea of once in jeopardy. The court overruled said objection and denied said plea, and this action upon its part is also asserted to have been prejudicial error.

After a delay of some days, owing to the illness of the defendant, the trial of the cause was proceeded with upon the issue raised by the defendant's plea of "not guilty by reason of insanity"; whereupon the defendant proceeded with the introduction of his evidence upon said plea, in the course of which he first offered certain affidavits purporting to have been made by persons living in another and distant state, and in which affidavits the affiants undertook to set forth certain facts with relation to the existence of insanity of certain members of the defendant's family and forbears. The introduction of these affidavits was objected to by the prosecution, and the trial court sustained said objection, and this action in so doing is asserted to have been prejudicial error. Thereupon the defendant proceeded to offer in evidence the testimony of two medical experts, who were asked and responded to certain hypothetical questions, and who also testified to having made a personal examination of the defendant during the progress of the trial with special reference to his then existing mental and physical condition. The defendant further introduced the testimony of three lay witnesses, two of whom gave it as their opinion that the defendant was insane, basing their opinion upon their observation of the defendant during the period of some years preceding the commission of said crimes, and the other of whom, a fellow inmate of the jail, gave a like opinion, based upon his observation of the defendant during his confinement there. Thereupon the defendant rested his case upon said issue, and upon his so doing the prosecution introduced a considerable body of evidence of both experts and lay witnesses touching this issue, after which the trial court gave to the jury a body of further instructions covering the issue of insanity, to the scope and sufficiency of which the defendant offers no objection. The jury then retired, and presently returned, as to each count of the information, a verdict finding the defendant sane at the time of the commission of each of the homicides charged therein. The judgment of conviction and sentence was thereupon pronounced by the court.

[6, 7] Upon the state of the record as disclosed by the foregoing facts and circumstances, having special reference to the appellant's contention that sections 1016, 1017 and 1026 of the Penal Code, as amended in 1927, are unconstitutional, we are of the opinion that we are not called upon to determine that question in this case. When the trial court had at the outset of the trial announced its intention of proceeding therewith under the provisions of the aforesaid sections of the Penal Code as thus amended, defendant, acting through his counsel, offered no objection of any kind to that procedure, but, on the contrary, proceeded to tender the dual plea of "not guilty" and "not guilty by reason of insanity," as provided for in said sections of the Penal Code, and thereafter and without objection proceeded with the trial of the cause upon the issue of "not guilty," in the course of which the defendant was permitted to offer such evidence as he desired, and was also permitted without objection to testify fully with reference, not only to the events of his past life, but also to his version of the facts and circumstances surrounding the injuries to the two decedents which resulted in the present death of each and with the occasioning of which he was charged, and, having done so, he rested his case. When the cause was thus submitted to the jury, there was no evidence in the record which in any degree tended to show that the defendant was insane. This being so, the presumption of sanity, whether disputable or conclusive, had full application to the then state of the defendant's case, and the jury were bound under the law, whether considered as it existed before or after the enactment of the foregoing amendments to the Penal Code, to apply such undisputed presumption and to find the defendant to be sane. This being so, it must be concluded that the instruction of the trial court to the jury, to the effect that at that stage of the case the defendant was conclusively presumed to be sane, cannot be held, at most, to have been other than harmless error.

With respect to the defendant's objection and plea of once in jeopardy, made for the first time at the inception of the proceedings for the purpose of determining the defendant's sanity upon his second plea, it must be evident that there was no semblance of merit in either said objection or said plea, for the reason that, conceding that the defendant had been once put in jeopardy by the event of the trial thus far proceeded with upon his plea of "not guilty," the further proceeding with the hearing upon his plea of "not guilty by reason of insanity" could not by any course of reasoning place him in further jeopardy, since the sole purpose of such hearing was that of permitting the defendant to relieve himself of the state of jeopardy in which he had been thus placed through the showing that at the time of the commission of the crimes of which he had been found guilty he was in fact insane and therefore innocent. The inaptitude of such objection and plea is further illustrated by a consideration of the state in which the defendant would have been placed, had the trial court sustained him in such objection and plea, and which would obviously have been that of leaving him fully subject to his prior conviction and penalty and wholly bereft of his opportunity to show that he was insane at the time of the commission of the crimes of which he had been thus convicted.

[8, 9] We are thus brought to a consideration of the question as to whether the rights of the defendant were prejudicially invaded by the refusal on the part of the trial court to permit a further examination of the members of the jury before proceeding with the trial upon the issue of the defendant's sanity in order to determine the existence in the minds of the members of the jury of a state of bias or prejudice with regard to that issue. Conceding, for the sake of argument, that the trial court ought, in the exercise of the discretion intrusted to it under the provisions of section 1078 of the Penal Code as recently amended, to have permitted such examination, the question remains as to whether any error which the trial court may have committed in that regard can be held to have been prejudicial error, and the solution of this question depends upon what further followed in the course of the hearing upon the issue of the defendant's sanity.

The defendant, in assuming without further objection the affirmative of that issue, introduced five witnesses in support of his said plea. Two of the three lay witnesses thus produced by the defendant testified that in their opinion the defendant was insane. In support of that opinion, however, said lay witnesses gave testimony as to certain facts and circumstances coming within the observation of each of them during their acquaintance with the defendant prior to the commission of said homicides, and it is obvious that the opinion evidence of such lay witnesses as to the defendant's sanity can be of no greater evidentiary value than that which could be given to the facts and circumstances to which they each testified and which formed the sole basis of their opinion.

When we examine the record as to such facts and circumstances we find that these refer to mere oddities or peculiarities in the occasional actions and conduct of the defendant and which show him to have displayed to the observation of these witnesses no greater degree of individuality or even of eccentricity than may be observed in the actions and conduct of most persons who are indubitably sane. The testimony of these two lay witnesses, therefore, must be considered as having no evidentiary value. As to the other of the three lay witnesses, he was an inmate of the jail in which the defendant was confined after the commission of his crimes and during the progress of his trial, and the testimony of this witness is inherently valueless, not only because it related to a time subsequent to the commission of said homicides, but that it disclosed nothing further than the existence of a degree of nervousness on the part of the defendant which would be nothing more than natural considering the imminent peril in which he stood at the time.

As to the defendant's two expert witnesses, each of these was a physician called to testify under an order of court, made in conformity with law, permitting the appointment of expert witnesses by the court in criminal cases. These witnesses, when thus called and examined at the instance of the defendant, were asked to respond to three hypothetical questions prepared and propounded by counsel for the defendant. To the first of these questions, which related solely to the past life of the defendant previous to the commission of his crime, each of said expert witnesses unhesitatingly testified that the facts set forth in said hypothetical question showed no evidence of insanity or unsound mind. The second hypothetical question asked of each of said expert witnesses bore upon the relations which had arisen and existed between the defendant and his two victims, and also between the defendant and their elder daughter, and to the facts and circumstances arising out of such relationships and assumed to be existent up to the time immediately preceding the infliction of the injuries upon the decedent father and mother of the girl, and to the hypothetical question embracing the foregoing matters each of said expert witnesses testified in turn that there was nothing therein to indicate any degree of insanity or unsoundness of mind on the part of the defendant. By the third hypothetical question asked of these two witnesses, counsel for the defendant undertook to relate in detail the facts and circumstances which the evidence in the case had disclosed with reference to the killing of the two persons with whose murder the defendant was charged, and also with reference to the actions and conduct of the defendant as testified to by himself and others immediately following the infliction of the injuries which produced the decedents' death.

It is to be noted that in framing this hypothetical question there was omitted therefrom certain details which had an important bearing upon the existence or nonexistence of a motive for the alleged acts of the defendant in subjecting the decedents to the violent injuries which resulted in their present decease. To the hypothetical question thus framed and asked of each of said witnesses they responded that in their opinion the acts of the defendant as thus related to them indicated temporary insanity at the time of his commission of said crimes. These two expert witnesses, each upon their direct examination by counsel for the defendant, proceeded to testify that they had each separately conducted a personal and professional examination of the defendant during the progress of the trial, and as a result of such examination they each unequivocally stated that the defendant at the time of such examination was both physically and mentally normal and sane. Upon cross-examination each of said witnesses testified that their opinion that the defendant must have been temporarily insane at the time he committed said crimes was predicated upon the fact that his commission thereof was an illogical sequence of his past life and of his relationship with his two victims, and upon the further fact that in the hypothetical question which had been propounded to them no motive had been disclosed for the commission by him of said crimes. Each of said witnesses, however, conceded that their conclusion as to the temporary insanity of the defendant would have been quite different had the evidence in the case and the hypothetical question upon which their opinion was founded disclosed a motive for the commission of the crimes. This is most aptly illustrated by the concluding question asked of the witness Podstata, who quite sufficiently qualified himself as an expert witness by showing that he was the physician in charge of the Livermore Sanitarium for the past seventeen years and a lecturer upon mental disorders in the University of California. The following was the final question asked of this witness:

> "Then the only fact in this hypothetical question upon which you rely in forming your opinion that the man was temporarily insane at the time he murdered these people is the fact that he did murder them and that there was no sufficient cause or motive shown in the hypothetical question?" Answer: "Yes."

An examination of the record quite sufficiently discloses a motive which might have led, and which probably did lead, this defendant to commit this dual crime. That motive was shown to consist in the fact that the defendant, after some years of cordial acquaintanceship with the members of the Artist family, and after he had formed an affectionate relationship with Isabelle, the elder daughter, discovered upon his visit to the household of the Artists that the parents of the girl were apparently disposed to favor the transfer of her affections to another suitor, and that the girl herself manifested a similar disposition, and that in fact, upon the very evening prior to the commission of said crime, he had been deceived and misled with relation thereto. What feelings of jealousy may thus have been awakened, or what resolution as to his actions in the presence of this situation was made, must be left to inference and surmise. But the facts remain that, immediately after the violent and murderous attack upon the father and mother of the girl, he attempted not only to have illicit intercourse with her, but to induce her to go away with him, without disclosing to her or to the other members of the family the fact that a violent and fatal assault had been made upon the father and mother, with relation to which the evidence is irresistible that he either must have committed, or must at the time have known of the commission of, the assault, and that these facts furnish abundant evidence of the existence of a motive which, if it existed, would have rendered utterly valueless the purely hypothetical conclusion of the expert witnesses called by the defendant that at the time of the commission of said crimes he was temporarily insane.

It is our deduction from the foregoing that there was no substantial evidence in the case sufficient to justify a verdict on the part of this or of another jury finding this defendant at the time of the commission of his aforesaid crimes to have been insane. This being so, any limitation which was placed by the trial judge upon the rights of the defendant's counsel to question further the jurors as to the existence of any mental attitude amounting to bias or prejudice against the defense of insanity or against the defendant seeking to establish that defense could not at the most have been other than harmless error.

The record fully discloses that the defendant committed a most foul, brutal, and utterly unjustified and unjustifiable crime; that he was brought to trial therefor before a fair and impartial jury; that he submitted himself without objection at the outset to the form of procedure adopted by the trial court; that he presented without protest or objection, the dual pleas provided for in the aforesaid amended sections of the Penal Code; that he proceeded to trial upon the first of said pleas, in the course of which he was permitted to introduce all of the evidence which he saw fit to offer bearing upon the history of his own past life and upon his relation to the family of his victims, and as to his own version as to the facts and circumstances attending and succeeding the commission of his said crimes; that upon his conviction upon the first of his said pleas the only objection which he urged to the purpose of the court to proceed before the same jury upon the second of his said pleas consisted in his insistence upon the right to further examine the jury and upon his claim and plea of once in jeopardy. These having been denied him, he proceeded with the second phase of the trial, assuming therein the burden of showing that he was insane. He entirely failed to make good such plea or showing by any sufficient or substantial evidence upon which the present or any other jury could have arrived at a verdict that the defendant was at the time of the commission of said murders insane. It thus appears that, entirely regardless of whatever errors, if any, the trial court may have committed in the course of the defendant's trial, it in no substantial way interfered with the canons of our criminal law, which entitle a defendant to a fair and impartial trial for the offense or offenses with which he has been charged.

In view of the foregoing conclusions the judgment and order are affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.; LANGDON, J.

205 Cal. 581

In re COOK'S ESTATE.

KESTER et al. v. McNEAR et al.
(S. F. 12968.)

Supreme Court of California. Nov. 23, 1928.

1. Judgment 🔑570(3)—Dismissal by plaintiff will not bar subsequent action for same cause (Code Civ. Proc. § 581, subd. 1).

Ordinary action or proceeding in court may be dismissed by plaintiff, and such dismissal will not bar subsequent action filed by him for same cause under Code Civ. Proc. § 581, subd. 1, though rule is different where judgment of dismissal is rendered on application of either party with written consent of the other.

2. Action 🔑25(1)—All distinction between actions in law and equity has been abolished.

In California, all distinction between actions in law and equity has been abolished, and parties are limited to but one form of action for enforcement of their rights.

3. Wills 🔑259—Will contest initiated after time appointed for hearing of petition, but before hour to which such hearing has been postponed, is in time (Code Civ. Proc. § 1308).

Under Code Civ. Proc. § 1308, will contest, initiated after time originally appointed for hearing of petition, but before hour to which such hearing has been postponed, is in time.

4. Wills 🔑307—Voluntary dismissal of will contest held not to bar contestants from instituting second contest (Code Civ. Proc. §§ 581, 1308, 1327).

Contestants of will *held* not barred from instituting second contest by reason of voluntary dismissal of first contest since, under Code Civ. Proc. §§ 1308, 1327, section 581 is applicable to probate proceedings, and it is immaterial that words "without prejudice" did not appear in order dismissing first contest.

In Bank.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

In the matter of the estate of Eliza Cook, deceased. From an order admitting a purported will and codicil to probate, and from an order granting the motion of George P. McNear, as special administrator, and another to strike out and dismiss a contest filed by Maud Kester, and another, contestants appeal. Reversed.

W. F. Cowan, Wallace L. Ware, and George W. Murphy, all of Santa Rosa, for appellants.

F. A. Meyer, of Petaluma, and Vallandigham & Hollingsworth, of Santa Rosa, for respondents.

CURTIS, J. This appeal is from an order of the superior court of the county of Sonoma, sitting as a probate court, admitting to probate the purported will and codicil of Eliza Cook, deceased, and also from the order of said court granting the motion of proponents to strike out and dismiss the contest to said will filed by contestants.

A petition for the probate of said purported will and codicil by respondent George P. McNear, the executor therein named, was filed in said probate court. Thereafter, and before the hearing of said petition, the contestants herein, together with some other heirs of said deceased, appeared in said proceeding and filed their written opposition to the probate of said will and their contest thereto. An answer was filed to said opposition and contest, and the matter came on for trial before a jury in said court. The verdict of said jury was in favor of the contestants, but was thereafter set aside by the trial court. The matter again came on for trial on November 16, 1927. The proponents objected to a trial of said matter by a jury on the ground that contestants had not complied with the provisions of section 1312 of the Code of Civil Procedure, requiring a written request for a jury trial to be filed at least 10 days prior to the day set for the hearing. The objection was sustained by the court. Thereupon the contestants in open court dismissed their opposition to the probate of said will, and the court made an order dismissing said contest. This order was made in open court on the 16th day of November, 1927. On December 9th following there was filed a written order of the court dismissing said contest. This order, among other things, recited and decreed as follows:

> "It appearing to the satisfaction of said court that the said contestants have abandoned and vountarily renounced their contest and opposition to said will on motion of said contestants, it is hereby ordered, adjudged and decreed that the said contest and opposition to said will filed herein by Alonzo Smith Cook (also known as Robert Cook or Bob Cook), Isaac N. Cook, Jefferson D. Cook, Grover Cook and Maud Kester, be and the same is hereby dismissed."

Upon the dismissal of said contest and opposition, and upon the request of the proponent, George P. McNear, the petition for the probate of said will was postponed and continued to November 18, 1927. On the same day of the dismissal of the original contest of said will, to wit, on said November 16, 1927, the contestants filed in said court a second contest of the probate of said will and codicil. The second contest was in writing and was based upon the same grounds which were relied upon in the first or original contest. The proponents promptly moved the court to strike out and dismiss said second contest, which motion was granted on December 6, 1927, and three days thereafter the court made its order admitting said will to probate. From each of these two last-mentioned orders the contestants have appealed. The order dismissing the second contest recites that the first contest came on regularly to be heard on the 16th day of November, 1927, "and the said contestants then and there in open court abandoned and renounced their contest of the said will and this court on said day, made and entered its final order dismissing the same." While the written order of the court dismissing the first contest and that dismissing the second contest recite that the contestants had abandoned and renounced their first contest of the probate of said will, these recitals are not strictly in accordance with the record before us showing just what did transpire in court at the time of such dismissal. As already stated, the contestants desired a jury trial, which was denied by the court, whereupon one of the attorneys for contestants stated to the court: "Then, if your Honor please, the contestants dismiss the opposition to the probate of the will." To this statement of counsel the court replied: "Very well. Let the opposition to the probate of the will be dismissed on motion of the contestants." These statements of the court and counsel constitute all that took place in court bearing upon the dismissal of the first contest. It is very evident therefrom that all that contestants did on that occasion was to voluntarily dismiss in open court their contest. Nothing was then said by contestants, or by their attorneys, or by the court to the effect that contestants had renounced or abandoned their contest. The written order of dismissal of the first contest, filed some 24 days after the court made its verbal order of dismissal, must be read in the light of the proceedings taken in court at the time the verbal order was made, as said written order shows upon its face that it was based upon said proceedings.

As so read and understood, it amounts to no more than an order of dismissal made upon contestants' voluntary motion to dismiss said proceeding. It cannot be accepted as a finding or adjudication of the court that the contestants had renounced and abandoned their contest.

[1] The sole question presented by this appeal is whether the contestants are barred from instituting their second contest of the probate of said will by reason of their dismissal of their first contest and the order of the probate court dismissing said first contest upon the voluntary motion of contestants that said contest be dismissed.

An ordinary action or proceeding in court may be dismissed by the plaintiff, and such dismissal will not be a bar to a subsequent action filed by him for the same cause. Davenport v. Turpin, 43 Cal. 597; McCreary v. Casey, 45 Cal. 128; Lord v. Dunster, 79 Cal. 477, 21 P. 865; Parks v. Dunlap, 86 Cal. 189, 25 P. 916; Pierce v. Hilton, 102 Cal. 276, 36 P. 595; Pyle v. Piercy, 122 Cal. 383, 55 P. 141; Carr v. Howell, 154 Cal. 372, 97 P. 885; Clopton v. Clopton, 162 Cal. 27, 121 P. 720; Foster v. Branen, 178 Cal. 118, 172 P. 382.

Such a dismissal is usually made under subdivision 1 of section 581 of the Code of Civil Procedure by written request of the plaintiff made to the clerk to dismiss the action and by entering of the dismissal by the clerk in his register. But this method is not exclusive. It may be made in open court upon motion of the plaintiff. Hinkel v. Donohue, 90 Cal. 389, 27 P. 301; Richards & Knox v. Bradley, 129 Cal. 670, 672, 62 P. 316. The rule, however, is different when the judgment of dismissal is rendered on the application of either party with the written consent of the other. In such a case the dismissal is held to be a voluntary renunciation of the plaintiff's action and amounts to a retraxit. Merritt v. Campbell, 47 Cal. 542; Stoutenborough v. Bd. Education, 104 Cal. 664, 38 P. 449; Crossman v. Davis, 79 Cal. 603, 21 P. 963. But where the dismissal is voluntary and is made without any agreement between the parties, it is not a bar to a subsequent action. This rule is clearly and positively stated in the case of Parks v. Dunlap, supra, as follows:

> "Conceding, however, that the question in litigation in the former action was the same now presented, it is well settled that the voluntary dismissal of an action, without any agreement of the parties or other circumstances tending to show that such dismissal was intended as a final disposition of the dispute between the parties, is not a bar to another action."

Upon an examination of the other authorities cited above in support of this rule, there will be found numerous statements therein equally as positive and definite as the foregoing excerpt from the decision of Parks v. Dunlap.

[2] One answer to these authorities made by the respondents is that the proceeding to contest the probate of wills is an equitable proceeding and that the rule above enunciated does not apply to suits in equity. In support of this claim, the respondents have cited a number of authorities from other jurisdictions to the effect that the dismissal of a bill in chancery will be presumed to be a final and conclusive adjudication on the merits, whether they were or were not determined, unless the contrary is apparent on the face of the pleading or in the decree of court. However controlling these authorities may be in the jurisdictions in which they were rendered, they have little or no application to the rule of practice in this state, where all distinction between actions in law and equity has been abolished and parties are limited to but one form of action for the enforcement of their rights. There is nothing in the cases of Asevado v. Orr, 100 Cal. 293, 34 P. 777, Frahm v. Walton, 130 Cal. 396, 62 P. 618, or Heim v. Mooney, 23 Cal. App. 233, 137 P. 616, which tends in the least degree to support respondents' contention that a different rule obtains in suits in equity than that applicable to actions at law. While the precise point has never been the subject of any adjudicated case in this state, the instances are numerous where the voluntary dismissal by the plaintiff of an equitable action has been held not to constitute a bar to the institution of a second action for the same cause. Carr v. Howell, 154 Cal. 372, 97 P. 885; Foster v. Branen, 178 Cal. 118, 172 P. 382; Parks v. Dunlap, 86 Cal. 189, 25 P. 916.

These cases, with the exception of the first, were actions instituted to foreclose mortgages. The case of Carr v. Howell, supra, was an action for specific performance of an agreement for the sale of real property. Plaintiff commenced the action in the superior court. The action was removed to the United States Circuit Court upon the ground that Mrs. Dwyer, one of the defendants, was a citizen of the state of Louisiana. Thereafter Mrs. Dwyer died, and a citizen of this state was appointed administrator of her estate. Thereupon the plaintiff voluntarily dismissed the action before the federal court, and instituted a new action against said administrator in the superior court. It was contended that plaintiff was barred from maintaining the subsequent action in the superior court by reason of his dismissal of the first action. The court held that:

> "The rule has long been established that a judgment of dismissal given upon motion of the plaintiff, before the hearing or trial of any issue of law or fact and without any determination of the merits of the cause, is no bar to a subsequent suit in any court upon the same cause of action [citing authorities]. The court below correctly held that this judgment was no bar to the present action."

[3, 4] There is no provision of the law relating to the administration of estates ex-

pressly limiting the time in which a contest of a will before the probate thereof may be filed. After a will has been admitted to probate, section 1327 of the Code of Civil Procedure provides that "any person interested may, at any time within one year after such probate, contest the same or the validity of the will." The only provision of our law bearing even indirectly upon the question as to the time in which a contest to a will may be filed before probate is to be found in section 1308 of the Code of Civil Procedure, which provides that, "if no person appears to contest the probate of the will, the court may admit it to probate on the testimony of one of the subscribing witnesses only." In view of the provisions of this section of the Code this court has held that a contest initiated after the time originally appointed for the hearing of the petition, but before the hour to which such hearing had been postponed, was in time. Stewart v. Hall, 100 Cal. 246, 34 P. 706; Estate of Mollenkopf, 164 Cal. 576, 129 P. 997. The Supreme Court of Montana, where the statute is in most respects like the above section of the Code of Civil Procedure of our own state, has given a similar ruling. Raleigh v. District Court, 24 Mont. 306, 61 P. 991, 81 Am. St. Rep. 431; State v. District Court, 25 Mont. 355, 65 P. 120. In the present proceeding, therefore, the second contest filed by contestants was within the time provided by the provisions of our Code of Civil Procedure. It was therefore a valid and legal contest, provided the voluntary dismissal by contestants of their prior contest was not a bar to the institution of this second or subsequent contest. As we have previously shown, the voluntary dismissal of an ordinary action in court is not a bar to a subsequent action instituted upon the same cause of action. We see no reason why this same rule should not apply to contests filed for the purpose of contesting wills, in the absence of any statute or Code provision upon the subject providing that such a dismissal would bar a subsequent proceeding. The question, so far as we are aware, has never been before the appellate courts of this state. The matter was discussed by the District Court of Appeal in the matter of the Estate of Knauft, 59 Cal. App. 536, 211 P. 29. In that proceeding the contestants had filed a contest and petition to have the probate of the will of said deceased set aside. The matter came on for hearing, and the contestants in open court moved to dismiss their contest and petition, without prejudice, which motion was granted over the objection of the proponents. The judgment dismissing the proceeding recited the fact that such dismissal was made without prejudice to the filing of a new contest and petition by the contestants. In passing upon this judgment of dismissal the court said (page 537 of 59 Cal. App. [211 P. 29]):

> "It is insisted first that the court had no authority to so qualify the judgment of dismissal as to give to the petitioners the right to further prosecute a proceeding for the revocation of the probate order. It seems to be well settled under our practice that a party may at any time, before final submission of a cause, dismiss the same (sec. 581, Code Civ. Proc., subd. 4), and that the judgment in that case will not operate as a bar to the recommencement of an action based upon the same cause (Merritt v. Campbell, 47 Cal. 542; Westbay v. Gray et al., 116 Cal. 660 [48 P. 800]), and there seems to be no reason why the same rule is not applicable to proceedings in probate."

As the order of court dismissing the prior contest in Estate of Knauft was made without prejudice to the contestants to file a new petition, that case is not an authority in support of appellants' contention that the dismissal of the prior contest, wherein no mention was made in the order of the court or elsewhere that the dismissal was made without prejudice, was not a bar to a subsequent contest by them. The case is authority, however, that the rule governing the dismissal of actions generally under section 581 of the Code of Civil Procedure is applicable to probate proceedings. That being the case, and the overwhelming weight of authority in this state being that the voluntary dismissal of an action by the plaintiff is not a bar to a subsequent action instituted by the same party upon the same cause of action, it naturally and logically follows that the dismissal of a contest in a probate proceeding is not a bar to a subsequent contest by the same contestants based upon the same grounds of contest, provided, of course, the same is filed within the time limited by the Code of Civil Procedure.

Respondents further contend that, as the words "without prejudice" do not appear in the order dismissing the first contest, the contestants are barred by said order from instituting a new contest. We think there is no merit in this contention, and we are cited to no authority to support it. On the other hand, there is an abundance of authorities holding that an order or judgment of dismissal, which contains no statement whatever that it was made without prejudice, is not a bar to a subsequent action. Pyle v. Piercy, 122 Cal. 383, 384, 55 P. 141; Rosenthal v. McMann, 93 Cal. 505, 509. 29 P. 121; Carr v. Howell, 154 Cal. 372, 97 P. 885.

Other points are made by respondents in support of their contention that the orders of the trial court should be sustained by this court. We think, however, we have considered all the more important questions raised by the briefs of the parties, and that a further discussion of any additional matters would serve no useful purpose. It is clear, according to the authorities cited, that the voluntary dismissal by contestants of their first contest did not bar them from instituting the second contest. The court therefore had no authority to dismiss the second contest on the ground that the contestants named therein had joined with the other heirs of the testator in dismissing the prior contest. As a valid contest was on file at the time the petition for the probate of the will came on for hearing, the probate court was in error in hearing and thereafter granting said petition without first disposing of, in the manner provided by law, the contest then on file. It follows, therefore, that the orders appealed from should be, and they are hereby, reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; PRESTON, J.; LANGDON, J.

Justice SEAWELL, deeming himself disqualified, does not participate in the foregoing opinion.

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205 Cal. 569

LIND et al. v. HUENE et ux. (L. A. 9430.)

Supreme Court of California. Nov. 22, 1928.

1. Brokers 🔑43(2)—Contract for employment of broker to procure lessee for real property need not be in writing (Civ. Code, § 1624, subd. 6).

Contract for employment or compensation of broker for services in procuring lessee of real property is not required to be in writing, since not within terms of Civ. Code, § 1624, subd. 6.

2. Brokers 🔑43(2)—Oral agreement of brokers to procure lessee of apartment building was valid, and brokers' rights thereunder after cancellation of agreement were not defeated by lessee's repudiation (Civ. Code, § 1624, subd. 6).

Oral contract for employment of brokers to secure lessee for apartment house building, under which brokers procured written offer to lease and written acceptance from defendant containing terms of commission, was valid and enforceable, and brokers' rights were not defeated by repudiation of contract on lessee's part, written contract for brokers' employment to procure lessee not being required by Civ. Code, § 1624, subd. 6.

3. Brokers 🔑64(2)—Failure of lessees to make deposit stipulated in offer to lease precluded lessor's brokers from recovering commission under written acceptance providing for payment of commission out of moneys received.

Under provision in defendant's acceptance of offer to lease apartment building, agreeing to pay specified commission to agent, "said amount to be retained out of moneys received as designated in this offer to lease," brokers acquired no right to commissions where $6,000 agreed to be deposited under terms of offer to lease was never paid and defendant did not consent to broker's acceptance of lessee's note for that amount.

4. Brokers 🔑64(2)—Lessor's agreement to accept lessee's note in lieu of cash payment stipulated in offer to lease did not entitle lessor's brokers to commissions payable from cash deposit.

If defendant, attempting to lease apartment building, accepted lessee's note in lieu of cash payment provided for in offer to lease, such acceptance was nevertheless ineffectual to give lessor's brokers right to commission, where written acceptance provided commission should be "retained out of the moneys received as designated in this offer to lease," and where no payments were made on the note.

5. Brokers 🔑64(2)—That lessor executed formal lease after refusal of proposed lessee to make cash deposit did not constitute ratification of brokers' acceptance of note in lieu of deposit.

That lessors drew up formal lease and executed it after refusal of lessee to consummate agreement for lease by making cash deposit stipulated in offer to lease did not amount to ratification of lessee's execution of note in lieu of the cash deposit, as regards right of brokers to commissions, payment of which was to be made from money deposit.

Department 1.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Suit by C. H. Lind and E. P. De Haven, copartners doing business under the fictitious name and style of the Lind-De Haven Company against E. A. Huene and Clara Huene, his wife. Judgment for plaintiffs, and defendant last named appeals. Reversed.

C. A. Stutsman, W. W. Kaye, and Stutsman & Stutsman, all of Los Angeles, for appellant.

Louis F. Laberere and John A. Cronin, both of Los Angeles, for respondents.

SEAWELL, J. This appeal was taken by defendant Clara Huene from a judgment for plaintiffs in an action brought by them to recover a commission as real estate brokers for securing a lessee for an apartment house building which was being constructed upon premises in the city of Los Angeles owned by said defendant. The transaction was never consummated because of the refusal of the prospective lessee to accept a lease of the premises, in accordance with the terms of her agreement with defendant, and to pay sums of money which became due under said agreement.

Appellant recognizes the general rule that a broker employed to negotiate a sale or lease of land earns his commission, and it is payable, when he produces a purchaser or lessee who is ready, willing, and able to take the property on the terms prescribed, or other terms accepted by the owner, and the broker cannot be deprived of the agreed commission because the purchaser or lessee repudiates the transaction by refusing to make payments provided for or to accept the deed or lease tendered in performance of the contract of sale or lease. Lundeen v. Ottis, 164 Cal. 183, 128 P. 335; Johnson v. Krier, 59 Cal. App. 330, 210 P. 966; Rucker v. Hubler, 56 Cal. App. 771, 206 P. 472. Defendant contends, however, that the general rule does not apply in her case, for the reason that the agreement for the commission herein expressly makes the earning of a commission conditional upon the payment by the lessee to the owner of advance rental. She further relies upon the rule stated in Jennings v. Jordan, 31 Cal. App. 335, 160 P. 576, Brion v. Cahill, 34 Cal. App. 258, 165 P. 704, Stewart v. Bowie, 43 Cal. App. 751, 185 P. 868, and more recently in Houghton v. Kuehnrich, 46 Cal. App. 469, 189 P. 457, wherein it is said that, when there is no separate enforceable contract of employment with the broker, and the owner's promise to pay the broker a commission is found only in the contract entered into between the owner and the prospective purchaser, if the purchaser should fail to carry out his undertaking to purchase, the owner is released from his promise to pay the broker a commission. In such a case, if the wrongful abandonment of the contract is consented to, the whole contract falls, the provision relating to the agent's commission with the rest. Jennings v. Jordan, 31 Cal. App. 335, 160 P. 576.

The inapplicability of the last-mentioned rule to the case at bar is patent from a recital of the transaction. At the time said apartment house building was in the course of construction, salesmen in the employ of plaintiffs procured from defendant and her husband oral authorization to undertake to find a lessee for a term of ten years at a monthly rental of $1,000. Such authorization was given upon the solicitation of plaintiffs' salesmen. The employment of plaintiffs as brokers to secure a lessee was not evidenced by a written agreement, nor does it appear that the rate of commission was definitely agreed upon. On October 6, 1923, a written "Offer to Lease," prepared at plaintiffs' office and signed by Mrs. Minnie G. Driggs, the prospective lessee, was submitted to the owner of said property, Mrs. Clara Huene, appellant herein, and to her husband, by Mrs. Westover, plaintiffs' employee. A written "Acceptance," also prepared by plaintiffs and designed for the signature of Mrs. Huene, followed the "Offer to Lease" executed by Mrs. Driggs. Said "Acceptance," as originally submitted to the Huenes, was as follows:

> "I accept the above offer to lease and agree to the terms and conditions as set forth therein. I further agree to pay the Lind-DeHaven Co. the usual commission for services rendered, in accordance with the rules of the Los Angeles Realty Board, said amount to be retained out of the moneys received, as designated in this offer to lease."

The realty board commission on the transaction would have approximated $6,000. Mrs. Huene refused to consent to the payment of such a commission, and after some negotiations with plaintiffs' agent agreed to pay not more than $3,500. Several days later plaintiffs consented to the reduction, and the words "the usual commission" and "in accordance with the rules of the Los Angeles Realty Board" were "x'd" out and the $3,500 written in their stead, whereupon Mrs. Huene signed the "Acceptance." On October 20, Mrs. Driggs gave notice to plaintiffs that she refused to go on with the deal, and, when a lease signed by the Huenes was presented to her for acceptance during the early part of November, she again repudiated the contract she had made with Mrs. Huene. No part of the $2,000 agreed to be paid upon the execution of the "Acceptance" was ever received from Mrs. Driggs. Having other offers to lease the property, the Huenes did not choose to enforce the contract by court proceedings.

On the date when the "Acceptance" was signed by Mrs. Huene, there had been inserted in writing, immediately between Mrs. Driggs' signature to the "Offer to Lease," which was a rather long document, presumably typewritten, and the "Acceptance," the following provision:

> "Receipt.
>
> "We hereby acknowledge the receipt of $6000.00 (note) dollars.
>
> "Lind-DeHaven Co.,
> "By C. H. Lind."

This provision will be discussed more fully hereafter.

[1, 2] In the cases above cited which hold that, where there is no separate contract of employment with the broker and the owner's promise to pay a commission is found only in the contract entered into between the owner and the prospective purchaser, if the purchaser should fail to carry out his undertaking, the owner is released from his promise to pay a broker's commission, the transactions involved were for the sale or exchange of real property. In those cases the broker could not recover a commission in the absence of a written commission contract or memorandum signed by the seller (Civ. Code, § 1624, subd. 6), and the only enforceable written agreement to pay a commission was contained in the contract between the owner and the purchaser, which agreement fell with the written contract when the purchaser repudiated it and the owner consented to the wrongful abandonment. In the instant case the brokers were not authorized to sell or exchange the property, but only to procure a lessee. The contract for their employment or compensation was not required to be in writing by the terms of subdivision 6 of section 1624, Civil Code, which applies only to agreements authorizing or employing an agent or broker to purchase or sell real estate. Guy v. Brennen, 60 Cal. App. 452, 213 P. 265. The negotiations between plaintiffs' agent and Mrs. Huene resulted in a valid and en-

forceable oral agreement between plaintiffs and Mrs. Huene for the payment of a commission of $3,500 to plaintiffs. Upon the repudiation of the contract for a lease, there remained to the brokers under their valid oral contract with the lessor the same rights they would have possessed had their employment been evidenced by a separate written agreement between themselves and the lessor.

[3] Appellant must fail on this point, but, on the other point made by her, to wit, that the agreement made payment of the commission conditional upon the receipt of advance rental agreed to be paid by Mrs. Driggs, the case must be reversed. Mrs. Driggs' "Offer to Lease" contained the following provision:

> "As security for my faithful performance of this lease, I agree to pay six months' rental in the sum of Six Thousand Dollars ($6,000.00), as follows: $2,000.00 upon my signing of this agreement, and $4,000 upon the completion and my occupancy of the building. This total sum of $6,000 to apply—$2,000 as the first two months' rent, and $4,000 to be the last four months' rent of the lease."

The "Acceptance," quoted above, when first submitted to Mrs. Huene and as finally executed by her, provided that the amount agreed to be paid as a commission was "to be retained out of the moneys received as designated in this offer to lease." It was not contemplated that the building would be completed until December 15. The payment of a portion of the brokers' commission of $3,500 would not become due until that date, since only $2,000 was due as advanced rental upon the execution of the contract. We regard the quoted language as a plain and unequivocal declaration that payment of the commission was to be made only if the amounts agreed to be paid by Mrs. Driggs were actually received. Said language is to be given the same effect as was ascribed to the contract in Lindley v. Fay, 119 Cal. 239, 51 P. 333, where the provision was to pay a commission "out of the first money received." In Beckwith-Anderson Land Co. v. Allison, 26 Cal. App. 473, 147 P. 482, defendant was notified by letter from plaintiff as a real estate brokerage firm of an offer received by plaintiff to purchase real property owned by defendant. The letter contained the following:

> "If you should consider this we would want to *retain as a commission* for ourselves 5%, being fifteen hundred ($1500.00) dollars out of the first cash payment of fifteen thousand ($15,000.00)." (Italics supplied.)

Defendant accepted the offer. In denying a recovery of a commission to plaintiff, the court said:

> "The letter proposed that the commission should be paid 'out of the first cash payment of $15,000.' No such payment has ever been made; nor can the failure to make it be chargeable as caused by any fault of the defendant. The condition so stated under which the commission might become due has never occurred."

See, also, Dunne v. Colomb, 192 Cal. 740, 221 P. 912; McPhail v. Buell, 87 Cal. 115, 25 P. 266; Coulter v. Howard (Cal. Sup.) 262 P. 751.

The plaintiffs rely upon their receipt of said $6,000 note, as acknowledged by plaintiff Lind by the insertion, as above explained, between Mrs. Driggs' signature to the "Offer to Lease" and the first line of the "Acceptance," as creating a different commission contract. On October 6, the day Mrs. Driggs signed the "Offer to Lease," she also signed a $6,000 promissory note payable to plaintiffs and to become due October 22. This was a separate transaction between plaintiffs and Mrs. Driggs. Appellant and her husband testified, and there is other evidence sustaining them, that the acknowledgment of said note was not on the offer when it was presented to them first on October 6, at the time they objected to the fixing of the commission in accordance with the rules of the realty board, and that they did not observe that it had been inserted in ink until several days thereafter, at the time when Mrs. Huene signed the acceptance and demanded the cash payment. The positive testimony of Mr. and Mrs. Huene, Mrs. Westover, the employee who conducted the transaction for plaintiffs (in one part of her testimony), Mr. Brock, the constructor of the building, and Mr. Arctander, a former salesman of plaintiffs, further aided by the conduct of the parties and the strong probabilities arising in the case, which cannot be ignored, present convincing proof to the effect that the Huenes, from the time their notice first fell upon the ink insertion written by plaintiff Lind between the offer to lease and its acceptance, emphatically and positively refused to accept a note in lieu of cash and that they were assured that the word "note," which plaintiffs parenthetically inserted after the words $6,000, referred to a separate transaction between plaintiffs and Mrs. Driggs, and was inserted for their convenience, and had nothing to do with the transaction between Mrs. Driggs and the Huenes. It would have been an absurd, if not an inane, thing for the Huenes, who were insisting on cash advance payments aggregating $6,000, to have accepted as *security* therefor another form of evidence of debt in the form of a bare promissory note. They already had her bound by the execution of the offer to lease, and another signature would not tend to secure the first obligation any more than the first would tend to secure the second. The testimony of the witnesses above-named is reasonable, probable, and seems convincing, and is supported by the rationale of the situation. Mrs. Westover, the saleslady who conducted the transaction, gave testimony to the effect that Mrs. and Mrs. Huene called her attention to the receipt calling for a note, whereas the offer to lease called for cash, and that she (Mrs. Westover) explained to the Huenes that the note was inserted as a matter of convenience arranged between Mrs. Driggs and plaintiffs, and that it was made to give Mrs. Driggs time to bring her cash to Los Angeles. It is true that plaintiff Lind and Mrs. Westover elsewhere in her testimony denied the conversations as related by the defendant's witnesses touching the purpose of said note, but there is an inherent improbability in plaintiffs' contention that a note made to plaintiffs by Mrs. Driggs was to be accepted as cash, in the light of the circumstances of the transaction.

Two days before the note, which was at all times in the possession of plaintiffs until after this action was commenced, fell due, to wit, October 20, 1923, Mrs. Driggs withdrew from the transaction and denied any and all obligations arising from the execution and delivery of said note to plaintiffs. As a matter of fact, plaintiffs considered bringing an action upon it against Mrs. Driggs. Said note was not out of plaintiffs' possession until after it was long past due and had been repudiated by Mrs. Driggs. Some two weeks before this action was commenced, plaintiffs indorsed it to Mrs. Huene and sent it to her through the mail after said action had been commenced. It was promptly returned by her to plaintiffs.

[4] Conceding that the written contract between Mrs. Driggs and the appellant did not correctly embody the agreement between them, nor properly state the oral commission contract between plaintiffs and appellant, and that the parol evidence rule was not violated in the admission of evidence as to the note referred to in the receipt, the judgment of the court below cannot be upheld. The course of dealings between the parties shows that, if the note was accepted by Mrs. Huene "in lieu of the cash payment," it would merely provide a different fund from which the commission was to be paid. Said note was due October 22, about two weeks after it was executed, and plaintiffs now assert that it was taken pending the arrival of Mrs. Driggs' securities from the east. If the note was accepted by Mrs. Huene in lieu of the cash payment, the commission to be retained from the cash payment was thereafter to be retained from the payment made on the note. Payment of the commission was dependent upon payment of the note, which was never paid.

Giving full force and effect to the receipt signed by plaintiff Lind, which reads, "We hereby acknowledge the receipt of $6,000.00 (note) dollars," does not, as a matter of law, weaken in any degree the terms of the offer to lease. The "Acceptance," which follows said receipt, reads:

> "I accept the above offer to lease, and agree to the terms and conditions as set forth therein. I further agree to pay the Lind-DeHaven Co. $3500.00 for services rendered, said amount to be retained out of the moneys received, as designated in this offer to lease."

It will be noticed that the commission is "to be retained out of the moneys *received as designated in this offer to lease*." The agreements of the parties are thereby reaffirmed.

[5] After the transaction failed by reason of Mrs. Driggs' refusal to consummate it, a formal lease was drawn up by plaintiffs and executed by Mrs. Huene, but Mrs. Driggs declined to consider the proposition further. Plaintiffs suggest that this willingness on the part of Mrs. Huene to carry out the original plan was a ratification of the first proposition. We think there is no merit in this point.

The judgment is reversed.

We concur: CURTIS, J.; PRESTON, J.

205 Cal. 562

N. C. ALBRIGHT, Plaintiff and Respondent, v. NORTH FORK DITCH COMPANY (a Corporation), Defendant and Appellant. (Sac. 4150).

Supreme Court of California. Nov. 21, 1928.

Department 2.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Lowell, Lowell & Lowell, of Auburn, and C. F. Metteer and H. J. March, both of Sacramento, for appellant.

W. H. Slade and C. H. Stilson, both of Auburn, for respondent.

RICHARDS, J. This appeal is from a judgment in the plaintiff's favor in an action for damages against the defendant for alleged negligence in the maintenance and operation of a certain ditch across the lands of the plaintiff, causing a seepage of water from said ditch, resulting in the killing of certain cherry trees growing upon the plaintiff's land in the vicinity of the ditch. The cause was tried before the court sitting without a jury. Upon the submission thereof findings of fact and conclusions of law were filed, wherein it was found by the trial court that the seepage of water from the ditch had occurred, as alleged in plaintiff's complaint, through the defendant's negligence, and had resulted in the injuries complained of. From such judgment the defendant has prosecuted this appeal.

The sole question presented thereon is as to whether the evidence is sufficient to justify the findings and judgment of the trial court. We have examined the record herein, and without attempting to review in detail the history of the construction and operation of the defendant's ditch across the lands of plaintiff, or to state at length the causes from which the seepage of water from said ditch into and upon the lands of plaintiff occurred, with the resulting damage complained of, we are satisfied that there was sufficient evidence to sustain the findings and conclusions of the trial court upon both counts of the plaintiff's complaint.

It follows that the judgment must be affirmed; and it is so ordered.

We concur: LANGDON, J.; SHENK, J.

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205 Cal. 541

SMITH v. CARLSTON. (S. F. 11737.)[*]

Supreme Court of California. Nov. 21, 1928.

Rehearing Denied Dec. 20, 1928.

1. Damages 🔑78(1)—Contract held not to require defendant to purchase stock pledged as security, but to provide for liquidated damages.

Contract in connection with giving of notes and pledging of stock as security, providing for return of "additional shares" before due date of original notes, *held* not to constitute agreement by defendant to purchase those shares which were not returned at time and in manner provided, and to pay stipulated sum per share as purchase price, but such clause was provision for liquidated damages.

2. Damages 🔑82—Provision in contract in connection with giving notes and pledging stock as security, providing for liquidated damages for failure to return stock as stipulated, held void (Civ. Code, §§ 1670, 1671).

Clause in contract in connection with giving of notes and pledging of stock as security, which provided for liquidated damages of $3 per share, in event defendant failed to return certain stock at certain time, *held* void, as in violation of Civ. Code, §§ 1670, 1671.

3. Contracts 🔑143—Entire agreement is considered in construing doubtful clauses of written contract.

When clauses of written agreement, doubtful in meaning, are construed, entire agreement must be looked to for light in determining meaning to be given particular clause under scrutiny.

4. Contracts 🔑169—Circumstances and relation of parties at time of execution of agreement are considered in construing doubtful clauses (Civ. Code, § 1647).

Circumstances and relations of parties at time of execution of agreement and insertion of particular clauses therein are carefully considered in construing doubtful clauses, under Civ. Code, § 1647.

5. Appeal and error 🔑882(5)—Where plaintiff did not amend complaint to avoid uncertainty pointed out by special demurrer, general order sustaining demurrer and judgment based on declination to amend will be upheld.

Where plaintiff's attention was directed to uncertainty in complaint by defendant's special demurrer, and plaintiff did not see fit to amend complaint to avoid uncertainty, general order of trial court sustaining demurrer and judgment, based on declination to amend complaint, will be upheld.

In Bank.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Evelyn Ellis Smith against J. F. Carlston. Judgment for defendant, and plaintiff appeals. Affirmed.

Superseding opinion in 263 P. 378. See, also, 271 P. 1096.

James F. Peck and George M. Naus, both of San Francisco (John H. McDaniels, of San Francisco, W. B. Bunker, of Oakland, and C. M. Peck, of San Francisco, of counsel), for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

RICHARDS, J. This action was commenced by the plaintiff for the recovery from the defendant of the sum of $300,000, with interest thereon at the rate of 7 per cent. per annum from the 12th day of January, 1923, and for her costs of suit. The plaintiff's cause of action is based upon certain written agreements made and entered into between herself and the defendant, and

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[*] Rehearing denied.

which are attached as exhibits to her complaint and are by reference made a part thereof. The first three of these agreements, in the order of their creation, are Exhibit A, Exhibit D and Exhibit C, the first two of which bear the date of January 12, 1922, and the third of which bears the date of January 17, 1922, but which, according to the averments of the plaintiff's complaint, were all entered into on the latter date. These three exhibits read as follows:

Exhibit A.

"$88,487.00

"Oakland, Calif., January 12, 1922.

"On or before one year from date, without grace, for value received, I promise to pay to the order of J. F. Carlston, at my office in the city, the sum of eighty-eight thousand four hundred and eighty-seven and no/100 dollars, payable in United States gold coin, with interest in like gold coin, from date until paid at the rate of six (6) per cent. per annum, payable June 30th and December 31st; and if not so paid to compound and become a part of the principal, and bear interest thereafter at the same rate. Evelyn Ellis Smith."

Exhibit D.

"$75,000.00

"Oakland, Calif., January 12, 1922.

"On or before one year after date, without grace, for value received, I promise to pay to the order of J. F. Carlston, at my office in this city, the sum of seventy-five thousand and no/100 dollars, payable in United States gold coin, with interest thereon in like gold coin, from date until paid, at the rate of six (6) per cent. per annum, payable June 30 and December 31; and if not so paid to compound and become a part of the principal, and bear interest thereafter at the same rate. Evelyn Ellis Smith."

Exhibit C.

"This agreement, made and entered into by and between J. F. Carlston of the City of Oakland, County of Alameda, State of California, party of the first part, and Evelyn Ellis Smith, of the same city, county and state, party of the second part, Witnesseth:

"That the said Evelyn Ellis Smith has been requested by the said J. F. Carlston to execute two promissory notes; one in the amount of seventy-five thousand dollars ($75,000), payable on or before one year after date, dated January 12, 1922; one for eighty-eight thousand four hundred eighty-seven dollars ($88,487), payable on or before one year after date, dated January 12, 1922, as a renewal of three notes heretofore given by Evelyn Ellis Smith to the said J. F. Carlston, as follows:

"One for fifty-five thousand eight hundred and 84/100ths dollars ($55,800.84), payable on demand, dated February 25, 1921; two for fifty thousand dollars ($50,000) each, payable on demand, dated February 25, 1921. Said last three notes are secured, first by a promissory note of the F. M. Smith Securities Company, dated February 28, 1918, for the amount of one hundred thirty-four thousand, five hundred eighty-six and 62/100ths dollars ($134,586.62), which said Securities Company note is itself secured by 1980 shares of stock of the Realty Syndicate; 100 shares preferred stock of Oakland Traction Company; second by 100,000 shares stock of West End Consolidated Mining Company; and

"Whereas, the said J. F. Carlston has requested that the two above notes to be given as a renewal of the said three notes now outstanding, be secured by additional shares of stock, to be divided as follows: Fifty thousand (50,000) shares West End Consolidated Mining Company and fifty thousand (50,000) shares West End Chemical Company stock, which last named one hundred thousand shares of stock are hereinafter referred to as '100,000 additional shares':

"Now, therefore, it is hereby agreed by and between the parties hereto, that in consideration of said Evelyn Ellis Smith granting the request of J. F. Carlston, the said J. F. Carlston will, on or before the due date of the said two renewal notes to be executed as above, accomplish a renewal of the said two notes for a further similar period of one year, making the last named expiration date two years from the date hereof; and it is further agreed by the said J. F. Carlston, that in addition to extending the time as hereinbefore stated, he will and hereby does guarantee and agree to release from the pledge so securing said notes and return to said Evelyn Ellis Smith the 100,000 additional shares of stock at such time as the said notes shall be paid by said Evelyn Ellis Smith, or at such time as said notes shall be returned to said J. F. Carlston, and under any circumstances said 100,000 additional shares shall be released and returned to Evelyn Ellis Smith not later than the due date of the said notes executed herewith.

"That said J. F. Carlston further, in consideration of the premises, agrees and guarantees that should the said 100,000 additional shares, or any thereof, be sold under the said pledge thereof by any person whomsoever, that the said J. F. Carlston will account to and pay to the said Evelyn Ellis Smith for such of the said 100,000 additional shares as are so sold or as are not returned to her as herein agreed, at the rate of three dollars ($3.00) per share for each share of said 100,000 additional shares of stock which may be so sold or which may not be returned to her, as aforesaid.

"The said J. F. Carlston further agrees to immediately deliver to said Evelyn Ellis Smith upon the execution of said two notes herewith the above mentioned note of the F. M. Smith Securities Company and the collateral securing it.

"Executed in duplicate.

"In witness whereof, the said parties hereto have hereunto set their hands and seals this 17th day of January, 1922.

"[Signed] J. F. Carlston. [Seal.]
"[Signed] Evelyn Ellis Smith. [Seal.]"

In addition to the foregoing exhibits, the complaint embodies by reference two other exhibits, namely, Exhibit B and Exhibit E, which have reference to transactions between the plaintiff and defendant occurring on or about December 31, 1922, and which are apparently renewals of the promissory notes, and in part also of the pledges of stock to which Exhibits A and D relate. In Exhibit C, attached to the complaint, there is a recital to the effect that the promissory notes embodied in Exhibits A and D thereof constituted renewals of three previous promissory notes which had been executed by plaintiff to the defendant, one for $55,800.84, dated February 25, 1921, and two for $50,000 each, dated February 25, 1921, each of which prior promissory notes had been secured by pledges of certain securities, specifically referred to in Exhibit C. It thus appears that for the period of at least one year prior to the particular agreement embodied in Exhibit C, and which forms the basis of the plaintiff's alleged right of recovery in the instant case, the relation between the parties hereto had been that of a borrower of certain large sums of money, evidenced by the several promissory notes above set forth or referred to, and the loaner of said several sums of money upon the giving of said notes secured by definite pledges of the stock of certain corporations as defined in the respective pledges thereof, and in which the respective rights and duties of the pledgor and pledgee thereof are specifically set forth.

It may also be stated that as to Exhibits B and E, attached to said complaint, it would appear that the foregoing relations between plaintiff and defendant continued to be the relation of each to the other for the period of about one year after the making and entering into of the agreement set forth in Exhibit C. Upon certain portions of said last-named agreement the plaintiff relies for her recovery in this action. It thus appears that upon January 17, 1922, the plaintiff had executed, or was about to execute and deliver to the defendant, those two certain promissory notes embodied in Exhibits A and D as renewals of or rather substitutes for three demand notes bearing date February 25, 1921, the principal of which, aggregating $155,800.84, and the overdue interest thereof, amounted to a sufficient sum to equal the aggregate of the two renewal notes, to wit, the sum of $163,487, which the plaintiff was on that date to execute and deliver. The two renewal notes thus presently to be delivered had each attached to it a pledge agreement, setting forth the securities deposited in pledge. The promissory note set forth in Exhibit A was thus to be secured by a pledge of certificate 79 for 50,000 shares of West End Consolidated Mining Company stock, certificate 225 for 25,000 shares of West End Consolidated Mining Company stock, and certificate 8366 for 25,000 shares of West End Chemical Company stock. The promissory note set forth in Exhibit D was to be secured by a pledge of certificate 78 for 50,000 shares of West End Consolidated Mining Company stock, certificate 224 for 25,000 shares of West End Consolidated Mining Company stock, and certificate 8365 for 25,000 shares of West End Chemical Company stock.

The foregoing promissory notes, each with its respective securities, had, according to the date borne by each, been executed by the plaintiff on January 12, 1922, but had not been delivered by plaintiff to the defendant until the agreement embodied in Exhibit C, bearing date of January 17, 1922, had been made between the parties thereto. By the terms of the last-named exhibit, wherein the foregoing facts are quite specifically set forth, it appears that said J. F. Carlston, in requesting the execution of the two renewal notes above referred to and secured as stated in the pledge agreement attached to each, further requested that said renewal notes should be secured by certain "additional shares of stock to be divided as follows: 50,000 shares West End Consolidated Mining Company and 50,000 shares West End Chemical Company stock, which last-named 100,000 shares of stock are hereinafter referred to as '100,000 additional shares.'" The agreement embodied in Exhibit C proceeds to state:

> "That in consideration of said Evelyn Ellis Smith granting the request of J. F. Carlston, the said J. F. Carlston will, on or before the due date of the said two renewal notes to be executed as above, accomplish a renewal of the said two notes for a similar period of one year, making the last named expiration date two years from the date hereof."

It would seem quite clear that the two promissory notes embodied in Exhibits B and E, attached to said complaint, were, upon the date named therein, executed and delivered in performance of that portion of said agreement, and that the corporate stock designated in the pledge agreement accompanying each of said notes is specifically the identical shares of stock pledged as security for the promissory notes embodied in Exhibits A and D, respectively, and of which the promissory notes embodied in Exhibits B and E were to be a renewal. It would thus seem to be fairly inferable that the 50,000 shares of West End Consolidated Mining Company and the 50,000 shares of West End Chemical Company stock, which are referred to in Exhibit C as "100,000 additional shares," were not, nor either of them, any portion of the stock which had been already designated as securing the two renewal notes referred to in Exhibits A and D, but were, as properly stated therein, "additional shares," and which as such were to be the special subject of the particular agreement embraced in Exhibit C, which the plaintiff asserts to have been violated.

It may be here suggested, however, that the plaintiff's complaint, including the exhibits appended thereto, creates a degree of uncertainty in the foregoing regard which has rendered said complaint subject to the special demurrer which the defendant aimed at it, and which uncertainty has been accentuated by the briefs and arguments of respective counsel. The importance of this suggestion will be adverted to at a later point in this opinion.

The particular portion of said Exhibit C which the plaintiff alleges to have been violated reads as follows:

> "It is further agreed by the said J. F. Carlston that in addition to extending the time as hereinbefore stated, he will and does hereby guarantee and agree to release from the pledge so securing said notes and return to said Evelyn Ellis Smith the 100,000 additional shares of stock at such time as the said notes shall be paid by said Evelyn Ellis Smith, or at such time as said notes shall be returned to said J. F. Carlston, and under any circumstances said 100,000 additional shares shall be released and returned to Evelyn Ellis Smith not later than the due date of the said notes executed herewith."

Thus far the agreement in Exhibit C seems to be fairly reasonable and intelligible, since the defendant thereby seems to agree that because of the granting by Evelyn Ellis Smith of his request for the pledge of the additional 100,000 shares of stock he will, at a date not later than the due date of the two notes which are to be further secured by the additional pledge of these two blocks of stock, release the pledge thereof and will return said additional shares of stock so pledged to Evelyn Ellis Smith, and will not include the same in the renewal of said two notes, which he has already agreed to accomplish for an additional period of one year upon the expiration date thereof. Thus far in said agreement, as well as in the other transactions between the parties which preceded the making thereof, these two parties have consistently occupied the relation, respectively, of borrower and loaner of money and pledgor and pledgee of stock; the pledgee agreeing to release the pledgor, within the year fixed by the due date of her two notes, the portion of the stock pledged to secure the payment thereof and designated as the "100,000 additional shares of stock."

It is at this point to be noted that the said J. F. Carlston, in his capacity of loaner of the sums of money evidenced by the plaintiff's two promissory notes, and as the holder in the capacity of pledgee of the several blocks of stock, including the "100,000 additional shares" pledged for the payment of said indebtedness, was entitled to the rights accorded by law to the owner and holder of such obligations and securities, and hence, and in the exercise of such rights, would be entitled to transfer or hypothecate to others said promissory notes, or either of them, together with the stock pledged to secure the payment thereof, and that he or his transferee thereof would also be entitled to exercise the pledgee's right to sell all or any portion of said pledged stock at the pledgee's sale upon the occurrence of any default on the part of the maker of said notes and of such respective pledges to pay the said notes or any installment of interest which might grow due thereon.

[1-4] It was doubtless in the exercise of the defendant's rights as the pledgee of the "100,000 additional shares" referred to in said agreement that, according to the averment in the plaintiff's complaint, 50,000 shares thereof were sold under said pledge by persons to whom the defendant had transferred one of the notes for the payment of which said shares of stock had been pledged as security; and it was also doubtless due to the possibility of such transfer of said obligations and sale of all or a portion of said "100,000 additional shares" of stock so held in pledge that the succeeding clause in said agreement and the one upon which the plaintiff counts for the specific nature of her right of recovery in this action was inserted in said agreement, and which clause reads as follows:

> "That said J. F. Carlston further, in consideration of the premises, agrees and guarantees that should the said 100,000 additional shares, or any thereof, be sold under the said pledge thereof by any person whomsoever, that the said J. F. Carlston will account to and pay to the said Evelyn Ellis Smith for such of the said 100,000 additional shares as are so sold or as are not returned to her as herein agreed, at the rate of three dollars per share for each share of said 100,000 additional shares of stock which may be so sold or which may not be returned to her, as aforesaid."

It is the contention of the appellant that the foregoing clause in said agreement is to be interpreted as constituting an agreement on the part of the defendant to purchase so much of such "100,000 additional shares" of said stock as are not returned to her at the time and in the manner provided in the preceding clause in the agreement, and to pay to the plaintiff as the purchase price thereof at the rate of $3 per share for such stock as shall not, pursuant thereto, be so returned to her. We are unable to give our concurrence to such a construction of the aforesaid clause in said agreement. When clauses in a written agreement between parties, doubtful in meaning, are to be construed, it is a cardinal rule of interpretation that the entire agreement must be looked to for light in determining the meaning to be given to the particular clause thereof under scrutiny (6 Cal. Juris. 258, § 16, and cases cited), and a not less important rule for the guidance of courts in determining the intent of parties in the insertion of particular clauses in their written agreements is that the circumstances and relations of the parties at the time of the execution of their agreements and of the insertion of particular clauses therein shall be carefully considered in aid of such interpretation (Civ. Code, § 1647).

When these two cardinal principles of construction are applied to the instant agreement they would seem to leave little doubt as to how it should be construed. The relation between these two parties throughout the entire course of their dealings, so far as the plaintiff's complaint discloses, was that of a borrower and lender of considerable sums of money, evidenced by several obligations in the form of promissory notes, and of pledgor and pledgee of specific shares of the capital stock of several corporations given in pledge to secure the payment of said several obligations. There is not a word or line in the plaintiff's complaint, other than that stated in her interpretation of the terms of said agreement, to indicate that the defendant ever was or ever intended to become a purchaser or owner of any portion of the several blocks of corporate stock which the plaintiff had pledged to him solely as security for the repayment of the money which he had loaned to her. Nor is there a word or line in said complaint, other than as above stated, that the plaintiff, in entering into the relation between herself and the defendant, as evinced by the several written agreements which are attached as exhibits to her complaint, desired or intended to sell or transfer in ownership to the defendant any part or portion of the corporate stock which she had thus pledged to him.

The words "purchase" and "sale" are significantly absent from that portion of Exhibit C upon which the plaintiff relies as the sole basis for the recovery sought herein; and even if it should result that the defendant should be compelled to pay to the plaintiff the sum of $300,000 for which she sues, it is plain that the defendant upon making such compelled payment could not become the purchaser or owner of at least one-half of the "100,000 additional shares" for which he had thus paid, since it affirmatively appears upon the face of the complaint that 50,000 shares thereof have already been sold and transferred by other persons to whom the defendant had assigned one of the notes for the payment of which said stock was pledged. Taking thus into consideration the situation and relation of the parties throughout, we can arrive at but one interpretation of the particular clause in said agreement upon which the plaintiff predicates her cause of action, and that interpretation is that it was the intent of the parties thereby to provide for the payment of liquidated damages in the event that the defendant should for any reason fail or be unable to keep his agreement to release and return to the plaintiff said "100,000 additional shares of stock" at a time not later than the due date of the two promissory notes for the payment of which said specific shares of stock were pledged as additional security.

This being our conclusion as to the only meaning which can reasonably be assigned to the aforesaid terms of said agreement, it follows irresistibly that the provisions therein providing for such liquidated damages are void as in violation of sections 1670 and 1671 of the Civil Code. It is not necessary to cite authorities in support of the position that if the particular clause in Exhibit C is to be interpreted as providing for the payment of liquidated damages it falls within the inhibition of section 1670 of the Civil Code, since the plaintiff has neither sought to plead a cause of action for unliquidated damages for the breach of said agreement, nor to set forth any facts or circumstances which would bring her cause of action within the exception to the foregoing section embodied in section 1671 of said Code. The appellant is resting her asserted right of recovery of the sum of $300,000 from the defendant solely upon her contention that the foregoing agreement is to be interpreted as having created an alternative contract which must necessarily have amounted to a contract of purchase and sale of so much of said stock as the defendant failed to return to the plaintiff within the allotted time. The authorities which the appellant cites in support of this contention are, in our opinion, inconclusive, since in none of the cases so cited does the pre-existing relation of pledgor and pledgee exist, while in each of the said cases the relation of purchaser and seller of the property in controversy is inferable from the relation of the parties and the language of the agreement in each particular case. The cases of Haskins v. Dern, 19 Utah, 89, 56 P. 953; Guss v. Nelson, 200 U. S. 298, 26 S. Ct. 260, 50 L. Ed. 489, and Stevens v. Hertzler, 109 Ala. 423, 19 So. 839, are illustrative of the difference between the causes and decisions upon which the plaintiff chiefly relies and the facts of the case at bar. The case of Wilmington Trans. Co. v. O'Neil, 98 Cal. 1, 32 P. 705, and the case of Westcott v. Thompson, 18 N. Y. 363, which in the former case is cited with approval, more nearly fits the instant situation, and are cited in support of our foregoing conclusion.

[5] We have thus far been considering the deficiencies in the plaintiff's complaint from the viewpoint of the general demurrer thereto. We do not deem it necessary to refer in detail to the numerous grounds of special demurrer which the defendant urged against the uncertainties in said complaint. We may, however, in furtherance of the suggestion put forth in an earlier portion of this opinion, advert to the uncertainty existing therein as to whether the additional 100,000 shares of stock, for the nonreturn of which the plaintiff seeks the recovery of the specific sum of $300,000, were or were not included within the designated shares of stock which are embraced in the pledge agreements which accompany the promissory notes set forth in Exhibits A and D in said complaint. If said "additional 100,000 shares of stock" have reference to blocks of stock other than those specifically referred to by

number and amount in said appended pledges, there might possibly be some basis for the appellant's argument that said additional stock was never intended by the parties to be pledged to the defendant at all, but was merely to be delivered to him for some undisclosed purpose and was to be returned or paid for at the rate per share stated in said agreement. If, on the other hand, said additional shares of stock were to be held identical with the designated shares to the same amount specified in said pledge agreements, there would thus exist a very plausible basis for the defendant's argument that by the renewal of the two notes, accomplished on December 31, 1923, accompanied by a repledge of the same identical stock which formed the security of the two obligations which these promissory notes replaced, the parties thereto had abrogated and rendered ineffectual that portion of the agreement embodied in Exhibit C upon which the plaintiff relies for a recovery.

The attention of the plaintiff was directed to the foregoing uncertainty in her complaint by subdivision (d) of the defendant's special demurrer, and, not having seen fit to so amend her complaint as to avoid this ground of special demurrer, it follows that the general order of the trial court sustaining said demurrer and the judgment based upon the declination to further amend her complaint should for that reason also be upheld.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; SHENK, J.

205 Cal. 788

Frank A. RETHERS, Plaintiff and Respondent, v. Evelyn Ellis SMITH, Defendant and Appellant. (S. F. 12057.)*

Supreme Court of California. Nov. 21, 1928.

Rehearing Denied Dec. 20, 1928.

In Bank.

Appeal by defendant from a judgment of the Superior Court of Alameda County, W. V. Tryon, Judge, in an action upon a promissory note. Affirmed.

James F. Peck, of San Francisco, and Crosby, Naus & Crosby and Louis W. Bennett, all of Oakland, for appellant.

Young & Hudson, of San Francisco, and Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

RICHARDS, J. The plaintiff commenced this action against the defendant to recover judgment upon a promissory note for the sum of $75,000, executed by the defendant to one J. F. Carlston, and by the latter assigned and transferred to the Anglo & London Paris National Bank, and by said corporation transferred to the plaintiff herein for collection, and upon which it is alleged that the sum of $66,754.17 remains and is due, payable, and unpaid. This promissory note was one of the two promissory notes involved in that certain series of transactions between said J. F. Carlston and the defendant and appellant herein, and which form the subject of the decision of this court in the case of Smith v. Carlston (S. F. No. 11737) 271 P. 1091, this day handed down. The answer and counterclaim which the defendant herein presented embraced the same matters of both law and fact which were presented by the plaintiff in that action to the trial court, and by the appellant therein to this court upon appeal.

Upon the trial of this action the trial court ordered a directed verdict to be returned by the jury in favor of the plaintiff herein, based upon its conclusion that the matters set forth in the defendant's said answer and counterclaim did not constitute a defense to this action. Upon the return of such verdict, and upon the entry of a judgment in the plaintiff's favor, the defendant has prosecuted this appeal. The decision by this court in the case of Smith v. Carlston, supra, is decisive of the controlling question presented upon this appeal, and renders unnecessary a discussion of the incidental questions which have been presented and elaborately argued by respective counsel therein.

It follows that upon the authority of Smith v. Carlston, supra, the judgment herein appealed from must be and the same is hereby affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.; SHENK, J.

95 Cal. App. 7

FILICE & PERRELLI CANNING CO., Inc., v. WALTON et al. (Civ. 5701.)*

District Court of Appeal, First District, Division 2, California. Nov. 17, 1928.

Rehearing Denied Dec. 17, 1928. Hearing Denied by Supreme Court Jan. 14, 1929.

1. Pleading 🔑204(3)—Demurrer to whole complaint held properly overruled, though one count did not state cause of action.

Demurrer to whole complaint, containing two separate counts, *held* properly overruled, though one of counts was insufficient to sustain a cause of action.

2. Sales 🔑197—Contract to sell tomato crop, containing provision that it was intended to pass title and to constitute absolute sale, held sale and not executory agreement to sell.

Contract to sell tomato crop to be grown on certain described land which sellers had under lease, containing provision that it was intended to pass title and to constitute an absolute sale, *held* to warrant holding of trial court that the contract constituted a sale and not an executory agreement to sell.

3. Sales 🔑45—Sellers could not rescind for buyers' insolvency, where representations were sufficient to put them on inquiry.

Where buyers made representations to sellers of tomato crop, which would have placed ordinary man on inquiry as to buyers' solvency

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★Rehearing denied. Hearing denied by Supreme Court.

or insolvency, and sellers did not inquire regarding buyers' financial condition, they may not rescind the contract for buyers' misrepresentation as to their financial ability.

4. Sales ⚷418(2)—Basing buyers' damages for breach of contract to sell tomatoes on value of tomatoes in month when they were to be delivered held proper (Civ. Code, § 3336).

In suit for breach of contract to sell tomatoes to be grown, basing buyers' damages on evidence as to value of tomatoes in month when they were to be delivered, *held* not improper under Civ. Code, § 3336.

Appeal from Superior Court, Santa Clara County; F. B. Browne, Judge.

Action by the Filice & Perrelli Canning Company, Incorporated, against F. B. Walton and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Fitzgerald & Johnson, of Gilroy, for appellants.

Crawford & O'Neill, of Gilroy, and Peter F. Morettini, of San José, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants, the defendants appeared and answered, a trial was had before the court sitting without a jury, the trial court made findings in favor of the plaintiff, and from a judgment entered thereon the defendants have appealed.

[1] The plaintiff's complaint was framed in two counts. In the first count it pleaded a breach of contract, alleging that the defendants had failed to deliver personal property theretofore sold to the plaintiff. In the second count it alleged that the defendants had converted the property. The defendants filed a demurrer "to plaintiff's complaint. * * *" The demurrer was overruled. It is now claimed that the order overruling the demurrer was erroneous. In this behalf the defendants assert that the second cause of action did not set forth facts sufficient and that the demurrer should have been sustained. It is sufficient to call attention to the fact that the defendants did not demur to the second count, but they demurred to the whole complaint. However, if we examine the second count, it is clear that it did state facts sufficient and if a demurrer had been directed against it that the demurrer should have been overruled.

The defendants complain because the trial court sustained plaintiff's objections to evidence offered by defendants at the trial. An examination of the record discloses that the point covers two rulings on the rejection of evidence and that the evidence offered was outside of the issues.

[2] The defendants specify certain findings and assert that they are not supported by the evidence. In so specifying the findings we understand the defendants to be acting through an abundance of precaution and that their real objection is that they desire to clearly make the point that the title did not pass and that there was no sale, but that there was an executory agreement to sell. This point has been very fully briefed by the defendants and by the plaintiff. The evidence, both documentary and oral, is before us. A most cursory examination discloses that on the 8th day of January, 1924, by an instrument in writing, Walton & Berry, as lessees, sold to the plaintiff the crop of tomatoes to be grown on 45 to 50 acres of land which was under lease to them and which is located about two miles east of Gilroy on the Hot Springs road and runs north from that road to Sixth street. The contract was in writing, and, among other things, contained a passage as follows: "This contract is intended and understood by both parties to pass title to said crops and to constitute an absolute sale. * * *" The contract also recites that Walton & Berry "has sold" and that Filice & Perrelli "has bought." Other passages are consonant with the contention that there was a sale as distinguished from an agreement to sell. No evidence, oral or documentary, was introduced at the trial tending to weaken this theory. There was evidence introduced that the defendants were lessees of the land described in the contract; that said land is also known as the Elizabeth Martin tract; that said tract contains 463 acres and that of that acreage 38 acres were planted to tomatoes in the season of 1924. These facts warranted the trial court in holding that the contract constituted a sale. Turner, Kuhn & Fraser, Inc., v. Jones, 61 Cal. App. 732, 734, 215 P. 1033; Jones v. California Growers & Shippers, 182 Cal. 777, 190 P. 172.

[3] In their answer the defendants pleaded that they had rescinded their purported contract with the plaintiff and that such rescission was based on misrepresentations made by the plaintiff as to its financial ability. If, as claimed by the defendants, fraud was imposed on them by the plaintiff, they were not bound to rescind, but they were entitled to plead the fraud in defense of plaintiff's action on the purported contract. Field v. Austin, 131 Cal. 379, 382, 63 P. 692. On the trial the defendants offered in evidence a written notice of rescission. It was objected to by the plaintiff and the objection was sustained. Conceding, solely for the purposes of this case that the ruling was erroneous, it was immaterial. The defendants did not introduce any evidence nor attempt to introduce any evidence, nor offer any evidence, showing that any representation was made nor that the representation was false. The representations alleged to have been made and which are pleaded by the defend-

ants included two separate statements. The defendants assert that plaintiff represented that its "financial condition was better than it had been at any time during the previous three years, whereas, in fact and in truth," it was not. The other representation was that the plaintiff had made arrangements with those to whom it was indebted for crops purchased during 1923 by which it had paid the sellers a sum of money equal to one-half the indebtedness and the balance by the issuance of stock and notes of the plaintiff, whereas, in fact and in truth, a very small percentage of the indebtedness was paid in cash. The first representation was the expression of an opinion and not actionable. Both representations, whether true or false, were of such a nature as to place any ordinary man on inquiry as to the solvency or insolvency of the purchaser. The defendants took a chance and may not now complain.

[4] The defendants assert that the trial court awarded damages at $4 per ton and that the damages so awarded rested on the testimony of Mr. Filice, who gave evidence as to values in September, 1924, and of a different variety of tomatoes. There was testimony that in the neighborhood of Gilroy tomatoes are delivered in the month of September. The contract was executed January 8, 1924. The action was commenced September 16, 1924. The date on which the value was ascertained was not improper. Civ. Code, § 3336. The contract specifies "tomatoes," and does not mention any particular variety. Mr. Filice was examined and without objection was allowed to testify that the market value per ton in the locality of Gilroy for tomatoes of the kind grown by defendants was $19 to $19.50. He was not cross-examined on that subject. The trial court made no ruling on the kind of tomatoes to which the evidence was addressed, and there is nothing to review.

The judgment is affirmed.

We concur: NOURSE, J.; BUCK, Justice pro tem.

94 Cal. App. 742

ROSS v. GENTRY. (Civ. 6320.)★

District Court of Appeal, First District, Division 2, California. Nov. 14, 1928.

Rehearing Denied Dec. 14, 1928. Hearing Denied by Supreme Court Jan. 10, 1929.

1. Vendor and purchaser ⇨187—Delay in declaring forfeiture held not waiver of provision making time of essence, though vendor made demands for payment after due date.

Vendor's delay in declaring forfeiture for nonpayment of installment *held* not waiver of provision in contract for sale of real estate making time of essence, though vendor made repeated demands for payment, where it was not shown that overdue payments were accepted or that purchaser was prejudiced by delay.

2. Vendor and purchaser ⇨187—Vendor's lapse of time and delay do not of themselves constitute waiver of provision making time of essence.

Lapse of time and delay do not of themselves amount to waiver by vendor of provision in contract for sale of land making time of essence, and this is especially true where delay is accompanied by demands for payments.

3. Appeal and error ⇨1071(2)—Error in concluding that provision of contract had been waived and reinstated did not invalidate judgment, where decree was supported by findings.

Error of trial court in determining that provisions of contract for sale of land had been waived and reinstated, instead of concluding that they had never been waived, did not render judgment invalid, where court's general conclusion of law and decree were supported by findings.

4. Vendor and purchaser ⇨101—Provision making time of essence was restored by notice, where plaintiff's testimony that bill was mailed to defendant, properly stamped and addressed, was uncontroverted (Code Civ. Proc. §§ 1961, 1963, subd. 24).

Vendor's bill to purchaser, headed "Final Three-Day Notice," *held* effective to restore provision of contract making time of essence, under Code Civ. Proc. §§ 1961, 1963, subd. 24, where it was established that bill had been mailed to purchaser, properly stamped and addressed, and such testimony was not controverted, and receipt thereof was not denied.

5. Vendor and purchaser ⇨185—Rights of vendor and purchaser depend on contract, irrespective of delayed tender of price, especially where time is made of essence.

Reciprocal rights of vendor and purchaser depend on contract and its performance, irrespective of delayed tender of purchase price, especially where time is made of essence.

Appeal from Superior Court, Los Angeles County; Harold Louderback, Judge.

Action by A. W. Ross against P. B. Gentry. Judgment for plaintiff, and defendant appeals. Affirmed.

Frazier McIntosh, of Los Angeles (Earle K. Backus, of Los Angeles, of counsel), for appellant.

Thos. C. Ridgway and Richard F. Bailey, both of Los Angeles (Ralph D. Brown, of Los Angeles, of counsel), for respondent.

KOFORD, P. J. Defendant appeals from a decree quieting plaintiff's title and foreclosing defendant's interest as vendee in three pieces of real estate. It is appellant's claim on this appeal that the provision in his contracts of purchase making time of the essence

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★Rehearing denied. Hearing denied by Supreme Court.

was waived by the conduct of plaintiff, and that the said provision was not thereafter reinstated by a proper notice.

One contract covered a parcel known as lot No. 9 and the other contract covered lots Nos. 21 and 22. Adding together the provisions of the two contracts, the agreements, treated as one, provide as follows: Purchase price, $17,500; initial payment on date of contract, $7,150; second payment, on or before June 23, 1923, $2,350; final payment, January 15, 1924, $7,000, together with 7 per cent. interest on deferred payments, payable quarterly; vendee agreed to pay taxes and assessments; time was made of the essence of the contract; and for failure to comply with the terms of the contract vendee should forfeit all rights and vendor be released from all obligations. Appellant, the vendee in said contracts, made the initial payment of $7,150 by receipting for that amount due him from respondent as the final payment under a grading contract performed by appellant. Appellant made no other payments on the contract, whether principal, interest, or taxes.

On July 21, 1923, respondent mailed to appellant a bill for the amount of principal and interest due and unpaid on the contracts amounting at that time to $3,712.25. On August 1, 1923, respondent wrote appellant a letter in which he stated that he called attention to the fact that payments of the principal and interest were long past due, and unless the same were taken care of immediately action would be taken to cancel the contract. On October 1, 1923, another bill for principal and interest was sent by respondent to appellant, amounting at that time to $3,893.38. Later in the month of October respondent met appellant's son, who was conceded to be the agent of his father, and again informed him that payments were long past due, and if he wanted to protect his interests he ought "to get busy and pay them," and that he ought not to expect any one to carry them forever. Gentry replied by exhibiting a large amount of due bills, saying that, if he could get some of them paid, he would pay up on the contract. Respondent replied that "he had better get busy and do it." On November 6, 1923, respondent again sent a bill for the amount of principal and interest then due, which was in the same form as previous bills except that it was headed "Final Three-Day Notice." These bills were supplemented with telephone calls requesting payments.

The court found these facts, and found that respondent at all times up to November 6 was willing to accept payment in despite of the delay. This action was filed on November 23. In December, 1923, appellant tendered respondent $12,000 in full payment of the contracts, which tender was refused by respondent and the action carried forward.

[1, 2] It seems to be the contention of appellant that a forfeiture must be declared immediately upon default, and that if this is not done the provision making time of the essence of the contract is waived. The evidence does not show that any overdue payments were accepted by respondent, nor that appellant was in any manner prejudiced by the failure of respondent to declare a forfeiture or commence an action immediately upon the first breach. The most that can be said of respondent's conduct as outlined above is that he forebore and delayed in declaring a forfeiture and instituting an action. His willingness to accept overdue payments does not add anything to his frequent demands, since, without such willingness, the demands would be sham. It cannot be denied that he consistently demanded and required payment. Lapse of time and delay do not of themselves amount to a waiver of the provision making time of the essence of the contract, and they should amount to less, if accompanied with demands for payments. Kerns v. McKean, 65 Cal. 411, 4 P. 404; Newhall Land & Farming Co. v. Burns, 31 Cal. App. 549, 161 P. 14; Drips v. Moore, 179 Cal. 249, 176 P. 159. Cases in which such a provision of a contract has been held waived by accepting overdue payments or other benefits from the vendee are not in point with the instant case.

[3] In the conclusions of law signed by the court it is stated that the conduct of plaintiff waived the provision of the contract making time of the essence, but that the provision had been reinstated by the notice of November 6, and that a reasonable time had thereafter elapsed to allow appellant to make overdue payment before the action was commenced. A further conclusion of law was made that the failure of appellant to make payments after November 6, and before commencement of the action, was a breach of the contract, and that at the time the action was commenced the appellant was in default and his rights under the contract were at an end and respondent was entitled to the decree. If it was error for the court to conclude from the findings that said provisions of the contract had been waived and reinstated instead of concluding that it had never been waived, the judgment nevertheless is valid, the general conclusion of law and the decree being supported by the findings. McNutt v. City of Los Angeles, 187 Cal. 245, 201 P. 592; Danziger v. Benson, 175 Cal. 565, 166 P. 313; Davis v. Baugh, 59 Cal. 576.

[4] Passing by the question of the sufficiency of the bill of November 6, headed "Final Three-Day Notice," we see no lack of sufficiency in the letter of August 1 to restore the provision making time the essence of the contract if it had been waived. Appellant's only criticism of this letter is that it was not proven to have been received. It appears that the appellant, who was a witness at the trial, neither admitted nor denied having received it. But the testimony of the plaintiff established that it had been mailed to appellant, proper-

ly stamped and addressed, in the same manner as the bills which had been mailed and received. This evidence not being controverted, it should be taken as established that the letter of August 1 was received by appellant. Code Civ. Proc. §§ 1961 and 1963, subd. 24.

Appellant filed a cross-complaint and answer seeking to have the contract reformed in such a manner that no payment should be required of him until the expiration of two years. The findings of the court were contrary to all the allegations of fact upon which this relief was sought and we do not understand the appellant as contending for any action upon the part of this court upon this branch of the case.

[5] Appellant has made numerous references scattered through his briefs to the fact that he tendered the full amount due after suit was commenced and before trial. We do not understand him to contend that this entitled him to more favorable consideration in the decree if in fact the tender was too late and in law he was in default for failure to observe the terms of his contract. The action was one to quiet respondent's title and foreclose appellant's interest as vendee, and obviously the rights of the parties depend upon the contract and its observance by them especially where time is expressly made of the essence. Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 9, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

The judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

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94 Cal. App. 795

SCOTT et al. v. DONAHUE et al. (Civ. 5690.)

District Court of Appeal, First District, Division 2, California. Nov. 16, 1928.

1. Appeal and error 🔑1203(1)—Appellate court judgments, reversing judgments, with directions to deduct, from trust funds involved fees properly chargeable against funds, left duty with trial court to determine fees properly chargeable.

In actions involving trust funds belonging to former members of local chapter of Brotherhood of Railroad Trainmen, appellate court judgments, reversing judgments for defendants, with directions to distribute funds among former members of local chapter, after deducting costs of suit and other charges and fees chargeable against trust fund, left duty with trial court, as court of equity, to determine what charges and fees were properly chargeable against such funds.

2. Costs 🔑236—Appellate court, reversing judgment, cannot award costs on appeal to unsuccessful party from trust fund it tried to defeat (Code Civ. Proc. § 1027).

Under Code Civ. Proc. § 1027, appellate court has no power to award costs on appeal to unsuccessful party, to be charged against trust fund which unsuccessful party tried to defeat.

3. Costs 🔑236—Appellate court clerk has no power to award costs on appeal in favor of losing party (Code Civ. Proc. § 1027; Supreme Court Rule 23).

Appellate court clerk has no power to award costs on appeal in favor of losing party, since under Code Civ. Proc. § 1027, and Supreme Court Rule 23, clerk must enter in his remittitur a judgment that appellant recover for costs on appeal from respondent in all cases where judgment is reversed.

Action by Robert C. Scott and others against J. J. Donahue and others. From the judgment, plaintiffs appealed. Judgments reversed, with directions. 269 P. 455, 458. On motions of defendants J. S. Wrinkle and the Brotherhood of Railroad Trainmen for the recall of the remittitur. Motions denied.

See, also, 269 P. 774.

George D. Collins, Jr., of San Francisco, for appellants.

Gillogley, Crofton & Payne, of San Francisco, for respondents.

NOURSE, J. The respondents in these two consolidated cases have moved for the recall of the remittiturs upon the ground that they do not conform to the judgments in respect to the matter of costs on appeal. The remittiturs followed the usual course in awarding to appellants against the respondents their costs on appeal upon the reversal of the two judgments.

The actions involved two trust funds belonging to the former members of the local chapter of the Brotherhood of Railway Trainmen. The litigation arose because of the claim of the parent order that it was entitled to all the funds of the local chapter upon dissolution of the latter. The two causes were commenced by the appellant on behalf of his associate members of the local chapter, the judgments went against him, and these were reversed, with directions to distribute the funds among all the former members of the local chapter who were in good standing at the time of its dissolution, "after deducting therefrom the costs of suit and other charges and fees properly chargeable against the trust fund."

[1] It is now claimed that, by reason of the language quoted, the respondents should not be charged with the costs on appeal. The remittiturs followed the express terms of the statute (section 1027, Code Civ. Proc.) in awarding costs to the appellant and against the respondent upon reversal of the judgment, and we find nothing in the language quoted from the main opinion which supports the claim that we intended to depart from this statutory rule. The language of this opinion

had reference to that rule of equity, based upon the principle of agency, which permits one who has sued on behalf of his associates to discover or preserve a common trust fund to have a charge against the fund itself for his costs and expenses. See Fox v. Hale & Norcross S. M. Co., 108 Cal. 475, 41 P. 328; Los Angeles T & S. Bank v. Ward, 197 Cal. 103, 239 P 847, County of Tulare v. City of Dinuba (Cal. App) 263 P. 252[1]; County of Tulare v City of Dinuba (Cal. Sup.) 270 P. 201 Therefore the direction in those judgments to the trial court to deduct from the trust funds the charges and fees "properly chargeable" against such funds left with the trial court the duty as a court of equity to determine what charges and fees were properly chargeable against these funds.

[2, 3] But we know of no rule that the unsuccessful party to such litigation may have his costs and expenditures charged against the trust fund which he has tried to defeat. But if the trial court, in the exercise of its equity jurisdiction, should have power to make such award in favor of the losing party, it is clear that the appellate court has no such power upon a reversal of the judgment, because section 1027, Code of Civil Procedure, expressly withholds such power. It is equally clear that, under the same statute, and under rule XXIII of the Supreme Court, the clerk does not have such power, but he must enter in his remittitur a judgment that the appellant recover his costs on appeal from the respondent in all cases where the judgment is reversed.

The motions are denied.

We concur: KOFORD, P. J.; STURTEVANT, J.

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94 Cal. App. 770

KLETZ v. MacADAM. (Civ. 6303.)

District Court of Appeal, First District, Division 2, California. Nov. 15, 1928.

1. Automobiles ⚷245(6)—Negligence of automobile driver striking pedestrian at street intersection held for jury.

In action for injuries to pedestrian struck by automobile while in the act of crossing street at intersection, evidence relative to negligence of automobile driver *held* sufficient for submission to jury.

2. Trial ⚷237(5)—Instruction that jury were not bound to decide in accordance with testimony of witnesses not producing conviction in their minds held not erroneous.

Instruction to effect that jury were the exclusive judges of the weight and sufficiency of evidence, and were not bound to decide in accordance with testimony of any number of witnesses which did not produce conviction in their minds, *held* not erroneous as requiring defendant to produce conviction on proposition that plaintiff was guilty of contributory negligence.

3. Appeal and error ⚷197(1), 215(3)—Claim that evidence or instructions covered subjects not within issue is too late on appeal.

Claim that evidence or instructions covered subjects not within issues is too late when made on appeal, particularly where evidence in such matters was introduced without objection.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Samuel Kletz against M. V. B. MacAdam. Judgment for plaintiff, and defendant appeals. Affirmed.

Cooley & Gallagher, of San Francisco, for appellant.

Goldman, Nye & Spicer and George K. Ford, all of San Francisco, for respondent.

STURTEVANT, J. Plaintiff commenced an action to recover damages for injuries sustained from being hit by an automobile driven by the defendant. The defendant interposed an answer denying many allegations contained in the complaint and affirmatively pleaded the contributory negligence of the plaintiff. A trial was had before the court sitting with a jury. The jury returned a verdict in favor of the plaintiff, and, from a judgment entered thereon, the defendant has appealed under section 953a of the Code of Civil Procedure.

[1] The first point presented by the defendant is the contention that the plaintiff was guilty of contributory negligence as a matter of law. The accident occurred October 4, 1924, at about half past 4 p. m. in Hyde street, immediately north of the north line of Fulton street, in San Francisco. Hyde street is 46 feet wide and Fulton street is 100 feet wide from curb to curb. The plaintiff was in the act of crossing from the east side of Hyde street to the west side, traversing that portion of the street which pedestrians ordinarily traverse in going up the north side of Fulton street. Before entering the street and before he left the sidewalk the plaintiff testified that he looked to the north and to the south, but that he did not see the machine driven by the defendant; that immediately after looking to the south he stepped into the street; that, as he was in the act of stepping from the curb into the street, he looked to the south and into the area embraced by the four corners of the intersection, and that he did not see defendant's automobile; that he took but two or three steps from the curb when he was struck by the automobile approaching him on his left side. The defendant argues that, when to look is to see, then it is not sufficient that a party testifies that he did not

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] Hearing granted. For opinion of Supreme Court, see 270 P. 201.

see an automobile which was within the territory which the witness testifies he looked into. The vice in this argument is the assumption that the automobile was in the territory in question. That was a disputed fact in the case. If at the time he looked the defendant's car was on the driver's left-hand side of the median line of Fulton street and had not entered the intersection of Hyde and Fulton, and if the plaintiff had seen the car in that position, he was entitled to assume that the defendant would not unlawfully proceed down that side of Fulton street and unlawfully run into him, and he was not bound to make a mental note thereof and remain standing until he could ascertain what movements the defendant was about to execute. True it is that the defendant offered testimony to the effect that her car was within the intersection. However, the record before us does not disclose that the automobile necessarily was in the zone concerning which the plaintiff addressed his testimony. On the other hand, there is evidence in the record produced by the plaintiff to the effect that the automobile was on the driver's left-hand side of the median line of Fulton street where that line crosses the median line of Hyde street, that it was proceeding at a speed of 20 to 25 miles an hour until it turned north into Hyde street on the easterly side. Just how far the defendant's car was from the median line of Fulton street when it turned into Hyde street does not appear in the printed record. However, the record shows that the witnesses were examined and cross-examined thereon and illustrated their testimony by marking diagrams which are not before us. The plaintiff illustrated how he moved at the time immediately preceding the accident. Counsel held a timepiece. The illustration took four seconds. At 20 to 25 miles per hour the defendant's car would travel, in that period, approximately 140 feet. It is clear there was a wide field for the jury to exercise its discretion in determining where the car was when plaintiff looked before he left the curb. The testimony is without conflict that the defendant drove west on Fulton street and turned into Hyde street. When the plaintiff looked north and looked south on Hyde street, it is altogether possible that the defendant's car as yet had not entered Hyde street. The duty did not rest on the plaintiff to look up and down Fulton street and decide what the vehicles in that street were doing or about to do. Courviosier v. Burger, 61 Cal. App. 470, 476, 215 P. 93.

The defendant asserts that the plaintiff had not pleaded general negligence but had merely pleaded that the defendant "without the sounding of any warning by horn, bell, whistle or other means of the approach of said automobile, and that the said automobile, by reason of the said negligent and careless operation and propelling thereof in the manner described as aforesaid was caused to" collide with the plaintiff. This statement of the issue is hardly complete. There was an amendment and supplement to the complaint. That amendment pleaded general negligence. On the trial there was evidence introduced that the defendant entered the intersection of the two streets driving at 20 or 25 miles an hour; that, before turning into Hyde, she did not pass to the right of the center of the intersection, but passed several feet to the left of that center; that she proceeded north, traveling 15 to 20 miles an hour and without sounding her horn or giving any other signal of approach before striking the plaintiff. There was an abundance of evidence which, if the jury believed it, would justify the jury in finding that the defendant was negligent.

[2] Of its own motion the trial court instructed the jury as follows:

> "You are the exclusive judges of the weight and sufficiency of the evidence. You are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, against a less number. The direct evidence of one witness, who is entitled to full credit, is sufficient for proof of any fact in a civil case."

The defendant argues that it was not required to produce *conviction* in the minds of the jurors upon the proposition that the plaintiff was guilty of contributory negligence. This argument is to borrow trouble. The instruction was not reasonably susceptible of the meaning placed on it by the defendant. All of the instructions were to be read together. The trial court correctly instructed upon the matters of burden of proof, preponderance of evidence, and on the subject of contributory negligence.

[3] Acting upon the request of the plaintiff, the trial court read to the jury passages from the Motor Vehicle Act (St. 1923, p. 517, as amended). Still claiming that the plaintiff had pleaded special negligence and not general negligence, the defendant asserts that the giving of instructions regarding these passages in the Motor Vehicle Act was erroneous. We think the contention is without merit. The pleadings were broad enough to authorize the proof. Evidence on these matters was introduced without objection. It is too late at this time to claim that either the evidence or the instructions covered subjects not within the issue.

We find no error in the record. The judgment is affirmed.

We concur: BUCK, Presiding Justice pro tem.; NOURSE, J.

94 Cal. App. 777

PEOPLE v. PARRA et al. (Cr. 1727.)

District Court of Appeal, Second District, Division 1, California. Nov. 15, 1928.

Criminal law ⚷683(1)—Testimony as to things occurring after automobile was abandoned held properly admitted in rebuttal, in prosecution for violating Vehicle Act (Vehicle Act, § 146).

In prosecution for violating the Vehicle Act (St. 1923, p. 517) § 146, admission of testimony as to things occurring after car was abandoned by defendants *held* not error, where such evidence came out only by way of rebuttal to testimony of appealing defendants.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Gilbert Parra and another were convicted of violating the California Vehicle Act, § 146, and they appeal. Affirmed.

H. M. Dalton, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

YORK, J. The defendants appealing, Gilbert Parra and Frank Olazabel, were tried and found guilty of violation of section 146 of the California Vehicle Act (St. 1923, p. 517) as charged in an information filed by the district attorney of Los Angeles county, but were acquitted of the charge of grand theft, also therein contained. There were two others charged in the same information, who were both found not guilty of the charge of grand theft, but one of whom (Joe Young) pleaded guilty and the other (Villarreal) was found guilty of violating section 146 of the Vehicle Act.

The first contention of appellants is that it was prejudicial error for the court to admit testimony as to certain things which occurred after the car had been abandoned by all of the defendants, particularly objecting to the testimony of a police officer. However, this evidence came out only by way of rebuttal to the testimony of the appealing defendants that they went directly to their home and that neither of them accompanied the others to the place where the machine was finally abandoned, or where the other defendants got into an altercation with parties not connected with the suit.

As to the second objection, that the evidence was insufficient to support the verdict as to appellants, an examination of the entire transcript discloses there was sufficient circumstantial, if not direct, evidence to show that the defendants were guilty of violating at least that part of section 146 of the Vehicle Act as follows:

"Any person who assists in, or is a party or accessory to or an accomplice in, any such stealing or unauthorized taking or driving, shall also be deemed guilty of a felony."

The judgments against the defendants Gilbert Parra and Frank Olazabel, respectively, are hereby affirmed.

We concur: CONREY, P. J.; HOUSER, J.

SAN BERNARDINO NAT. BANK et al. v. JONES et al. (Civ. 3583.) ★

District Court of Appeal, Third District, California. Nov. 16, 1928.

Hearing Granted by Supreme Court Dec. 13, 1928.

1. Waters and water courses ⚷154(1)—Purchasers, observing underground pipe which ran from spring to house on property, were not put on inquiry as to another's easement in water.

Purchasers of patented land, taking it with knowledge of underground water pipe from spring extending into house on property were not put on inquiry as to easement in use of water through pipe line, acquired by third party from purchasers' predecessors in title.

2. Easements ⚷22—Purchaser is bound to take notice only of what reasonably careful inspection would disclose, relative to easements.

Purchaser of land is bound to take notice only of what a reasonably careful inspection would disclose, as regards question of constructive notice of easement.

3. Waters and water courses ⚷154(1)—Recorded conveyance of water from tunnel, which examination of record title of lots purchased would not disclose, held not constructive notice to purchasers.

Recorded conveyance of right to use water developed in tunnel "in block 4, section 18," from defendant's predecessors to predecessors of plaintiff, *held* not to constitute constructive notice of existence of easement to defendants purchasing lots, since examination of record title of lots would not have disclosed conveyance.

4. Waters and water courses ⚷158½(1)—Conveyance from defendants' predecessors of water developed in land purchased by defendants held inadmissible to prove plaintiffs' easement, where defendants had no actual or constructive notice thereof.

In action to establish right to use of water from spring on defendants' land, under conveyance from defendants' predecessors in title, conveyance giving right to use of water developed in tunnel in block was inadmissible to prove plaintiffs' easement, where it was not shown that defendants had actual knowledge of conveyance, or of its recordation, and where conveyance was not constructive notice as to the particular lots purchased by defendants.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing granted. 279 P. 657.

5. Waters and water courses ⇨154(1)—Purchaser is chargeable with constructive notice of contents of patent reserving vested water rights.

Purchaser of property is charged with constructive notice of contents of patent reserving vested water rights and rights to ditches and reservoirs.

6. Waters and water courses ⇨154(1)—General reservation in patents of vested water rights therein does not give notice that water right has in fact vested.

Reservation in patent to government land of vested water rights and rights to ditches and reservoirs, where inserted in all patents, does not give notice that any water right has in fact vested or accrued.

7. Easements ⇨22—Grantee under conveyance takes subject only to vested rights of which he has actual or constructive notice.

Grantee under conveyance from government or private individual takes property subject to vested rights of others of which he has actual or constructive notice, but takes free of secret easements of which he has no notice, either actual or constructive.

8. Vendor and purchaser ⇨229(1)—Purchaser put on inquiry is chargeable with "constructive notice," if inquiry becomes duty which, if followed, would lead to knowledge of true situation (Civ. Code, § 19).

Whatever puts purchaser on inquiry as to a particular fact amounts to "constructive notice," provided the inquiry becomes a duty, and, if followed, would lead to knowledge of facts by ordinary diligence, under Civ. Code, § 19.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second and Third Series, Constructive Notice.]

9. Easements ⇨22—Purchaser of patented land need not make neighborhood search for secret easements, of which no suspicion arises from reasonably careful inspection of land (Civ. Code, § 19).

Purchaser of patented land is not required to make neighborhood search for secret easements in exercise of due diligence under Civ. Code, § 19, where reasonably careful inspection of land discloses nothing to create suspicion that such an easement exists.

10. Waters and water courses ⇨154(1)—Evidence held not to support finding that defendant purchasing land was chargeable with notice of plaintiffs' right to water from spring under conveyance from defendants' predecessors (Civ. Code, § 19).

In action to establish right to take water from spring on defendants' land, evidence *held* not to support finding that defendant purchasing land with knowledge of small flow of water apparently conducted to house on premises for domestic use, was chargeable with notice of facts putting him on inquiry as to existence of plaintiffs' rights under conveyance from defendants' predecessors in title, under Civ. Code, § 19.

11. Waters and water courses ⇨154(1)—Right to water from spring on another's property and right of way for pipe line constitute "easements" (Civ. Code, § 801).

Right to use water from spring on another's land, and right of way for pipe line to convey the water, constitute "easements," under Civ. Code, § 801.

[Ed. Note.—For other definitions, see Words and Phrases, First, Second and Third Series, Easement.]

12. Easements ⇨21—Grantor of easement, who conveys servient tenement unconditionally for value, passes title free from easement, where purchaser takes without notice (Civ. Code, § 19).

If grantor of easement for valuable consideration unconditionally conveys servient tenement to another who takes without notice and without knowledge of facts sufficient to put him on inquiry under Civ. Code, § 19, purchaser will take land free from burden of easement.

13. Easements ⇨21—One acquiring easement from government has no greater right than grantee from private owner, where servient estate is acquired by innocent purchaser without notice.

One holding easement under grant from government is in no better position than grantee of private owner, where innocent purchaser for value acquires servient estate without actual or constructive notice of easement.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by the San Bernardino National Bank and others against W. J. Jones and another. Judgment for plaintiffs, and defendants appeal. Reversed.

Jones, Hoyt & Rifkind, of Los Angeles, for appellants.

Swing & Wilson, of San Bernardino, for respondents.

FINCH, P. J. Respondents have filed a petition for a rehearing and have reargued some of the questions discussed in the briefs upon which the appeal was originally submitted. In order the more fully to discuss such questions, it is ordered that the opinion filed herein October 17, 1928, be set aside, the judgment of this court made at that time reversing the judgment of the trial court to stand, and that the following opinion be substituted for the one stricken out: The trial court found that the plaintiffs are the owners of the north half of section 19, township 2 south, range 1 west, San Bernardino base and meridian; that the defendants are the owners of lot 8 and a part of lot 9 in section 18, bounded on the south by the plaintiffs' land; that "while said lots 8 and 9 were still government land * * * plaintiffs' predecessors entered in and upon said lot 9 and constructed a tunnel at a spring thereon, and thereby developed water in said tunnel, and conveyed said water" through a pipe line "from said spring and tunnel to and across said lots 9 and 8 * * * to the said lands of plaintiffs"; that "ever since the construction thereof, except when interfered with by the defendants, the said plaintiffs and their predecessors in interest have maintained said tunnel and pipe line and have taken and diverted and used" on plaintiffs' land "the water flowing therefrom"; that the predecessors in interest of the defendants had notice and knowledge of such diversion and use; that the "defendants acquired said property (lots 8 and 9) on or about the 17th day of October, 1923, with notice and knowledge of facts and circumstances sufficient to put a prudent man on inquiry as to the existence of the rights, claims and ownerships of said plaintiffs in and to the tunnel situated in said portion of said lot 9 and the water flowing therein and the pipe line leading therefrom and of said right of way, and that by prosecuting such inquiry said defendants would have learned of the existence thereof." On these findings and others which need not be stated, judgment was entered quieting plaintiffs' title to the tunnel and pipe line and the use of the water flowing from the tunnel and enjoining interference therewith by the defendants. The defendants have appealed from the judgment.

[1,2] The spring and the tunnel referred to in the findings are on the defendants' land. It appears from the evidence that the flow of water therefrom is very small. A concrete bulkhead was constructed in the mouth of the tunnel, by one of plaintiffs' predecessors, in 1906, causing the water to accumulate in a small reservoir, thereby providing "more water by storing it, for the house and for stock use." An underground pipe, at some places three-fourths of an inch in diameter and at other places an inch, extended from the reservoir in a general southwesterly direction about 300 feet to a house on lot 8 and thence in the same general direction approximately 1,500 feet to a house on the plaintiffs' land. This house was over 800 feet from the north line of plaintiffs' land. When the defendants examined lots 8 and 9 before purchasing the land, a water pipe extended into the house thereon, but it was "stopped up" and the "sink and faucet had been taken away." The water from the tunnel was flowing over the bulkhead and going to waste. No pipes were visible, except at the house on lot 8, and there was no evidence on the property to indicate that the water had ever been taken to other lands than lots 8 and 9. About the time the purchase was completed the defendants' grantor, who was in possession, caused a faucet to be placed in the pipe at the house and water from the reservoir to flow through the same. The defendants had paid the full purchase price of the property, $1,600, and had been in possession for some time before they first learned that the water had ever been taken to any lands other than lots 8 and 9. Prior to that time they were without notice or knowledge of any facts to put them on inquiry. The fact that water was conveyed from the tunnel to the house on lot 8 was not sufficient to put them on inquiry to ascertain whether the water was carried to the lands of others, but the natural inference from the situation as they found it was that the tunnel was designed for supplying water to the house upon the land they were purchasing. A purchaser of land is bound to take notice only of what a reasonably careful inspection would disclose. Pollard v. Rebman, 162 Cal. 633, 635, 124 P. 235; Duvall v. Ridout, 124 Md. 193, 92 A. 209, L. R. A. 1915C, 347; Rollo v. Nelson, 34 Utah, 116, 96 P. 263, 26 L. R. A. (N. S.) 326; 41 A. L. R. 1445.

O. A. Turner, who acquired the Jones land July 30, 1922, testified:

> "I went over the property to see whether or not I would accept it on a deal I had. * * * I went up to the tunnel and found that the water was flowing over the walls of the tunnel, I looked around the house and found a water pipe visible along the side of the house and around the corner and up to the end of the house, and I went in the house and I found that the faucet had been taken off and a block put in the place of it. * * * There were two separate orchards. I went over both orchards lengthwise and crosswise."

The witness further testified that there was nothing to indicate that "any water from that spring or tunnel was being used any place other than on the Jones land at that time." June 14, 1923, he sold the land to John Turner. The latter testified:

> "I went up and examined the property with a view to improving it. That was about the 24th of June, 1923. * * * I went all over it and examined it very carefully. I examined the water conditions, and the trees on the place, with the object of improving the place. * * * The water was running over the dam and going to waste, going down on the orchard and on the place. * * * The pipe at the house was stopped up there. * * * There was a pipe at the house. * * * It came out of the ground near the house and laid on top of the ground and up in the house, and a sink and faucet had been taken away. * * * In September, 1923, I stayed there and lived there about two weeks and worked on the place. * * * I cleared up the old brush and weeds, * * * (over) all the cultivated part, about 10 acres."

The witness also testified that he found no pipe running south from the Jones house and that he had no "knowledge of any claim to that water right by any one else." John Turner sold the land to the defendants September 29, 1923. Mrs. Jones testified, relative to her examination of the property prior to its purchase by herself and husband, as follows:

> "We walked up to the tunnel. * * * The water was running * * * over this dam in the tunnel, a little bit; and that was all you

could see. * * * You could not see any pipe at all, only the one that came in the house and went in through the side of the house. * * * We walked around over the orchard. I don't think I went over in the far orchard, but I walked around some in the one where the house is. * * * It is on our ground, between the stone house (the house on plaintiffs' land) and our house. * * *

"Q. Did you see any ditches, pipes or other conveyances of any kind? A. I did not see anything. * * * There was no pipes; there was only the one that ran around the house and up to the house. * * *

"Q. Did you make any investigation to see where the water went? A. No, sir; because the tunnel was flowing right over and I didn't think about it going anywhere else."

The witness further testified that she "never heard anything about" any claim of right to use the water elsewhere than on the Jones land until several months after payment had been made in full for the land. Mr. Jones testified that before making the purchase he walked over the land on two different occasions and examined it carefully; that "that little pipe that run in the house was the only pipe I seen"; that water "was running over the top of the bulkhead"; that he walked "all over the lower land, * * * over both orchards," one orchard being between the Jones house and that of the plaintiffs; that the land below the Jones house "is level ground, only it is a little rolling"; that he did not see "any pipe line, flume, or ditch or trough"; that, when the last payment was made on the purchase price, he did not "know that the plaintiff or any one else ever had used or claimed a right to use any of the water on any land other than that "he had purchased." The water was not running through the pipe to the plaintiffs' place during the period of time mentioned by these witnesses.

[3, 4] Plaintiffs introduced in evidence, over the defendants' objection, a written conveyance of the right to the use of the water developed in a tunnel in "block 4, section 18," from defendants' predecessors to the predecessors of the plaintiffs, dated December 15, 1904, and duly recorded. The parties to that conveyance may have intended to describe the tunnel here in question, but no attempt was made to show that the defendants had any notice or knowledge thereof. An examination of the record title of lots 8 and 9 would not give any information as to the conveyance in question, and its recordation was not constructive notice to the defendants. Davis v. Ward, 109 Cal. 186, 189, 41 P. 1010, 50 Am. St. Rep. 29; Treadwell v. Inslee, 120 N. Y. 458, 24 N. E. 651. In answer to the defendants' objection that "the conveyance of water rights on lot 4 would not in any way give notice of water rights on lot 9," the trial court said: "I think it goes to the weight of the evidence simply." Without proof that the defendants had knowledge of the conveyance or of its recordation, the conveyance did not in any manner tend to show that they had notice of the plaintiffs' claim to the use of the water, and the conveyance was not admissible for that purpose.

[5-7] Patents containing the usual reservations of "any vested or accrued water rights * * * and rights to ditches and reservoirs used in connection with such water rights" were issued to the defendants' predecessors in title and duly recorded. Of course, the defendants were charged with constructive notice of the contents of these patents. Since this reservation is general, and is inserted in all patents, regardless of whether any water rights have vested or accrued, it certainly cannot be construed as notice in any particular case that such a water right has in fact vested or accrued. A grantee, whether the conveyance be made by the government or a private individual, always takes the property conveyed subject to all accrued or vested rights of others of which he has actual or constructive notice, whether the conveyance expressly reserves such rights or not. Witherill v. Brehm, 74 Cal. App. 286, 296, 240 P. 529. It would be a departure from the principles of equity to hold that the grantee of one who has acquired title to land from the government takes it subject to secret easements of which he has neither actual nor constructive notice.

[8, 9] The purpose of the recording acts is that a purchaser of land "may rely on the record title to the property, in the absence of actual knowledge of the title in fact, or of facts sufficient to put him on inquiry in respect thereto." 23 R. C. L. 197. "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." Civ. Code, § 19. "Whatever puts a party on inquiry amounts in judgment of law to constructive notice, provided the inquiry becomes a duty, and if followed would lead to the knowledge of the requisite facts by ordinary diligence and understanding." Prouty v. Devin, 118 Cal. 258, 260, 50 P. 380, 381. Ordinary diligence certainly does not require a purchaser of patented land to make a neighborhood search for secret easements in the land where a reasonably careful inspection of the land discloses nothing to create even a suspicion that such an easement exists.

[10] There is no evidence in the record tending to support the finding of the trial court that the defendants had "notice and knowledge of facts and circumstances sufficient to put a prudent man on inquiry as to the existence of the rights" claimed by the plaintiffs. The uncontradicted evidence shows that there was nothing visible or apparent on the Jones land to put the defendants on inquiry. The testimony of the defendants and two of their predecessors in ti-

tle is to the effect that they knew of no such claim prior to acquiring title. Granting that the burden of proof was on the defendants to show want of notice, and that it is within the province of the trial court to determine the credibility of witnesses, nevertheless, in a case such as this, where the undisputed physical facts lead to the natural conclusion that the small flow of water was conducted only to the house on the premises for domestic use, and there is no evidence whatever tending to show that the defendants were otherwise put on inquiry, the finding that they had knowledge of facts sufficient to put them on inquiry cannot be upheld.

[11, 12] Plaintiffs' right to the use of the water in question and the right of way for their pipe line constitute easements. Civ. Code, § 801; Farmer v. Ukiah Water Co, 56 Cal. 11, 13; Smith v. Hawkins, 110 Cal. 122, 125, 42 P. 453; Henrici v. South Feather Land etc., Co., 177 Cal. 442, 446, 170 P. 1135; Witherill v. Brehm, supra. If the owner of an easement "fails to have the conveyance for such easement legally recorded, it remains good, nevertheless, against the grantor of the easement. But if the grantor of the easement, in such case, for a valuable consideration, afterwards unconditionally conveys the servient tenement to another, who takes without notice, * * * and with no knowledge of facts sufficient to put him on inquiry concerning it, he will take the land free from the burden of the easement." Pollard v. Rebman, supra; Mesmer v. Uharriet, 174 Cal. 110, 116, 162 P. 104; Powers v. Perry, 12 Cal. App. 77, 82, 106 P. 595. In the case last cited, the facts in many respects were similar to those of this case, and it was there held that the evidence was insufficient to support the finding that the purchasers of the land on which the spring was located had knowledge of facts sufficient to put them on inquiry. Among other cases holding that, under similar circumstances, an innocent purchaser for value takes title free from secret easements are the following: Blake v. Boye, 38 Colo. 55, 88 P. 470, 8 L. R. A. (N. S.) 814; Jobling v. Tuttle, 75 Kan. 351, 89 P. 699, 9 L. R. A. (N. S.) 960; Butterworth v. Crawford, 46 N. Y. 349, 7 Am. Rep. 352; Treadwell v. Inslee, supra; Shevchuk v. Kotchik, 96 Or. 181, 189 P. 399; Scott v Beutel, 23 Grat. (Va.) 1; Miller v. Skaggs, 79 W. Va. 645, 91 S. E. 536, Ann. Cas. 1918D, 929.

Respondents rely on the case of Cave v. Tyler, 147 Cal. 454, 82 P. 64, as establishing the doctrine that, where appropriation of water has been made on government land by one person and the land is later acquired by another, all subsequent purchasers of the land take title "subject to the existing appropriations, whether they had notice or not." No such doctrine is either stated or discussed in that case, but the court said:

> "The sole question to be determined by the court below was whether or not the present right of the plaintiffs had accrued and vested prior to March 3, 1871, and then included all the water to the extent of twenty-five hundred inches."

It may be stated further that the appropriation and diversion of water in that case was not hidden or secret, but was made openly in the usual manner and could have been ascertained readily by following the course of the stream. In Le Quime v. Chambers, 15 Idaho, 405, 98 P. 415, 21 L. R. A. (N. S.) 76, also relied on by respondents, it appears that the plaintiffs developed the water of a spring on government land to the extent of "about one-fourth of a cubic foot per second," and thereafter continuously conveyed the water through a pipe line to his own land, where it was used for domestic purposes and irrigation. Thereafter the defendant acquired title to the land from the government. The question there presented was whether in fact the land on which the spring is located was a part of the public domain at the time of the appropriation, not whether the defendant had notice of the appropriation. The fact that all the water of the spring, amounting to one-fourth of a second foot, was continuously diverted through the pipe, was clearly sufficient to put on inquiry any one who made even the most superficial examination of the land.

[13] The plaintiffs and their predecessors held the easement in question under a grant from the government. No reason appears for holding that they are in any better position than a grantee of a private owner would be, where an innocent purchaser for value acquires the servient estate without notice, actual or constructive, of the easement.

The judgment is reversed.

We concur: HART, J.; PLUMMER, J.

95 Cal. App. 35

LINCOLN v. SUPERIOR COURT OF CALIFORNIA et al. (Civ. 6158.)

District Court of Appeal, Second District, Division 2, California. Nov. 19, 1928.

1. Attorney and client 🔑56, 57—Judgment suspending attorney is self-executing, and is not suspended or superseded by appeal.

A judgment suspending an attorney from practicing for stated period is self-executing, and an appeal therefrom does not have effect of suspending or superseding such judgment.

2. Judgment 🔑650—Generally, judgment, to be admissible to prove facts therein recited, must be final (Code Civ. Proc. § 1049).

Generally, in view of Code Civ. Proc. § 1049, judgment, in order to be admissible in evidence for purpose of proving facts therein recited, must be final judgment in cause, and, if action in which judgment is rendered is still pending, judgment is not final.

3. **Attorney and client 🔑53(1)—Judgment suspending attorney from practice held admissible in subsequent proceedings charging attorney with practicing during suspension period, though appeal from judgment was undetermined.**

Judgment suspending attorney from practice for stated period being self-executing and not suspended or superseded by appeal, in subsequent proceedings against attorney charging that he engaged in practice of law during period of suspension, judgment roll of judgment of suspension was admissible in evidence, notwithstanding appeal from such judgment was undetermined.

4. **Mandamus 🔑4(1)—Mere errors do not warrant issuance of writ of mandate.**

Mere errors are not sufficient to warrant issuance of writ of mandate.

5. **Attorney and client 🔑57—Proceedings against attorney for violating judgment of suspension held properly continued until determination of appeal from such judgment.**

In proceedings against attorney for engaging in practice during period for which he had been suspended by prior judgment of suspension, court did not err in continuing cause until there should be determination of attorney's appeal from judgment of suspension.

Application by Walter Gould Lincoln for writ of mandate to be directed to Superior Court of Los Angeles County, Carl A. Stutsman, Judge, to compel entry of a judgment. Writ denied.

Walter Gould Lincoln, of Los Angeles, in pro. per.

Andrew J. Copp, Jr., and R. H. Purdue, both of Los Angeles, for respondents.

THOMPSON, J. On December 8, 1924, a judgment was rendered in the respondent court adjudging that the petitioner herein "be suspended and precluded from practicing as an attorney at law or as an attorney or agent of another, in and before all courts, * * * in the State of California, * * * and from practicing as an attorney or counsellor at law in any manner * * * for the period of one year from and after December 24, 1924." An appeal was taken from this judgment and still remains undetermined. On July 13, 1927, another accusation was filed by the Los Angeles Bar Association against the petitioner, consisting of three causes of action, the first and second counts of which charged that the accused engaged in the practice of law during the period of suspension, and the third count charged the embezzlement of funds belonging to a client of petitioner. This cause went to trial before the respondent judge on June 27, 1928, and after evidence was offered in support of and in opposition to the accusation, and only after the cause was reopened for the express purpose, the bar association offered in evidence the judgment rendered on December 8, 1924. An objection was interposed by the accused and sustained by the court, whereupon the court, after the suggestion had been made that the case be continued, stated:

> "I may say, as I have said before, that I cannot find anything in the evidence offered by the Bar Association to support the third accusation, which involves in my opinion, acts of moral turpitude. I do think the allegations of the first and second counts of the accusation have been sustained. The amount and the extent of the judgment of the court should be left, I think, until the decision of the appellate court; because if the appellate court finds that the decision should be reversed, then manifestly any decision rendered now would be unjust to the accused. On the other hand, if the decision be affirmed, I see no reason at all why the defendant should not be all the more punished, having in mind the recent decision of the court.
>
> "The matter may be continued as counsel may suggest, with the opportunity to the accused, if the judgment of the appellate court be adverse, to present such character witnesses as he may desire for the purpose of diminution of the judgment of the court."

And in response to a query of the petitioner whether he understood correctly that judgment was to be in his favor on the third count, the court further stated:

> "And in favor of the Bar Association on the first two. But I am not prepared at this time to sign any such judgment, and I do not think the record should show that a judgment is ordered, because manifestly that would be unsupported by the proof. The view I take of the offer of counsel for the Bar Association, of this judgment roll, is such, that the judgment would be without any support in the evidence, and manifestly would be reversible."

The continuance was then ordered.

We have quoted at some length from the record in order to make clear that there is no room for the difference of opinion between counsel concerning the action of the court. It is made manifest from the statements just taken therefrom that the respondent judge, being impressed with the conviction that the judgment roll was inadmissible, ordered the entire cause continued until after the determination of the appeal, indicating to counsel that, when the judgment had become final and admissible in evidence, the judgment would then be in favor of the accused on the third count and adverse to him on the first and second counts.

The petitioner seeks the writ of mandate from this court compelling the respondent court to enter judgment without waiting for a determination of the appeal. His argument in this behalf is that no cause of action existed at the time the charges were filed, and, further, that the case was completely tried and the prosecution rested without having proved a cause of action. The respondent, on the other hand, asserts that the court was well within its rights in continuing the cause until the judgment roll should become admissible. This argument is grounded upon authorities which hold that judgments suspending or disbarring an attorney are self-executing, and hence the cause of action had accrued at the time the charges were filed, although the evidence was inadmissible.

[1] We are first then to inquire concerning the character of the judgment and the effect of the appeal therefrom upon it. The first authority in California involving a judgment of suspension is that of Tyler v. Presley, 72 Cal. 290, 13 P. 856, in which case the petitioner sought from our Supreme Court the writ of mandate compelling the superior court to allow him to practice in the last-named court, for the reason that the Chief Justice had allowed a writ of error to the Supreme Court of the United States and citation had been issued and served and bond filed, and hence the order of suspension was superseded. The court said:

> "When the judgment is rendered, and, no process is required to be issued for its enforcement, no supersedeas is allowed. In fact, there is no necessity for such a writ. There is nothing to stay or supersede. * * *
>
> "The order disbarring Tyler needs no process to execute it, and it stands unaffected by the writ of error."

And again the court says:

> "The judgment or order stands as it was rendered, and the effect is to suspend the applicant for the writ in this case from the practice of his profession."

Another judgment of suspension was considered in the case of In re Graves, 62 Cal. App. 168, 216 P. 386, upon an application for the writ of supersedeas, in which it was reannounced that the judgment was self-executing—operating "directly against petitioner without the necessity for process or proceedings of any kind for its enforcement." To the same effect, see Walls v. Palmer, 64 Ind. 493, and for judgments of similar nature. Dulin v. Pacific W. & C. Co., 98 Cal. 304, 33 P. 123; Rogers v. Superior Court, 126 Cal. 183, 58 P. 452; Clute v. Superior Court, 155 Cal. 15, 99 P. 362, 132 Am. St. Rep. 54; Hellman Com. Tr. & Sav. Bank v. Alden (Cal. App.) 268 P. 688. It is obvious from these authorities that the appeal did not have the effect of suspending or superseding the judgment of suspension, but that, regardless of the outcome of the appeal itself, the petitioner here was by the self-executing character of that judgment suspended for one year from and after December 24, 1924. His status for that period of time was as effectually determined as though there had been no appeal.

[2-4] We are therefore next to consider whether the judgment was admissible in evidence for any purpose. The general rule is not in doubt. It is that:

> "A judgment, in order to be admissible in evidence *for the purpose of proving facts therein recited*, must be a final judgment in the cause, and if the action in which the judgment is rendered is still pending, necessarily the judgment is not final." (Italics ours.) In re Blythe's Estate, 99 Cal. 472, 34 P. 108; Feeney v. Hinckley, 134 Cal. 467, 66 P. 580, 86 Am. St. Rep. 290, and authorities there collected.

It should be noted, however, that the reason for the rule is found in section 1049 of the Code of Civil Procedure which says that:

> "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

It is to be observed, as it was in the concurring opinion of Justices Harrison and Paterson in the case of Naftzger v. Gregg, 99 Cal. 83, 33 P. 757, 37 Am. St. Rep. 23, that this section does not purport to prescribe a rule of evidence, but determines the condition of the action after judgment has been rendered. It is also said in this opinion:

> "There are many cases in which a judgment is admissible in evidence at any time after its entry."

We also direct attention at this time to the closing words of the section, "unless the judgment is sooner satisfied." It is apparent from what we have already said concerning the self-executing character of the judgment involved, that the suspension terminated at the end of one year from December 24, 1924, and, of course, was thereby satisfied. It becomes of more or less importance to note this instance in our effort to determine whether there are exceptions to the general rule already announced. Without stopping to analyze in detail the case of Cook v. Rice, 91 Cal. 664, 27 P. 1081, where a judgment declaring that the plaintiff was not entitled to possession of certain lands was received in evidence before it became final, we quote from the opinion upholding its allowance as follows:

> "It was not necessary that it should be final, in the sense that it was not liable to be reversed on appeal. It was enough that the judgment was in force, not suspended by an appeal or otherwise, and that while in force, it finally disposed of the controversy."

In California Bank v. Graves, 129 Cal. 649, 62 P. 259, there was an application for a writ of assistance, following a judgment of foreclosure and sale thereunder, although there was an appeal from the judgment. The Supreme Court held that the judgment roll was properly admitted for the reason that, upon appellant's failure to file a supersedeas bond, the execution of the judgment was not stayed, and gave as its authority Montgomery v. Tutt, 11 Cal. 190. While holding that an action, the foundation of which was an order settling the account of a guardian, was premature because the order had not become final when the action was commenced, in the case of Cook v. Ceas, 143 Cal. 221, 77 P. 65, the court took occasion (in commenting upon authorities to the general rule) to use this language:

> "The effect of these numerous decisions is not in the least impaired by the fact that in some cases, and for some purposes, an appealable judgment may be offered in evidence. It may, of course, be offered in evidence whenever the mere fact that it has been entered is material; as, for instance, in support of a plea in abatement, or to show the regularity of an execution."

From the discussion so far, it appears that exceptions to the general rule have always been recognized in California, and we now consider two cases which bear more closely upon the one at bar. In both of the authorities, Jenner v. Murphy, 6 Cal. App. 434, 92 P. 405, and Sewell v. Price, 164 Cal. 265, 128 P. 407, the status of the plaintiff as a judgment creditor was of supreme importance, because each case was one to set aside a conveyance alleged to be fraudulent, and in both instances the status could only be shown by judgments which had not become final. In the first case (Jenner v. Murphy, supra) an appeal was pending, and yet the court held:

> "It is true, that pending an appeal, the judgment was not final, but it was nevertheless a judgment. It was entered as the code provides it should be. It entitled the plaintiff to a writ of execution. It was admissible in evidence for the purposes of this case."

The other case (Sewell v. Price, supra) follows the rule. It may be asked why, if the judgments were there admissible for the purpose of establishing the status of plaintiffs as creditors, it is not admissible here to determine the status of petitioner as suspended from the privilege of practicing. As we have already observed, the judgment operated directly upon petitioner, and he was in fact and in law suspended regardless of the subsequent determination of his appeal. Nor can it be argued that this works an injustice upon petitioner, for the reason that he is not only presumed to know the law as announced in Tyler v. Presley and in Re Graves, supra, but also it was his duty to obey the mandate of the judgment of the superior court until it was set aside or reversed on appeal. It is evident therefore that the respondent court was in error in holding that the judgment roll was not to be received for the limited purpose indicated. Mere errors are not, however, sufficient to warrant the issuance of the writ of mandate. 16 Cal. Jur. p. 822.

[5] Proceeding upon the assumption that the judgment was inadmissible the respondent court continued the cause until there should be a determination of the appeal. Except for the fundamental error noted, there was nothing improper in this procedure. It is said in Smith v. Smith, 134 Cal. 117, 66 P. 81, in discussing a somewhat similar situation:

> "A much better mode to secure the benefit of the evidence, and to avoid a conclusion which may prove unjust, is to move for a continuance, as suggested in Rose v. Superior Court, 65 Cal. 570 [4 P. 577], and Brown v. Campbell, 100 Cal. 635 [35 P. 433, 38 Am. St. Rep. 314]."

In the instant case the court adopted the procedure suggested in these opinions, and by the force of their voice the petitioner is concluded.

Writ denied.

We concur: WORKS, P. J.; CRAIG, J.

94 Cal. App. 747

ROBERTS v. FITZGERALD et al. ★

(Civ. 6189.)

District Court of Appeal, Second District, Division 2, California. Nov. 14, 1928.

Rehearing Denied Dec. 13, 1928. Hearing Denied by Supreme Court Jan. 10, 1929.

1. Appeal and error 🔑1237—Motion for judgment on bond staying execution may be made ex parte (Code Civ. Proc. § 942).

Motion for judgment against sureties on bond staying execution after judgment may be made ex parte in accordance with Code Civ. Proc. § 942, requiring provision to that effect in such an undertaking.

2. Appeal and error 🔑125—Sureties have no right of appeal from judgment on bond staying execution.

Sureties on bond staying execution after judgment had no right of appeal from judgment subsequently entered against them, since such judgment is in effect a consent judgment.

Action by Marcus L. Roberts against P. G. Fitzgerald, wherein R. J. Fitzgerald and another were sureties on a bond staying execution after judgment. Judgment was subsequently entered against the sureties, and they appeal. On motion to dismiss. Motion granted.

Ernest B. Coil, of Los Angeles, for appellants.

Paul W. Schenck and Marcus L. Roberts, both of Los Angeles, for respondent.

CRAIG, J. The appellants herein were sureties of the defendant upon a bond staying execution after judgment rendered by a judge pro tempore of the superior court of Los Angeles county in favor of the respondent. By the terms of said bond the appellants agreed that they should be liable if the judgment be affirmed or the appeal dismissed, and that, if the appellant should fail to make payment within 30 days after filing of the remittitur, "judgment may be entered on mo-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

tion of respondent, in his favor, against the sureties for such amount." The defendant's appeal was dismissed, judgment was, more than three months thereafter, entered against the sureties, from which they appealed, and the respondent now moves to dismiss the latter appeal.

It is contended by appellants that the original judgment was declared void by the Supreme Court, and that hence the surety bond was without consideration and void; that the judgment from which the instant appeal was taken was not alone void because it was taken ex parte, but also for the reason that the main judgment was invalid.

[1, 2] That section 942 of the Code of Civil Procedure requires provision in such an undertaking for entry of judgment against the sureties upon motion, and that the motion may be made ex parte, is too well settled to require further discussion. Gray v. Cotton, 174 Cal. 256, 162 P. 1019; Duerr v. Sloan, 50 Cal. App. 512, 195 P. 475. That, under the circumstances here presented, sureties have no right of appeal for the reason that the judgment entered against them is in effect a consent judgment, is equally well settled. Judnick v. Judnick, 47 Cal. App. 380, 190 P. 480; Duerr v. Sloan, supra.

Since no appeal from such a judgment may be taken, an appellate tribunal is without jurisdiction to consider its merits.

The motion to dismiss is granted.

We concur: WORKS, P. J.; Thompson, J.

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94 Cal. App. 486

SICHTERMAN v. R. M. HOLLINGSHEAD CO. (Civ. 6310.)★

District Court of Appeal, First District, Division 2, California. Nov. 23, 1928.

Rehearing Denied Nov. 23, 1928. Hearing Denied by Supreme Court Dec. 24, 1928.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

On rehearing. Denied.

For former opinion, see 271 P. 372.

Edwin H. Williams, of San Leandro, for appellant.

Ford, Johnson & Bourquin, of San Francisco, for respondent.

PER CURIAM. The petition for rehearing is denied.

In his brief the plaintiff did not specify any act of defendant claimed to be negligence. In his petition for a rehearing plaintiff asserts that the defendant violated the provisions of subdivision 2 of section 113 of the Motor Vehicle Act (1 Deering's Gen. Laws 1923, p. 1886), and that defendant failed to use ordinary care. Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066. The statute relied on refers to places "when the driver's view is obstructed." In this case there is no evidence that the driver's view was obstructed. The statute relied on limits speed to 15 miles "in traversing" an intersection. To traverse means "to pass across, pass over, cross in traveling." Cent. Dict. As defendant traversed the intersection the record wholly fails to show that he did so at a speed of 15 miles or more.

In his petition the plaintiff states that the driver of the truck "admits that when he entered the intersection of the two streets he was traveling at a speed in excess of that allowed by law, and he admits that he saw and realized then that a collision was inevitable if he did not stop, and admits that at the speed he was traveling he could have brought his truck to a stop in time to avoid the accident—very quickly—within 20 feet. * * *" The claim is stated strongly. The vice rests in this: That the record does not sustain the claim. The driver testified that when traveling 17 to 18 miles he could stop in 20 feet (Tr. 103); that he was so traveling when he was at the intersection (Tr. 150); that he there reduced his speed (Tr. 150); that when he saw the Ford swing into his path the witness blew his siren, put on both brakes, and swung to his right (Tr. 206–233); that when he so swung the witness was at the point marked H–14 (Tr. 232); that is a point 15 feet inside of the intersection and about 30 feet from the point of impact; that when the witness swung to his right was when he discovered that a collision was imminent (Tr. 206); at that same instant, so the testimony of that witness runs, the truck was moving 13 miles per hour or less (Tr. 234); or, as the testimony of the driver of the Ford runs, the truck was then traveling about 10 or 15 miles per hour (Tr. 21).

The record discloses no act of negligence on the part of the defendant.

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95 Cal. App. 29

GIFFIN v. SUPREME LODGE OF FRATERNAL BROTHERHOOD. (Civ. 6452.) ★

District Court of Appeal, First District, Division 2, California. Nov. 19, 1928.

Rehearing Denied Dec. 19, 1928. Hearing Denied by Supreme Court Jan. 17, 1929.

1. Appeal and error ⟹900—Presumption in favor of judgment below held not overcome by record containing judgment roll and stipulation of facts.

Presumption in favor of judgment entered below *held* not overcome by record including stipulation of facts referring to several documents attached to it, whereas nothing is attached to copy of transcript and documents marked as exhibits are not certified nor authenticated by any affidavit.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Rehearing denied. Hearing denied by Supreme Court.

2. Insurance 🔑819(2)—Implied finding that deceased was member in good standing at date of his death held supported by some evidence, in action on beneficiary certificate.

In action on beneficiary certificate, implied finding that deceased was a member in good standing at date of his death *held* supported by some evidence.

3. Insurance 🔑747—In action on beneficiary certificate, contention that under by-law, delinquent member is ipso facto suspended and so remains until reinstated held not sustained.

In action under beneficiary certificate, defendant *held* not to have sustained contention by clear proof that under provisions of its by-law a delinquent member is ipso facto suspended and so remains until he is reinstated.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Edna E. Giffin against the Supreme Lodge of the Fraternal Brotherhood. Judgment for plaintiff, and defendant appeals. Affirmed.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for appellant.

B. M. Benson and Cecil E. Edgar, both of Fresno, for respondent.

STURTEVANT, J. [1] The plaintiff sued the defendant to recover a judgment for moneys alleged to be due under a benefit certificate alleged to have been issued by the defendant. The latter appeared and answered. Later a stipulation of facts was executed. A trial was had thereon before the court sitting without a jury. The court caused a judgment to be entered which was in favor of the plaintiff. The defendant appealed and brought up what purports to be the judgment roll, including a purported copy of the stipulation. The defendant filed its brief June 7, 1928, and therein it presented many facts not shown by the stipulation. On June 27, 1928, the respondent filed her brief and therein made one point—the defendant had failed to follow the method prescribed by sections 953a, 953b, 953c, of the Code of Civil Procedure. She also made a motion to affirm the judgment. The presentation of the appeal and of the motion came on for hearing August 2, 1928. At the same time the defendant suggested a diminution of the record. The motion and suggestion were heard. The suggestion of the diminution of the record was accepted, and the clerk of the trial court was directed to certify the absent documents. The motion to affirm was denied. Permission was granted to file additional briefs. Thereafter, August 13, 1928, the clerk of the trial court sent to the clerk of this court four documents marked "Exhibit A," "Exhibit B," "Exhibit C," and "Exhibit D." No one is certified in any manner, nor does any certificate accompany the lot. On August 16, 1928, the respondent filed another brief in which she again attacked the record as not conforming to the law and in which for the first time she replied to the points made by the defendant. On September 4, 1928, the appellant filed another brief in which it contented itself with the assertion:

> "The stipulation of fact having been adopted by the trial court as its findings of fact, it thereby became a part of the judgment roll and was properly before the court in the clerk's transcript."

True, but the assertion does not aid the defendant. The clerk's transcript contains what purports to be the stipulation of facts. But that stipulation refers to four several documents as being attached to it, whereas nothing is attached to the copy of it which is inserted in the transcript, and there is nothing before us showing that any document was attached to the original stipulation, or, if it was, what it was. In his certificate to the transcript, the clerk certifies that the transcript contains "a full, true, and correct copy of the original: * * * Stipulation of facts * * * and of the whole of such originals. * * *" Now, the exhibits above referred to are not certified, are not authenticated by any affidavit, and they do not break down the force of the clerk's certificate just quoted. He sends us exhibits which are numbered 1, 2, 3, and 4—the numbers are scratched, and they are re-marked A, B, C, and D. But none is certified. Every presumption is in favor of the judgment as rendered. The record before us does not tend to break down that presumption.

However, the judgment must be affirmed if we go into all of the documents, whether they are regularly before us or otherwise. Briefly stated, the facts are as follows: John W. Giffin held a benefit certificate in the Fraternal Brotherhood. The certificate recited, among other things, that its provisions did not apply "unless said member is in good standing * * * at the time of the death of said member." For the month of December, 1926, Giffin became delinquent in his dues. On January 25, 1927, he paid his dues down to the last day of February, 1927. On February 4, 1927, the insured died. It is now claimed that after being delinquent in December that Giffin was never reinstated. The answer is, the record does not show the fact. In the stipulation of facts it is recited that the dues and assessments were paid. In the stipulation there is no statement whether Giffin was reinstated or was not reinstated. Assuming, as appellant contends, that the proofs of loss, Exhibit C, were attached to the stipulation of facts, it became some evidence. It included the affidavit of the treasurer. Among other things that affiant averred:

> "3. That at the date of the said late member first being ill, of the disease, or suffering

the injury from which he died, he was a member in good standing in Victory Lodge No. 1073 of The Fraternal Brotherhood and that he continued in good standing until the date of death on the 4th day of February, 1927."

[2] When a suspended member is fully reinstated, the by-laws provide that such fact will be certified to the treasurer of the local lodge. He is therefore a qualified witness as to who is a member in good standing. If any act or acts were necessary to reinstate the deceased as a member in good standing, we must assume from this record that the event had taken place. It follows that there was some evidence sustaining the implied finding that deceased was a member in good standing at the date of his death.

[3] The appellant's contention is that under the provisions of the by-laws a delinquent member is ipso facto suspended and so remains until he is reinstated. Turning to the by-laws, we find that a member who is delinquent for less than 60 days may tender his payments and the local treasurer may accept the same, but such payment will be received under an implied warranty that the member was at the date of the payment in good health; but, if it transpires that he was not, then such member's tentative reinstatement becomes inoperative from the date the supreme officers get notice of the fact that the member was not in good health on the date of the payment of the delinquent dues. Broadly construed, this latter provision may be construed as providing that a member who was delinquent on his second payment and while sick paid up such fines and dues in less than 60 days, and thereafter made all other payments for 25 years, will find he was during the whole of that time a suspended member. In other words, the member would have paid assessments and dues for 25 years, and the Brotherhood would have received and held the same, but the member would get nothing. One who would claim that a contract should be so construed must needs make clear proof. This defendant has not done so.

The judgment is affirmed.

We concur: BUCK, Presiding Justice pro tem.: NOURSE, J.

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94 Cal. App. 799

PEOPLE of the State of California, Plaintiff and Respondent, v. Henry V. JONAS, Defendant and Appellant. (Cr. 1687.)

District Court of Appeal, Second District, Division 1, California. Nov. 15, 1928.

Appeal by defendant from a judgment of the Superior Court of Los Angeles County, Elliot Craig, Judge, of conviction of the crime of burglary.

R. M. Wiley, of Silver City, N. M., for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CONREY, P. J. The information charged against defendant that he committed the crime of burglary, a felony, by entering certain described premises "with the intent then and there and therein to commit the crime of larceny." Judgment was entered against him, pursuant to a plea of guilty. He now claims that the information did not charge the commission of any crime.

The only point in the case is identical with that presented to this court in People v. Giron, 270 P. 462. In that case we held against the contention of appellant, and the Supreme Court has denied a petition for rehearing.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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94 Cal. App. 656

PEOPLE of the State of California, Plaintiff and Respondent, v. John J. TOSI, Defendant and Appellant. (Cr. 1060.)

District Court of Appeal, Third District, California. Nov. 1, 1928.

Appeal by defendant from a judgment of the Superior Court of Sonoma County, R. L. Thompson, Judge, of conviction of passing a fictitious check.

J. Harold McAlpine, of Santa Rosa, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted in the superior court of Sonoma county of a felony, to wit, the crime of making, drawing, uttering, and delivering to another person a check and draft upon a bank without sufficient funds to meet such check and draft.

The transcript on appeal was filed in this court October 3, 1928. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on November 1, 1928. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment is affirmed.

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94 Cal. App. 655

PEOPLE of the State of California, Plaintiff and Respondent, v. Henry William MAYBERRY, Defendant and Appellant. (Cr. 1058.)

District Court of Appeal, Third District, California. Nov. 1, 1928.

Appeal by defendant from a judgment of the Superior Court of Sacramento County, John F. Pullen, Judge, of conviction of attempt to commit robbery.

John C. Stoller, of Los Angeles, and Samuel W. Greene, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted in the superior court of Sacramento county of a felony, to wit, the crime of attempt to commit robbery.

The transcript on appeal was filed in this court September 11, 1928. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on November 1, 1928. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

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95 Cal. App. 75

MARTIN v. McMAHAN et al. (Civ. No. 3085.)

District Court of Appeal, Third District, California. Nov. 20, 1928.

1. Contracts 🔑229(3)—Where owners changed plans to increase cost of building, architect is entitled to compensation, notwithstanding provision limiting amount if cost exceeded certain figure.

Where architect's plans are changed by owners to increase cost of building after being drawn as contemplated by parties in first instance, architect is entitled to compensation, notwithstanding provision limiting compensation if cost exceeded certain amount.

2. Appeal and error 🔑1071(1)—Omnibus finding may be disregarded where other findings sustain judgment.

Omnibus finding may be disregarded where trial court had found all that was necessary to sustain judgment in other findings.

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Eugene K. Martin against John McMahan and another, doing business under the firm name and style of McMahan Furniture Company. Judgment for plaintiff, and defendants appeal. Affirmed.

Emmons & Aldrich, of Bakersfield, for appellants.

Dorsey & Campbell, of Bakersfield, for respondent.

PLUMMER, J. The plaintiff had judgment in this action for the sum of $1,800, the amount found due from the defendants for and on account of architect's fees. From this judgment the defendants appeal.

The action is for services as an architect, performed by the plaintiff for the defendants, based upon the following writing, to wit:

"Service Order

"From McMahan Furniture Co.
"To Eugene K. Martin, Architect, Bakersfield, California.

"Your office is hereby authorized to render full professional services in connection with the construction and completion of a store and apartment building as per plans now in our files. This building not to exceed $60,000.00, your compensation will be $150.00 and no more if building cannot be built for this sum.

"Located at ——
"Plans to be property of McMahan Furniture Co.
"Payments will be made per schedule of the American Society of Architects.

"Signature:
"Owner, McMahan Furniture Co.
"Legal Representative, J. I. McMahan.
"City.
"Date 5/1/22."

After finding that the architect's fees should be calculated at the rate of 5 per cent. upon the cost of the building, the trial court found as follows:

"That plaintiff prepared the plans and specifications in accordance with said agreement; that the plans and specifications so prepared by plaintiff were accepted by said defendants and as so accepted called for the expenditure of less than Sixty Thousand Dollars ($60,000.00), to-wit: for Fifty-five Thousand Dollars ($55,000.00); that the building was erected by the defendants according to the plans and specifications so prepared by plaintiff, save and except that the apartments on the second floor as shown by the plans and specifications were omitted by the defendants in the erection of said building; that the plans and specifications prepared by the plaintiff were the only plans and specifications used by the defendants in the erection of said building; that the contract price for the erection of said building was Thirty-nine Thousand Dollars ($39,000.00); that plaintiff did not supervise the construction of said building; that the defendants have paid plaintiff on account the sum of One Hundred Fifty Dollars ($150.00) and no more; that by the terms of the contract plaintiff is entitled to receive as compensation for preparing plans and specifications five per cent. of Thirty-nine Thousand Dollars ($39,000.00) or Nineteen Hundred Fifty Dollars ($1950.00) no part of which has been paid, save and except the sum of One Hundred Fifty Dollars ($150.00); that there is now due, owing and unpaid from defendants to plaintiff the sum of Eighteen Hundred Dollars ($1800.00)."

The trial court also made an omnibus finding which is in the words and figures following:

"That all of the allegations of plaintiff's complaint not inconsistent with these findings are true and all the denials in defendants' answer not consistent with these findings are untrue."

The contention is made upon this appeal that under the contract the plaintiff was entitled only to the sum of $150, for the reason that after all the changes in the plans, made at the request of the owners, the lowest bid for the construction of the building was for the sum of $68,000. The record, however, shows the following, and amply supports the finding of the court: That when the plans were completed for the construction of the building as originally designed, a bid was received for the erection of the building at a cost of $55,000. The record shows that after this bid was received a number of changes were made at the request of the defendants, and bids again called for, and, as herein stated, the lowest bid for the erection of the building was $68,000. Following the receipt of this bid the defendants eliminated from the building a number of items relating to the upper stories thereof, and then, using the same plans, obtained the construction of the building for the sum of $39,000. Based upon this record, the court found that the plaintiff was entitled to this compensation at the rate of 5 per cent. upon the cost of the building, that being the rate contemplated in the contract where it provides "that payment will be made per schedule of the American Society of Architects."

[1] While the law is well settled that where the agreement provides for a building not to cost more than a certain sum, the architect is not entitled to compensation under a contract such as was signed by the parties in this case, it also seems to be pretty well settled that if, after the plans are drawn as contemplated by the parties in the first instance, they are so changed by the owners as to increase the cost of the building, the architect is entitled to compensation. 5 C. J. p. 262; Benenato v. McDougall, 166 Cal. 405, 137 P. 8, 49 L. R. A. (N. S.) 1202, Ann. Cas. 1915C, 871.

[2] The final objection of appellants is based upon the omnibus finding hereinbefore set forth, the contention being that it is impossible to ascertain what allegations in the plaintiff's complaint are inconsistent or consistent with the findings, and also, what denials in the answer filed by the defendants are, or are not consistent, with the findings. If this were the only finding made by the trial court, appellants' contention would be well founded. The trial court, however, having found all that was necessary to sustain the judgment, the omnibus finding may be disregarded. This is amply shown by the opinion of the Supreme Court in the case of Turner v. Turner, 187 Cal. 632, 203 P. 109, and the cases cited on page 635 of the same volume (203 P. 110).

Finding no merit whatever in the defendants' appeal, the judgment of the trial court is affirmed.

We concur: FINCH, P. J.; HART, J.

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